

ARTICLES

The Anti-leveraging Principle and the Spending Clause After *NFIB*

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This Article offers an initial assessment of the Supreme Court's Spending Clause holding in National Federation of Independent Business v. Sebelius (NFIB), which addressed the constitutional challenge to the Affordable Care Act. As Justice Ginsburg pointed out, NFIB marks "the first time ever" that the Court has held that a spending condition unconstitutionally coerced the states. The implications of that holding are potentially massive, and some of the language in the decision, if read broadly, would seriously threaten the constitutionality of a broad swath of federal spending legislation.

Notwithstanding some of the Court's language, this Article contends that the case is not best read as rendering federal spending conditions unconstitutional simply because they are attached to large amounts of federal money, change the terms of participation in entrenched cooperative programs, or tie together separate programs into a package deal. Rather, Chief Justice Roberts's pivotal opinion is best read as adopting an "anti-leveraging principle" that will find coercion only where all three of these conditions are present at the same time. The anti-leveraging principle both makes the most sense of what the Chief Justice actually said in NFIB and does a better job of accommodating the relevant constitutional values than do plausible alternative readings of the case. Although that principle threatens the constitutionality of far fewer conditional-spending laws than do those alternative readings, it raises challenging questions about the constitutionality of certain spending conditions. And it gives states an important new tool in negotiations with federal administrators.

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INTRODUCTION

When the Supreme Court issued its much-anticipated decision in *National Federation of Independent Business v. Sebelius (NFIB)*,¹ supporters of the Affordable Care Act (ACA)² let out a long sigh of relief. Despite much speculation that it would invalidate the ACA's individual mandate³—an essential, if controversial, piece of the law—the Court *just barely* declined to take that step. The statute ranked as an historic achievement—not just the signature domestic accomplishment of a sitting president, but also the long-delayed completion of the New Deal/Great Society project. After a highly unusual three days of oral argument, many observers had predicted that a bare and partisan 5–4 majority would vote to invalidate the centerpiece of that achievement—and perhaps strike down the ACA in its entirety.⁴ When Chief Justice Roberts instead abandoned his usual ideological confederates and cast the decisive vote to uphold the individual mandate on a tax-power theory, supporters of the statute were thrilled that the Court had ratified and legitimated its “new social contract.”⁵

But there was a dark cloud behind that silver lining. In a portion of the case that had drawn less public attention than the fight over the individual mandate, the Court concluded that the ACA's Medicaid expansion provisions exceeded Congress's power under the Spending Clause.⁶ Seven Justices across two opinions concluded that, by requiring states that wished to continue participating in Medicaid to expand that program to cover every resident with an income below 133% of the federal poverty level, Congress impermissibly coerced the states into agreeing to the expansion.⁷ A different coalition of five Justices agreed that the Medicaid expansion, with its extremely generous federal reimbursement,⁸ could continue to stand on a voluntary basis.⁹ But the Court's

1. 132 S. Ct. 2566 (2012) [hereinafter *NFIB*].

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

3. “The individual mandate requires most Americans to maintain ‘minimum essential’ health insurance coverage.” *NFIB*, 132 S. Ct. at 2580 (quoting 26 U.S.C. § 5000A (Supp. 2010)).

4. For a particularly prominent example, see Byron Tau, *Toobin: Health Law “Looks Like It’s Going To Be Struck Down,”* POLITICO (Mar. 27, 2012, 12:30 PM), <http://www.politico.com/politico44/2012/03/toobin-health-law-looks-like-its-going-to-be-struck-118811.html>.

5. *E.g.*, Jack M. Balkin, *The Court Affirms Our Social Contract*, THE ATLANTIC (June 29, 2012, 5:00 PM), <http://www.theatlantic.com/national/archive/2012/06/the-court-affirms-our-social-contract/259186/>.

6. U.S. CONST., art. I, § 8, cl. 1.

7. *See NFIB*, 132 S. Ct. at 2607 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.); *id.* at 2666–68 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

8. The ACA provides that the federal government will bear 100% of the costs of the expansion initially, with the rate of reimbursement dropping only to 90% by the end of the decade. *See* 42 U.S.C. § 1396d(y)(1) (Supp. 2011). For preexpansion Medicaid, the federal government will reimburse between 50% and 75% of the costs depending on the state. *See* 75 Fed. Reg. 69082, 69083 (Nov. 10, 2010).

9. *See NFIB*, 132 S. Ct. at 2607–08 (opinion of Roberts, C.J.); *id.* at 2630–31 (Ginsburg, J., joined by Sotomayor, J., concurring in part and dissenting in part).

judgment barred the federal government from withholding *all* Medicaid funds from states that declined to expand their rolls.¹⁰

This holding has significant consequences for the ACA itself. The Act's drafters had relied on the Medicaid expansion to provide care for more than fifteen million uninsured persons; the Court's decision removes an important lever to induce states to participate in that expansion.¹¹ But the holding is even more significant for its effect on Spending Clause doctrine. Although the Court had twice suggested that there *might* be a case in which a condition on federal spending was coercive and hence unconstitutional,¹² the analytic and philosophical difficulties with finding coercion in the spending context had deterred courts from invalidating any statutes on that basis.¹³ *NFIB* thus marks "*the first time ever*" that the Court has held that a spending condition unconstitutionally coerced the states.¹⁴

The implications of that holding are potentially massive. An enormous amount of the New Deal/Great Society state is built on conditional spending statutes. Through the years, states have challenged a number of these laws in the social-welfare, civil-rights, and environmental fields as exceeding Congress's spending power.¹⁵ Though the challenges have typically failed in the past, the *NFIB* decision will certainly revive the challenges to those laws.¹⁶ Some of the language in the decision, if read broadly, would seriously threaten the constitutionality of a broad swath of federal spending legislation.¹⁷

In this Article, I offer an initial assessment of the Spending Clause holding in *NFIB*. Notwithstanding some of the broad language in the Chief Justice's opinion and the joint dissent, I contend that the case is *not* best read as rendering federal spending conditions unconstitutional simply because they are attached to large amounts of federal money, change the terms of participation in entrenched cooperative programs, or tie together separate programs into a package deal. Rather, the case—and particularly Chief Justice Roberts's pivotal opinion—is best read as adopting a principle that will find coercion only where all three of these conditions are present at the same time. I call this the

10. See *id.* at 2608 (opinion of Roberts, C.J.).

11. The Congressional Budget Office estimates that, as a result of the Court's decision, three million fewer uninsured individuals will receive coverage under the ACA by 2022 than originally predicted. See CONG. BUDGET OFFICE, ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION 3–5 (2012).

12. See *South Dakota v. Dole*, 483 U.S. 203, 211 (1987); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

13. See Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 372–80 (2008).

14. *NFIB*, 132 S. Ct. at 2630 (Ginsburg, J., concurring in part and dissenting in part). Yes, the emphasis is Justice Ginsburg's.

15. See *infra* Part IV.

16. See *id.*

17. See *infra* Part II.

“anti-leveraging principle.”¹⁸ The anti-leveraging principle provides that when Congress takes an entrenched federal program that provides large sums to the states and tells states they can continue to participate in that program only if they *also* agree to participate in a separate and independent program, the condition is unconstitutionally coercive.

Although it has flaws of its own, I argue that the anti-leveraging principle both makes the most sense of what the Chief Justice actually said in *NFIB* and does a better job of accommodating the relevant constitutional values than do the plausible alternative readings of the case. That principle also threatens the constitutionality of far fewer conditional-spending laws than do those alternative readings. It does not leave all of those statutes in the clear, however. In particular, the anti-leveraging principle raises challenging questions about the constitutionality of withholding federal highway funds for state violations of the Clean Air Act. Both in that context and in the context of the federal–state programs paying for health care, education, and social welfare, the anti-leveraging principle gives states an important new tool to obtain leverage of their own in waiver negotiations with federal administrators. Perhaps the most significant effect of *NFIB*’s Spending Clause holding will be to further entrench and spread the practice of “federalism by waiver.”¹⁹

My argument proceeds as follows. In Part I, I explore the reasons the Roberts opinion and the joint dissent—the two opinions that concluded that the ACA’s Medicaid expansion provisions were unconstitutional—actually offered for their conclusions. I show that the Chief Justice’s opinion is the pivotal one that lower courts can be expected to follow. I also explain that, in that opinion, the Chief Justice adopted the anti-leveraging principle as I have defined it. In Part II, I explore the alternative readings of *NFIB*’s Spending Clause holding as adopting either a too-big-to-refuse principle, a no-new-conditions principle, or a no-conditions-about-separate-programs principle. Each of those readings finds support in some of the language of the Roberts opinion and the joint dissent. However, I argue that none is ultimately consistent with the Chief Justice’s analysis, and each of them is deeply flawed analytically and normatively.

In Part III, I offer an uneasy defense of the anti-leveraging principle. That principle, I argue, does a tolerably good job of accommodating the constitutional values of ensuring that Congress can spend according to its current understanding of the general welfare while promoting accountability. A majority of Justices evidently believed it important that the coercion doctrine impose real

18. I should note that an amicus brief filed in *NFIB* by Professor Jim Blumstein, which appeared particularly influential on the Chief Justice, specifically identified the problem with the Medicaid expansion as one of excessive “leveraging.” Brief of James F. Blumstein, as Amicus Curiae in Support of Petitioners (Medicaid Issue), *Florida v. Dep’t of Health & Human Serv.*, No. 11-400, 2012 WL 195306. The Chief Justice’s articulation of the anti-leveraging principle differs in some significant ways from the arguments in Professor Blumstein’s brief. In this Article, I focus my attention on the various Justices’ opinions rather than on the arguments presented to the Court.

19. See *infra* Part IV.

limits on the conditional spending power. The anti-leveraging principle achieves that result without greatly unsettling other important constitutional values. Finally, in Part IV, I begin to evaluate the implications of the anti-leveraging principle for other federal conditional-spending statutes. Although *NFIB* can be expected to trigger challenges to a wide range of enactments, I argue that most of these challenges should fail under the anti-leveraging principle. But some of these challenges—notably, challenges to statutes like the Clean Air Act that impose “crossover” conditions that tie together separate programs—will be powerful. And federal officials who administer conditional spending programs, fearing constitutional challenges, can be expected to be increasingly receptive to states’ requests for waivers of various requirements of those programs. This expansion of the practice of federalism by waiver may be the most important legacy of *NFIB*’s Spending Clause holding.

I. THE ROBERTS OPINION AND THE JOINT DISSENT ON COERCION

The *NFIB* Court did not settle on a single coercion analysis. The seven Justices who concluded that the Affordable Care Act’s Medicaid expansion provisions were coercive expressed that conclusion in two separate opinions: Chief Justice Roberts’s lead opinion, joined by Justices Breyer and Kagan, which concluded only that it would be coercive to withhold all Medicaid funds from states that refused the expansion, but which, with the concurrence of Justices Ginsburg and Sotomayor, allowed the expansion to remain in place in those states that chose to accept it;²⁰ and the joint dissent of Justices Scalia, Kennedy, Thomas, and Alito, which would have invalidated the entire ACA, including the Medicaid expansion.²¹ In this Part, I aim to distill, as concisely but faithfully as I can, the explanations Chief Justice Roberts and the joint dissenters themselves provided for concluding that the ACA’s Medicaid expansion provisions were unconstitutional.

As I make clear in the remainder of this Part, the rationale offered by the joint dissent is significantly broader than that offered by the Chief Justice’s opinion. The Chief Justice relied on what I call the anti-leveraging principle.²² That principle, directly stated, is this: When Congress takes an entrenched federal program that provides large sums to the states and tells states that they can continue to participate in that program only if they *also* agree to participate in a separate and independent program, the condition is unconstitutionally coercive. The Chief Justice’s application of that principle explicitly rested on the convergence of three aspects of the Medicaid expansion: that the ACA put a large amount of money at stake in a state’s decision whether to agree to the expansion; that Congress was threatening to shut off access to an entrenched grant program in which states had participated for years; and that, as the Chief Justice

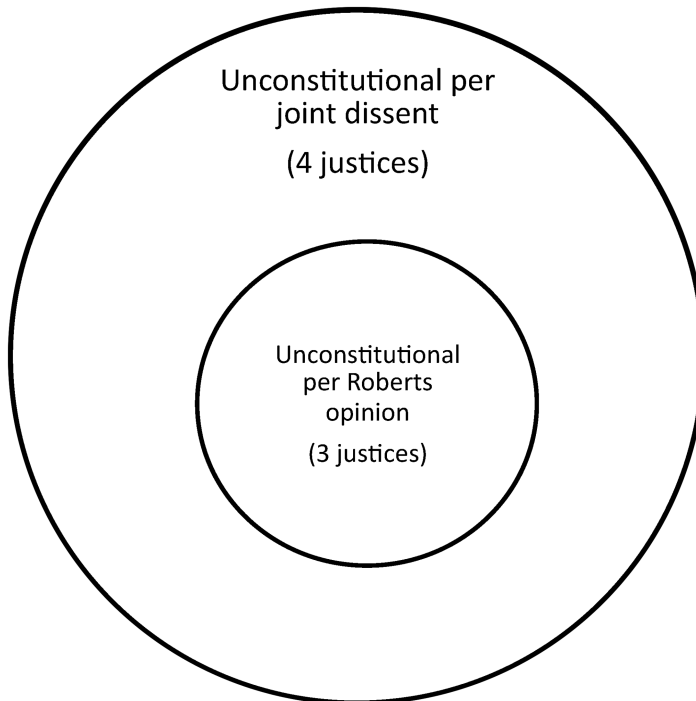
20. See *NFIB*, 132 S. Ct. 2566, 2607 (2012) (opinion of Roberts, C.J.).

21. See *id.* at 2666–68 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

22. See *infra* section I.A.

understood them, the expansion provisions did not simply change the existing Medicaid program but leveraged states' desire to remain in that program to induce them to agree to participate in an importantly distinct and independent program. All three of these aspects are necessary to the analysis that is set forth in the Chief Justice's opinion.

By contrast, the joint dissent focuses its analysis primarily on the large amount of money at stake, though some of its language also adverts to the entrenched nature of the existing grant program.²³ The joint dissent's analysis would likely render many more spending conditions unconstitutional than would the analysis in the Roberts opinion. By the same token, it is difficult to think of any spending conditions that the analysis in the Roberts opinion would render unconstitutional but that the joint dissent's analysis would find acceptable. The two opinions have the relationship described by the following Venn diagram:



The Roberts opinion is thus the Court's pivotal opinion on the Spending Clause question. We can expect that at least seven Justices (the Chief Justice, Justice Breyer, and Justice Kagan, as well as the four joint dissenters) would

23. See *infra* section I.B.

invalidate any statute that is unconstitutional under the analysis of that opinion, while we can expect that at least five Justices (the Chief Justice, Justice Breyer, and Justice Kagan, as well as Justices Ginsburg and Sotomayor) would uphold any statute that is constitutional under its analysis. Accordingly, to the extent that it differs from that of the joint dissenters, the analysis that appears in the Chief Justice's opinion is the analysis that lower courts will most safely follow.²⁴ I nonetheless devote substantial attention to both opinions, because they highlight the doctrinal and normative stakes here, and the cleavages between the two opinions highlight the limits of the reach of the principle applied by the Chief Justice.

A. THE ROBERTS OPINION

The Chief Justice began by acknowledging that the Spending Clause authorizes the federal government to impose conditions on grants to "ensure that the funds are used by the States to 'provide for the . . . general Welfare' in the manner Congress intended."²⁵ As the Chief Justice recognized in the opening pages of his opinion, such a conditional offer may, constitutionally, "induce the States to adopt policies that the Federal Government itself could not impose."²⁶ This, of course, is the basic Hamiltonian position, which the Court has endorsed in interpreting the Spending Clause for over seventy-five years.²⁷ But, the Chief Justice noted, this power is limited by the anticommandeering principle that the Court adopted in *New York v. United States*²⁸ and *Printz v. United States*.²⁹ Congress may not require the states to regulate, the Chief Justice argued, "whether Congress directly commands a State to regulate or indirectly coerces a

24. Strictly speaking, the conclusions of three Justices who joined the judgment (here, the Chief Justice and Justices Breyer and Kagan) cannot be added to the conclusions of four Justices who dissented (here, Justices Scalia, Kennedy, Thomas, and Alito) to establish *binding* precedent. See *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)). But even though the aggregation of votes across those who joined the Court's judgment and those who dissented "does not establish any authoritative legal propositions" that *bind* the lower courts, Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 33 n.120 (1994), as a practical matter, lower courts can be expected to seek to identify and apply those propositions that would command the assent of five Justices to avoid reversal. See *id.* at 33 & n.122. Whether lower courts *should* engage in such predictive decision making is a matter I do not take up here. Compare, e.g., *id.* (arguing that lower courts should often see their job as trying to predict the decisions that higher courts will reach), with Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 655 (1995) (arguing that, "as a general matter, the prediction approach undermines the rule of law"). For my purposes, it is enough to observe that lower courts will want to understand what propositions are likely to persuade a majority on the Supreme Court.

25. *NFIB*, 132 S. Ct. at 2602 (opinion of Roberts, C.J.) (quoting U.S. CONST., art. I, § 8, cl. 1).

26. *Id.* at 2579.

27. See *United States v. Butler*, 297 U.S. 1, 65–66 (1936).

28. 505 U.S. 144, 175–77 (1992).

29. 521 U.S. 898, 935 (1997).

State to adopt a federal regulatory system as its own.”³⁰

How can we determine whether a state has been (permissibly) induced or (impermissibly) coerced? The Chief Justice explained that in the “typical case,” states can take care of themselves:

In the typical case we look to the States to defend their prerogatives by adopting “the simple expedient of not yielding” to federal blandishments when they do not want to embrace the federal policies as their own. The States are separate and independent sovereigns. Sometimes they have to act like it.³¹

But the Chief Justice agreed with the State plaintiffs that the ACA’s Medicaid expansion was “far from the typical case.”³²

In explaining how he reached this conclusion, the Chief Justice first distinguished between two sorts of spending conditions that Congress might impose. On the one hand, he asserted, it is constitutional for the federal government to impose conditions on the states that “govern the use of the funds” Congress offers, “because that is the means by which Congress ensures that the funds are spent according to its view of the ‘general Welfare.’”³³ On the other hand, when the conditions imposed by Congress “take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.”³⁴

Importantly, the Chief Justice did not find that all such efforts to “pressur[e] the States to accept policy changes”³⁵ are unconstitutional. To the contrary, he made clear that the determination that Congress has threatened “to terminate . . . significant independent grants”³⁶ is the *trigger* for conducting a coercion analysis, not the *conclusion* of that analysis. This is clear from his discussion of *South Dakota v. Dole*,³⁷ which immediately follows his remark about terminating “other significant independent grants.”³⁸ The Roberts opinion describes the condition in *Dole*, which required states to enforce a minimum drinking age of twenty-one years, as “not a restriction on how the highway funds—set aside for specific highway improvement and maintenance efforts—were to be used.”³⁹ For that reason—because the statute threatened to terminate part of a “significant independent grant”—the *Dole* Court “accordingly asked whether ‘the financial inducement offered by Congress’ was ‘so coercive as to pass the point

30. *NFIB*, 132 S. Ct. at 2602 (opinion of Roberts, C.J.).

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

32. *Id.*

33. *Id.* at 2604.

34. *Id.*

35. *Id.*

36. *Id.*

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

38. *NFIB*, 132 S. Ct. at 2604.

39. *Id.*

at which pressure turns into compulsion.”⁴⁰ The Court determined that the statute in *Dole* was not coercive because the threatened cutoff of only 5% of federal highway funds left the states a real choice as to whether to accept the drinking age change “not merely in theory but in fact.”⁴¹ For the Chief Justice, then, congressional motive to pressure the states is not enough to render a threatened funding cutoff unconstitutional; rather, the threat must actually take away the states’ ability, “not merely in theory but in fact,”⁴² to choose whether to accept a funding condition.

By contrast to *Dole*, the Chief Justice found that the condition in *NFIB*, which threatened to oust a state from the Medicaid program if it did not agree to the proposed expansion, amounted to “a gun to the head.”⁴³ In reaching that conclusion, Chief Justice Roberts pointed first to the large amount of money at stake: “Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs.”⁴⁴ “The threatened loss of over 10 percent of a State’s overall budget,” the Chief Justice continued, “. . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”⁴⁵ But as the Chief Justice’s reference to the “loss” of funds suggests, the amount of money at stake was not important in and of itself; it was important because states had come to rely upon federal Medicaid funds to provide a major portion of their revenues. The Chief Justice acknowledged that the Medicaid Act made clear to states that chose to participate “that Congress was entitled to make adjustments to the Medicaid program as it developed.”⁴⁶ He nonetheless concluded that the states that entered the program did not have notice that Congress would later condition their continued participation on their agreement to *also* participate in, what he considered to be, a “new health care program”—one that had different federal reimbursement rules and mandated a different benefits package than the reimbursement rules and benefits packages that would continue to apply to those who were eligible for preexpansion Medicaid.⁴⁷ Congress thus violated the contract-based principle that the Court had previously applied in its Spending Clause jurisprudence—the principle against “surprising participating States with post-acceptance or ‘retroactive’ conditions” on federal spending.⁴⁸

The Chief Justice’s opinion thus makes three significant analytic moves. First, it draws a distinction between conditions that govern the use of the funding Congress offers and conditions that threaten to terminate other signifi-

40. *Id.* (quoting *Dole*, 483 U.S. at 211) (internal quotation marks omitted).

41. *Id.* (internal quotation marks omitted) (quoting *Dole*, 483 U.S. at 211–12).

42. *Id.*

43. *Id.* at 2604.

44. *Id.*

45. *Id.* at 2605.

46. *Id.* (citing 42 U.S.C. § 1304).

47. *Id.* at 2606.

48. *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981)).

cant independent grants. Only the latter category of conditions triggers the Chief Justice's coercion analysis. Second, within the latter category, the opinion asks whether the condition at issue leaves states a real choice, "not merely in theory but in fact."⁴⁹ For this purpose, the Chief Justice expressly relied on and reaffirmed *Dole* and its holding—that a condition that puts too little money at stake is not coercive. Third, in determining whether a state has a real choice, the Chief Justice found it significant that the new conditions were attached to continued participation in an entrenched and lucrative cooperative program. All three of these moves are essential to the analysis in the Chief Justice's opinion. Taken together, they establish the anti-leveraging principle.

B. THE JOINT DISSENT

In their discussion of the Medicaid expansion, Justices Scalia, Kennedy, Thomas, and Alito expressly eschewed any formalistic understanding of coercion. They contended, instead, that "if States really have no choice other than to accept the package, the offer is coercive," and that "theoretical voluntariness is not enough."⁵⁰ To determine whether states "really have [a] choice,"⁵¹ the joint dissenters looked principally to the size of the federal grant at issue. The larger the federal grant, they contended, the harder it will be for the state to say no: "When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative."⁵²

As the reference to "a heavy federal tax" indicates, the joint dissenters found the mechanism of coercion in the risk that federal taxes will crowd out the ability of states to raise their own revenue.⁵³ They illustrated this point with an example of a hypothetical statute that they treated as obviously coercive:

Suppose, for example, that Congress enacted legislation offering each State a grant equal to the State's entire annual expenditures for primary and secondary education. Suppose also that this funding came with conditions governing such things as school curriculum, the hiring and tenure of teachers, the drawing of school districts, the length and hours of the school day, the school calendar, a dress code for students, and rules for student discipline. *As a matter of law*, a State could turn down that offer, but if it did so, its residents would not only be required to pay the federal taxes needed to support this expensive new program, but they would also be forced to pay an equivalent amount in state taxes.⁵⁴

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

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

51. *Id.*

52. *Id.*

53. *See id.* at 2661–62 & n.13.

54. *Id.* at 2662.

Note that this example does not involve the federal government leveraging a state's participation in one program to force its participation in another. Rather, for the joint dissent, the size of a federal grant—and the tax burden the grant presumably places on a state's residents—is what makes the conditions attached to the grant coercive. And that is true whether the conditions are new strings attached to a preexisting federal program or are terms imposed for the first time in an entirely new program.

Applying these principles to the ACA's Medicaid expansion, the joint dissenters had "no doubt" that the expansion was coercive.⁵⁵ They focused primarily on "the sheer size of [the Medicaid] program in relation to state expenditures."⁵⁶ The joint dissenters argued that a state opting out of Medicaid "would be very hard pressed" to raise enough revenue of its own to provide a state-only program with similar services.⁵⁷ In Arizona, for example, the federal government's contribution to the state's Medicaid program is \$5.6 billion, or about a third of the state's total expenditures.⁵⁸ Without federal Medicaid funding, then, Arizona "would have to commit an additional 33% of all its state expenditures to fund an equivalent state program along the lines of pre-expansion Medicaid."⁵⁹ When added to the roughly \$2 billion that the state already spends of its own funds for Medicaid, this would mean "that the State would have to allocate 45% of its annual expenditures for that one purpose."⁶⁰

Unlike the Chief Justice, then, the joint dissenters focused almost exclusively on the amount of federal money at stake in the Medicaid program and the difficulty a state will face self-financing its own program if it declines a large offer of federal funds financed by general taxes. The joint dissent's rationale is not limited to cases in which Congress uses a state's desire to continue participating in one program as leverage to get it to agree to participate in a separate program, nor is it even necessarily limited to changes Congress makes to ongoing spending programs. Rather, based on the rationale of the joint dissent, congressional creation of a brand new program—say, for universal

55. *Id.*

56. *Id.* at 2663.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* Moreover, the joint dissenters argued, Congress seemed to recognize that refusal to accept the expansion "was not a practical option" for states. *Id.* at 2665. Otherwise, the statute would have provided some way that Medicaid-eligible individuals could satisfy the new minimum-coverage provision if their states refused to participate in the expansion. But the ACA did not provide subsidies for individuals "whose income is below the federal poverty level." *Id.* The statute provided "no means, other than Medicaid, for these individuals to obtain coverage and comply with the Mandate." *Id.* The joint dissenters thus concluded that "Congress never dreamed that any State would refuse to go along with the expansion of Medicaid." *Id.* But this argument seems to me a bit of a makeweight. The question, as the joint dissenters posed it, is not what Congress *thought* (whatever that concept even means for a multimember body) but whether the states "really have [a] choice." *Id.* at 2661. Congress's expectations may be relevant to the latter question, but it is hard to see how they are especially probative.

early childhood education—that offered states a sufficiently large amount of money, would be coercive simply because the federal taxes used to pay for that program might crowd out state revenue sources. In contrast to Chief Roberts’s opinion, then, the rationale of the joint dissent would therefore invalidate far more conditional offers of federal funds.

II. WHY THE ALTERNATIVE READINGS FAIL

As the previous Part demonstrated, the Chief Justice’s conclusion that the Medicaid expansion provisions were coercive rested on three aspects of those provisions: the large amount of money at stake; Congress’s threat to shut off access to an entrenched source of federal funds; and Congress’s imposition of a condition that did not merely change the existing program but leveraged states’ desire to remain in *that* program to get them to participate in a *separate* program. All three of these conditions were essential to the Chief Justice’s analysis.

It will nonetheless be tempting for lower courts and commentators to pull out individual strands of the Chief Justice’s argument and to interpret *NFIB* as adopting one of three possible rules: (1) that a condition attached to *too large a sum* of federal money is coercive; (2) that a *new* condition on the *continued receipt* of an established funding stream is coercive; or (3) that tying receipt of funds to participation in an *analytically separate* program is coercive. The temptation will be particularly strong because each of these three possible rules resonates strongly with a distinct effort in the literature to identify coercive spending conditions. The first recalls Professor Lynn Baker’s argument that certain federal spending programs are coercive because they crowd out states’ abilities to raise their own revenues.⁶¹ The second recalls Professor Seth Kreimer’s argument that, in some circumstances, the threat to stop providing funds that have been consistently provided in the past is coercive.⁶² And the third recalls Professor Mitch Berman’s argument that withholding funds for the purpose of discouraging or penalizing a state’s exercise of its Tenth Amendment rights is coercive.⁶³

But none of these potential rules can by itself make sense of the Chief Justice’s opinion. Nor would any of them offer a normatively satisfactory account of which spending conditions are unconstitutionally coercive. To accept any of them as setting forth the coercion test would radically destabilize the doctrine and would do so without sufficient justification. In this Part, I highlight

61. See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); see also RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 152 (1993) (“The offer of assistance is not an isolated transaction but must (as with the thief who will resell stolen goods to its true owner) be nested in its larger coercive context.”).

62. See Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

63. See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001).

the problems with relying exclusively on any one of these individual strands of the Chief Justice's analysis. Section A discusses the too-big-to-refuse principle; section B discusses the no-new-conditions principle; and section C discusses the no-conditions-about-separate-programs principle. My discussion here lays the groundwork for my argument in the next Part, where I mount an uneasy defense of the anti-leveraging principle as a better interpretation—doctrinally, normatively, and based on the text of the Chief Justice's opinion—of Chief Justice Roberts's coercion analysis.

A. THE SIZE OF THE GRANT AS DETERMINATIVE—OR, THE TOO-BIG-TO-REFUSE
PRINCIPLE

1. When Does the State Have a “Real Option” To Refuse?

Applying the *New York/Printz* anticommandeering principle to the Spending Clause context, both the Roberts opinion and the joint dissent conclude that a conditional offer of federal funds is tantamount to commandeering and hence coercive if a state has “*no real option*” to refuse.⁶⁴ But what does it mean to say that a state has no real option to refuse an offer? It is easy enough to conclude that a state has no real choice when it has no *legal* option to refuse—and thus will be enjoined to accept a federal requirement even if it chooses not to. And it is also possible to imagine cases in which Congress takes away more than just federal funds from a state that refuses to accept a spending condition. For example, if Congress were to declare that states who refused to participate in a federal spending program must give up other incidents of their own sovereignty, perhaps that would be the state-coercion equivalent of holding a gun to someone's head.⁶⁵ Note, however, that the Court held in *New York* that Congress could oust a state entirely from regulating in a particular area if the state refuses to participate in a federal regulatory scheme,⁶⁶ so not all federal acts displacing a state's sovereign power amount to impermissible coercion.⁶⁷

But where all that is at stake is money that Congress has no obligation to

64. *NFIB*, 132 S. Ct. 2566, 2605 (2012) (opinion of Roberts, C.J.) (emphasis added); see also *id.* at 2661 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (arguing that an offer is coercive “if States *really have no choice* other than to accept the package”) (emphasis added).

65. See *id.* at 2604 (opinion of Roberts, C.J.) (describing the threat to withhold future Medicaid funds from states that did not agree to the ACA's Medicaid expansion as a “gun to the head”); cf. Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163, 166 (2001) (arguing that “in the federalism context, coercion means the loss of sovereign accountability, not subjection to undue influence or financial inducement”).

66. *New York v. United States*, 505 U.S. 144, 188 (1992) (“The Constitution enables the Federal Government to preempt state regulation contrary to federal interests . . .”).

67. Cf. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1634 (2006) (arguing that “direct federal regulation limits state regulatory power to a greater extent than does commandeering as a general matter, and states must retain regulatory control in order to realize the values typically associated with federalism”).

provide to the states in the first place,⁶⁸ how can we conclude that the threat to withhold that money leaves states “no real choice” but to accept the conditions Congress places on it?⁶⁹ All of the Justices in *NFIB* acknowledged that Congress is free to offer federal funds to induce states to pursue federal priorities.⁷⁰ In doing so, Congress must necessarily be entitled to design its inducements so that they are sufficiently attractive to gain the states’ acceptance.⁷¹ Because states are intimately involved in Congress’s design of federal spending programs, it is a practical reality that Congress will craft those programs to promote state agreement in any event.⁷²

If that is right, the no-real-choice principle has an incredibly difficult task. It must distinguish between offers that a state *cannot* refuse, which are impermissible, and offers that are *too good* to refuse, which are acceptable and ubiquitous.⁷³ Nearly a decade ago, Professors Lynn Baker and Mitch Berman argued that “the no-rational-choice and no-fair-choice constructions of impermissible coercion are just too amorphous to be judicially administrable.”⁷⁴ Notably, they found it “virtually unimaginable that Justice Scalia . . . would agree to this formulation.”⁷⁵ However, a similar formulation—“no real choice”—is central to the opinion Justice Scalia signed in *NFIB*.⁷⁶

One might read *NFIB* as holding that a state cannot refuse a federal grant if

68. See *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686–87 (1999) (“Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts.”).

69. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1450 (1989) (arguing that where “the government benefits at issue [are] gratuitous in the first place,” it “runs against the ground rules of the negative Constitution” to “hold that conditions coerce recipients because they make them worse off with respect to a benefit than they *ought* to be”).

70. See *NFIB*, 132 S. Ct. at 2579 (opinion of Roberts, C.J.); *id.* at 2659 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

71. The *Dole* Court seemed to recognize this point when it stated that a conditional spending program is not coercive “simply by reason of its success in achieving the congressional objective.” *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

72. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 862 (1998) (“After all, Congress designs the grant package with input from nonfederal governments and their organizations, such as the National League of Cities and the National Governors’ Association. Therefore, it should not be surprising that, when Congress actually offers the grant, nonfederal governments accept it.”).

73. Cf. Alan Wertheimer, *Exploitation and Commercial Surrogacy*, 74 DENV. U. L. REV. 1215, 1222 (1997) (“If A offers B an opportunity (a new job) that would render her so much better off than her eminently acceptable status quo that it would be *irrational* for B to refuse, there is no reason to refer to such offers as coercive or to think that they compromise the voluntariness of B’s choice.”).

74. 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, 521 (2003). I agreed with this assessment. See Bagenstos, *supra* note 13, at 372.

75. Baker & Berman, *supra* note 74, at 521–22.

76. See *NFIB*, 132 S. Ct. 2566, 2657 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (arguing that ACA “really does not give [states] any choice at all”); *id.* at 2659 (noting that spending legislation must “give[] the States a real choice”); *id.* at 2661 (stating that “if States really have no choice other than to accept the package, the offer is coercive”); *id.* at 2667 (referring to “[t]he reality that States were given no real choice but to expand Medicaid”).

the amount of money at stake is sufficiently large. As I showed in section I.B, the argument at the core of the joint dissent was that the large amount of federal money at stake left the states no real choice but to agree to the Medicaid expansion.⁷⁷ But it would not be a fair reading of *NFIB* to conclude that a federal spending condition is coercive whenever it is tied to a sufficiently large amount of money. For one, as I showed in section I.A, the analysis in the Chief Justice's pivotal opinion would not examine the size of the grant at issue unless, sometime after establishing the grant program, Congress conditioned continuing participation on a state's additional agreement to participate in a separate, independent program.⁷⁸ For another, as I show below, a too-big-to-refuse principle is analytically elusive and normatively difficult to justify.

2. The Insufficiency of the Too-Big-To-Refuse Principle

The size of the grant Congress offers cannot distinguish between an offer that cannot be refused and an offer that is too good to refuse. A too-big-to-refuse principle would lead to the perverse conclusion that the more generous the terms offered to a state—and thus the more that a state could extract from Congress to agree to its conditions—the more likely a condition would be found to violate the state's right to be free from coercion. In the case of Medicaid after the ACA, what Congress was offering the states was indeed generous: the federal government would give the states over a quarter of a trillion dollars to defray most of the costs of insuring certain indigent and disabled persons, if the states would agree also to insure every individual up to 133% of the federal poverty level—an additional population for which the federal government would bear all of the costs initially, dropping to the still-high figure of 90% of the costs by the end of the decade.⁷⁹ Such a generous package can be understood to demonstrate the states' effective use of a strong bargaining position at least as readily as it can be understood as federal coercion.⁸⁰

To be sure, if the states are somehow entitled to receive federal Medicaid money without the conditions Congress has recently instated, then the large amount of money the states will receive in exchange for those conditions does not demonstrate that the states were *uncoerced*. A negotiation in which a kidnapper returns a hostage unharmed in exchange for a ransom is properly understood to be coercive even if the ransom is far less than the hostage's family would have been willing to pay. But this point does not depend on the amount of money at issue; it depends on the parties' baseline entitlements. If the states have an entitlement to receive Medicaid money from the federal government, then Congress's decision to attach conditions to the receipt of that money

77. See *supra* section I.B.

78. See *supra* section I.A.

79. See 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (Supp. 2011); *id.* § 1396d(y)(1) (E) (Supp. 2011).

80. See Brian Galle, *Getting Spending: How To Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 186–87 (2004); Hills, *supra* note 72, at 871–91.

is coercive regardless of how much is at issue. If the states have no such entitlement, the amount of money at issue tells us nothing more than how much it takes to entice those states to voluntarily agree to Congress's conditions. I turn to the baseline entitlement question now.

3. Crowding Out State Revenue Sources

The joint dissenters sought to avoid the baseline problem by arguing that the large federal taxes that finance Medicaid also, “as a practical matter,” keep states from raising enough revenue to provide health care to their own residents if they turn down federal funds.⁸¹ This analysis strongly resonates with Professor Lynn Baker's argument that federal taxation of state residents can make conditional federal spending coercive.⁸² Both Professor Baker and the joint dissent argue, essentially, that the states have a preexisting entitlement to the revenue that the federal government, by taxing their residents, prevents states from raising themselves.⁸³

Notably, Chief Justice Roberts did not endorse the joint dissent's analysis on this point. Indeed, the ultimate conclusion of the Chief Justice's opinion—as reflected in the judgment of the Court—seems flatly inconsistent with it. The Chief Justice held only that the federal government may not bar a state *entirely* from the Medicaid program for refusing to agree to the ACA's expansion. His opinion, and the Court's judgment he announced, expressly determined that it was constitutional for Congress to offer states the opportunity to participate in the expansion and to withhold the money earmarked for the expansion from states that refused to participate in it. Even as limited by the Court's judgment, the Medicaid expansion offers states large amounts of federal money that have been obtained as general federal taxes from the residents of states. Under the joint dissent's analysis, it would likely be coercive to offer states the opportunity to participate in the expansion even as a stand-alone, voluntary program, yet that is precisely what the ACA does after the Court's decision.

Moreover, basic principles identified in the Court's previous decisions stand in the way of a conclusion that federal taxation of state residents can impermissibly coerce the states. For one, the notion that the states have some baseline entitlement to keep Congress from taxing their residents stands in tension with the adoption of the Sixteenth Amendment, which seems to “reflect[] the view that the federal government has, and ought to have, the first claim on the tax

81. *NFIB*, 132 S. Ct. at 2661–62 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); see also *id.* at 2662 n.13 (“[U]nless Justice Ginsburg thinks that there is no limit to the amount of money that can be squeezed out of taxpayers, heavy federal taxation diminishes the practical ability of States to collect their own taxes.”).

82. See Baker, *supra* note 61, at 1935–37.

83. See Bagenstos, *supra* note 13, at 376 (“Baker articulates a clear baseline against which to measure coercion: when the federal government spends, it is really spending ‘the states’ money,’ so the states are entitled to receive federal assistance in proportion to their share of the federal tax base.”) (footnote omitted) (quoting Baker, *supra* note 61, at 1937).

base.”⁸⁴ Such a notion is also in tension with the Court’s own dual-federalism jurisprudence. As the Court explained in *Printz*, the “great innovation of this [constitutional] design was that ‘our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.’”⁸⁵ Under that system, the *Printz* Court explained, “the State and Federal Governments . . . exercise concurrent authority over the people.”⁸⁶

Justices Scalia, Kennedy, Thomas, and Alito agreed with Justice Ginsburg that the Court’s dual federalism precedents meant that, “as a formal matter,” a state “‘has no claim on the money its residents pay in federal taxes.’”⁸⁷ But they nonetheless argued that “unless Justice Ginsburg thinks that there is no limit to the amount of money that can be squeezed out of taxpayers, heavy federal taxation diminishes the practical ability of States to collect their own taxes.”⁸⁸ The joint dissenters thus seemed to adopt a quasi-Lockean proviso, in which the federal government is free to tax the residents of states to pay for conditional federal spending programs, but that it must leave enough tax base untapped so as not to functionally limit the States’ ability to collect taxes.

There are a number of problems with this quasi-Lockean proviso. First, the scope of the principle is completely unclear. Does it mean that Congress must not adopt spending programs that, in any way and to any degree, diminish the practical ability of states to collect revenue? That would circumvent the principle that the states have no claim on the money their residents pay in federal taxes. If the federal and state governments are seeking revenue from the same limited pool, nearly every conditional federal spending program will, to some extent, limit the practical ability of states to raise revenue.⁸⁹

Other portions of the joint dissent suggest that the federal government must leave the states with sufficient revenue sources to fully replace the federal grant if they want to turn it down. In its discussion of Arizona, for example, the opinion argues that the state “would have to commit an additional 33% of all its state expenditures to fund an equivalent state program *along the lines of pre-expansion Medicaid*.”⁹⁰ Arizona might well be hard-pressed to raise its revenue to such an extent. But that is not because the federal government has so heavily taxed Arizona’s residents to pay for Medicaid that the state no longer has an adequate source of revenue. Rather, it is because Congress has chosen to

84. *Id.* at 377.

85. *Printz v. United States*, 521 U.S. 898, 920 (1997) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

86. *Printz*, 521 U.S. at 919–20.

87. *NFIB*, 132 S. Ct. 2566, 2662 n.13 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (quoting *NFIB*, 132 S. Ct. at 2641 n.26 (Ginsburg, J., concurring in part and dissenting in part)).

88. *Id.*

89. There is ample reason to doubt the premise that the states and the federal government *are* actually seeking revenue from the same limited pool. See Brian Galle, *Does Federal Spending “Coerce” States? Evidence from State Budgets*, __ NW. U. L. REV. __ (forthcoming 2013). To the extent that the premise is incorrect, the joint dissent’s argument is even less supportable.

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

take revenue paid to the federal government by the residents of *other* states and redistribute it to the governments of poorer states like Arizona by giving them greater rates of federal Medicaid matching funds.⁹¹ It is difficult to see what constitutional basis Arizona has for complaining if it cannot, by taxing its own residents, make up for the revenue it would lose by giving up the opportunity to participate in a federal program that redistributes revenue gained from residents of *other* states.

Finally, the joint dissent's quasi-Lockean proviso proves far too much. Most of the federal budget does not go to conditional spending programs;⁹² nearly all of it comes from taxpayers who also pay taxes to the states. If a state can challenge a cooperative federal program because, as a practical matter, the program limits the state's ability to raise revenue, why shouldn't it be able to challenge the far larger federal-only programs that, if anything, must impose far greater practical burdens on raising revenue? It seems perverse to conclude that a state may challenge a federal decision to offer it "back" some of the money the federal government raised from its residents but may not challenge a federal decision to spend the money itself.

The argument of the joint dissent might rest on the notion that a state is coerced into participation because failure to participate would direct the money paid by "its" taxpayers to subsidies for the residents of other states. But Spending Clause legislation often gives more money to some states than others.⁹³ Unless the state has a claim on the money its residents pay to the federal government in taxes, a state can have no basis to complain about that. Any effort to develop a doctrine prohibiting some states from benefiting more than others from federal spending programs, whether under the General Welfare Clause or otherwise, is fraught with difficulties.⁹⁴

4. Accountability and the Size of Federal Grants

Nor does a conclusion that especially large grants are coercive serve the goal of accountability. Under the theory of *New York* and *Printz*, when the federal government requires the states to regulate individuals, officials at both levels of government can sow confusion regarding who is responsible for the regulation.

91. In Fiscal Year 2012, the federal government paid 67.3% of the cost of Medicaid in Arizona. That is the eleventh-highest Medicaid match rate (Federal Medical Assistance Percentage, or "FMAP") of any state. See 75 Fed. Reg. 69083 (Nov. 10, 2010). More generally, for at least three decades Arizona has consistently received more federal spending than its residents have paid in federal taxes. See TAX FOUND., FEDERAL TAXES PAID VS. FEDERAL SPENDING RECEIVED BY STATE, 1981–2005 (2007); *America's Fiscal Union: The Red and the Black*, ECONOMIST ONLINE (Aug. 1, 2011), <http://www.economist.com/blogs/dailychart/2011/08/americas-fiscal-union>.

92. The Office of Management and Budget estimates that in Fiscal Year 2012, the federal government will spend just over \$600 billion on grants to states, out of nearly \$3.8 trillion in total outlays. See OFFICE OF MGMT. & BUDGET, THE BUDGET FOR FISCAL YEAR 2013, 208 tbl.S-4, 287, 304 tbl.18–2 (2012), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/tables.pdf>.

93. See *America's Fiscal Union*, *supra* note 91.

94. See Bagenstos, *supra* note 13, at 356–63.

Both state and federal officials can take credit for the popular aspects of the regulation, while casting blame on the other for any unpopular aspects.⁹⁵ Both the Roberts opinion and the joint dissent expressly invoke this accountability theory to justify the extension of the anticommandeering doctrine to prohibit coercive spending conditions.⁹⁶

Even as applied to commandeering, the accountability argument has always been a stretch. As Professor Neil Siegel argues:

Even after factoring in search costs and rational ignorance, it seems likely that citizens who pay attention to public affairs and who care to inquire will be able to discern which level of government is responsible for a government regulation, and citizens who do not care to inquire may be largely beyond judicial or political help on the accountability front.⁹⁷

Not all acts of commandeering are likely to lead to accountability problems, nor are they necessarily more likely to do so than other permissible federal–state interventions.⁹⁸ But applying the accountability argument to federal grants simply because those grants are especially large extends the argument beyond any reasonable limit.

To be sure, *any* federal–state program—regardless of whether state participation is compulsory—might blur the lines of accountability to some extent.⁹⁹ But the Court has consistently concluded that cooperative federal spending programs ordinarily do not unconstitutionally impede accountability. When state officials accept federal grants with conditions that a state’s voters “do not consider” to be “in their best interest,” the Court has determined that the voters may replace those officials and “elect state officials who share their view.”¹⁰⁰ When Congress conditions receipt of federal money for a given program on a state’s agreement to follow the rules that govern the expenditure of funds in that program, that conclusion seems particularly apt. Residents who are upset by a state’s participation in such a program can readily pose for their fellow voters the question of whether it is in the state’s best interests, all things considered, to participate in the program.

95. See *Printz v. United States*, 521 U.S. 898, 929–30 (1997); *New York v. United States*, 505 U.S. 144, 168–69, 182–83 (1992).

96. See *NFIB*, 132 S. Ct. 2566, 2602–03 (opinion of Roberts, C.J.); *id.* at 2660–61 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

97. Siegel, *supra* note 67, at 1632.

98. See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995); Hills, *supra* note 72, at 826; Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2200–05 (1998).

99. See Hills, *supra* note 72, at 828 (“[E]rosion of political accountability is endemic to *all* forms of cooperative federalism; whenever the federal government induces states to act, whether with block grants or categorical grants, there is a considerable risk that voters will be confused about which level of government imposed the regulatory burdens of the program.”).

100. *New York*, 505 U.S. at 168.

Note that this is true regardless of how much money Congress will reimburse states for participating in the program. The question posed for the state's voters is the same easy-to-understand question—whether, with whatever large or small reimbursement Congress offers, the state is better served by participating in the program. The more that Congress offers a state to induce participation, the more difficult it may be for state officials to turn down the offer. But the theory of accountability does not require state officials to be insulated from tough choices.¹⁰¹ To the contrary, that theory requires only “that a State’s government will represent and remain accountable to its own citizens.”¹⁰² Those requirements are satisfied if the choice before the state is clear enough to voters so that they can ensure that the state makes the choice in accordance with their preferences.

If all especially large federal grants are deemed to create an impermissible accountability problem, the likely alternative for the federal government will be to administer more programs directly. This would entirely displace state decision making. This alternative might make the lines of accountability clearer, but it would move day-to-day decisions over more issues to a level of government that is less accessible—and therefore plausibly less accountable—to the people. That would be an ironic result for a doctrine that is designed to promote accountability and preserve state prerogatives.

B. PAST FUNDING DECISIONS AS THE BASELINE—OR, THE
NO-NEW-CONDITIONS PRINCIPLE

1. Unpacking the Opinions

The arguments about the size of the federal grant at issue—and the degree to which the federal taxes that pay for the grant might crowd out state revenue raising—might apply to any conditional federal spending. They do not turn on Congress’s having changed the terms of an ongoing cooperative program. If Medicaid did not yet exist in 2010, but Congress had decided to create such a program for the first time with the scope that program had after the ACA, the offer to participate in the program might well have been an offer too big to refuse and thus coercive under the logic of the joint dissent’s argument.

But Chief Justice Roberts emphasized that the ACA did not simply create Medicaid from scratch. Rather, it changed—in what seemed to be a fundamental way—the terms by which states could continue to participate in the ongoing Medicaid program. The Chief Justice emphasized that Congress was not threatening to shut off the spigot for failure to comply with new obligations within the general scope of the preexisting Medicaid program. Rather, the new conditions effected a “shift in kind, not merely degree,” transforming Medicaid’s

101. As the Chief Justice wrote, “The States are separate and independent sovereigns. Sometimes they have to act like it.” *NFIB*, 132 S. Ct. at 2603 (opinion of Roberts, C.J.).

102. *Printz v. United States*, 521 U.S. 898, 920 (1997).

federal–state contract from “a program to care for the neediest among us” to “an element of a comprehensive national plan to provide universal health insurance coverage.”¹⁰³

Focusing solely on this language, one might be tempted to read *NFIB* as establishing the following principle: If Congress has provided a sufficiently large amount of money to the states for a given purpose for a sufficiently long time that states have come to expect and rely upon the continued provision of that money, it is coercive for Congress to condition continued receipt of that money on compliance with new requirements that would “transform” the federal program or effect a “shift in kind, not merely degree.”¹⁰⁴ If the premise is that the states must have a “real” choice,¹⁰⁵ the prospect of having an entrenched source of federal funding shut off certainly feels like it violates that principle much more than the prospect of losing the opportunity to obtain federal funds that a state had never previously received.

Understood in this way, the Court’s holding would implement one aspect of Professor Seth Kreimer’s analysis of unconstitutional conditions. Professor Kreimer defines coercion as “an alteration of the position one would have enjoyed in the normal course of events.”¹⁰⁶ In determining what is the “normal course of events”—the baseline against which to measure whether the government has threatened to take away an entitlement—he argues that courts should look in part to history: “Losing a benefit previously provided,” he argues, “seems different from simply never having been provided the benefit in the first place.”¹⁰⁷

The language of the Roberts opinion on this point also resonates with Professor Rick Hills’s suggestion that certain spending programs promote an “addiction” by the states that receive federal funds. Professor Hills argues that such a situation occurs when, after a state has “become[] politically incapable of discontinuing the program, Congress then adds new conditions, that, if apparent from the outset, would have deterred the states from accepting the funds in the first place.”¹⁰⁸ Applying the Court’s Spending Clause contract analogy, Chief Justice Roberts similarly suggested that states must have notice at the time they enter a cooperative federal program of the sorts of changes that Congress might make to the program in the (perhaps quite distant) future.¹⁰⁹ Thus, the Roberts

103. *NFIB*, 132 S. Ct. at 2605–06 (opinion of Roberts, C.J.).

104. This is essentially the argument that Professor Blumstein made in his amicus brief in *NFIB*. See Brief of James F. Blumstein, *supra* note 18. Although I believe Professor Blumstein’s brief was quite influential in the Chief Justice’s decision-making process, for reasons I develop in text, I do not believe the Chief Justice adopted Professor Blumstein’s argument in its entirety.

105. *NFIB*, 132 S. Ct. at 2608 (opinion of Roberts, C.J.) (“It is fair to say that Congress assumed that every State would participate in the Medicaid expansion, given that States had no *real choice* but to do so.”) (emphasis added).

106. Kreimer, *supra* note 62, at 1353.

107. *Id.* at 1359.

108. Hills, *supra* note 72, at 866 n.184.

109. *NFIB*, 132 S. Ct. at 2605 (opinion of Roberts, C.J.).

opinion invokes the Court's *Pennhurst* decision for the proposition that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."¹¹⁰ Although the opinion notes that the Medicaid Act has always "contain[ed] a clause expressly reserving '[t]he right to alter, amend, or repeal any provision' of that statute,"¹¹¹ it concludes that a "State could hardly anticipate that Congress's reservation of the right to 'alter' or 'amend' the Medicaid program included the power to transform it so dramatically."¹¹² The ACA's Medicaid expansion thus violated the principle against "surprising participating States with post-acceptance or 'retroactive' conditions."¹¹³

As with the amount of money at stake, that the Medicaid expansion made a significant change to an entrenched spending program is an element of the analysis of the Roberts opinion. But that opinion is *not* best read as adopting the principle that Congress engages in impermissible coercion whenever it makes changes—even fundamental changes—to the terms by which states can continue participating in an entrenched spending program. As I explained in section I.A, the Chief Justice's opinion does not rest only on the conclusion that Congress significantly changed the terms on which states could remain in an ongoing program.¹¹⁴ It also rests, crucially, on the determination that Congress was using a state's desire to continue to participate in a lucrative program as leverage to force the states *also* to participate in a separate and independent program. To read the opinion otherwise would, as I show in the rest of this section, conflict with basic premises of the past seventy-five years of Spending Clause doctrine—premises that Chief Justice Roberts himself endorsed.

2. The Democratic Problems with Freezing the Past in Place

Although Chief Justice Roberts referred to the consequence of failing to expand Medicaid as "the loss" of federal funding, it is important to keep clear exactly what states would lose. Under the ACA as written, a state that refused to expand Medicaid to cover everyone below 133% of the federal poverty level would not lose any money it had received in the *past*.¹¹⁵ It would instead lose the opportunity to continue to receive Medicaid money in the *future*—after January 1, 2014, the effective date of the expansion.¹¹⁶

To suggest that Congress's decision to provide Medicaid funds to the states under certain rules *in the past* sets a baseline against which we can measure whether new conditions on the receipt of Medicaid *in the future* are coercive,

110. *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (internal quotation marks omitted).

111. *Id.* (quoting 42 U.S.C. § 1304).

112. *Id.* at 2606.

113. *Id.* (quoting *Pennhurst*, 451 U.S. at 25) (internal quotation marks omitted).

114. *See supra* section I.A.

115. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (Supp. 2011).

116. *Id.*

then, is to suggest that states have an entitlement to the continuation of the old Medicaid program indefinitely. But that cannot be right. There are any number of reasons why Congress might legitimately want to end or fundamentally alter a conditional spending program: A new political coalition may have taken power, and it may have different views about proper policy than did the coalition that held power at the time the program was adopted; experience with the program as originally designed and implemented might have demonstrated a need to alter or eliminate its less successful aspects; changing economic conditions might, in the view of the current Congress, warrant expansion of certain aspects of the program or contraction of others; new budget realities might make some aspects of the original program unaffordable in the view of the current Congress. And so on.

For democratic reasons, Congress should be entitled to respond to these changes by prospectively altering or eliminating programs that no longer accord with current political alignments, policy lessons, or understandings of the facts in the world. The Supreme Court's post-New Deal Spending Clause jurisprudence has been built on this very premise. Since at least *United States v. Butler*,¹¹⁷ the Court has held that Congress's spending power rests on Article I, Section 8's authorization "to pay the Debts and provide for the common Defence and general Welfare of the United States."¹¹⁸ As Justice Cardozo explained in *Helvering v. Davis*,¹¹⁹ in language the Court reaffirmed in *South Dakota v. Dole*,¹²⁰ "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress"¹²¹ Justice Cardozo explicitly recognized, moreover, that Congress's understanding of what is in the general welfare would not be "static," because "[w]hat is critical or urgent changes with the times."¹²² The Court has thus left it to the current Congress, informed by current policy views, to determine what spending conditions serve the general welfare.¹²³

Chief Justice Roberts acknowledged that Congress may "ensure[] that the funds are spent according to its view of the general Welfare."¹²⁴ And he seemed to acknowledge that Congress could constitutionally repeal the old Medicaid program in its entirety and then enact a new Medicaid program that contained all of the conditions that program included after the ACA.¹²⁵ "But," he responded, "it would certainly not be that easy. Practical constraints would plainly

117. 297 U.S. 1 (1936).

118. U.S. CONST. art. I, § 8, cl. 1.

119. 301 U.S. 619 (1937).

120. 483 U.S. 203, 208 (1987).

121. *Helvering*, 301 U.S. at 645.

122. *Id.* at 641.

123. *See, e.g., Dole*, 483 U.S. at 207 & n.2 (1987) (directing courts to "defer substantially to the judgment of Congress" in determining what is in the general welfare and noting that the Court has "questioned whether 'general welfare' is a judicially enforceable restriction at all").

124. *NFIB*, 132 S. Ct. at 2604 (opinion of Roberts, C.J.) (internal quotation marks omitted).

125. *See id.* at 2606 n.14.

inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration.”¹²⁶

It is difficult to know what to make of this statement. One might read the Chief Justice’s statement as accepting that Congress can constitutionally make fundamental, prospective changes in the terms of a conditional spending program—but only if Congress goes through a process that imposes significant practical obstacles on its ability to achieve that goal. Such a reading would still impose broad and unjustified limits on Congress’s ability to spend according to its current understanding of the general welfare.

First, there are already significant practical obstacles to enacting *any* new legislation. Some of these come from the Constitution itself—particularly the requirements of bicameralism and presentment that appear in Article I, Section 7.¹²⁷ Others come from subconstitutional practices, such as the filibuster and the committee system, that create numerous veto points within each House of Congress.¹²⁸ This structure is already significantly biased against the enactment of new legislation. If one takes seriously Justice Cardozo’s argument that the current Congress must be free to tailor spending legislation to today’s understanding of the general welfare, there is no good justification for making it even *harder* for Congress prospectively to change the terms of a cooperative spending program.

Second, it is difficult to know what Chief Justice Roberts meant by “putting every feature of Medicaid on the table for political reconsideration,”¹²⁹ because in any legal and practical sense, the ACA already did that. The statute made massive changes across-the-board in the federal laws regulating and providing for health care.¹³⁰ In addition to the coverage expansion provision, the ACA made a number of significant changes to Medicaid itself. These included: new provisions for community-based services for people with disabilities; new prescription-drug provisions; an adjustment to the formula for payments to states for “hospitals that provide greater than average medical services to Medicaid, CHIP, uninsured, or other low-income patients” (a longstanding source of tension in the administration of the Medicaid program); new provisions promoting integration of benefits for people who are eligible for both (the entirely federal) Medicare and (the federal–state) Medicaid; important new quality-of-care provisions; and others.¹³¹ These changes were made in the course of an extensive, politically salient legislative process. As a matter of

126. *Id.*

127. *See, e.g.*, SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 133–74 (2012).

128. *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 *STAN. L. REV.* 181 (1997).

129. *NFIB*, 132 S. Ct. at 2606 n.14.

130. For a discussion that details all of these changes, see generally JOHN E. McDONOUGH, *INSIDE NATIONAL HEALTH REFORM* (2011).

131. *See id.* at 144–47, 279.

both Congress's germaneness rules and practical politics, the ACA's legislative process already put every aspect of Medicaid in play.

Third, there is no difference between what Congress actually did, on the one hand, and repealing the old Medicaid program and enacting a new Medicaid program that "'combin[ed] the pre-2010 coverage with the expanded coverage required by the ACA,'" on the other.¹³² By the ACA's terms, a state could participate in Medicaid after January 1, 2014, only if it complied with the new Medicaid program rules, including the requirement to cover everyone up to 133% of the poverty line.¹³³ That is exactly the same legal regime as the states would have faced if Congress had framed the Medicaid expansion in two sections: Section One (repealing the old Medicaid program) and Section Two (enacting a new Medicaid program, combining the pre- and post-ACA coverage rules).¹³⁴

One might read Chief Justice Roberts's discussion as saying that Congress may not make fundamental, prospective changes to an entrenched conditional spending program without first passing a bill that would repeal the existing program and then waiting for it to become effective, clearing the slate before enacting a new program with different terms. But that is not a plausible reading, either. At best, such a rule would be inefficient.¹³⁵ At worst, such a rule would impose a significant and unjustified status quo bias. Members of Congress often will balk before agreeing to eliminate an existing program on which many constituents depend unless they can at the same time reach agreement on what, if anything, will replace it. Repeal of a program could transform surrounding politics in unpredictable ways by creating new holdup opportunities for pivotal legislators in the efforts to replace it. Even if most members of Congress agree that the program should no longer be structured as it currently is—and even if a sufficient majority in both houses could reach agreement on a replacement—they may see continuation of the status quo as a second-best option as compared with a repeal that will lead to unpredictable legislative consequences. A repeal-before-replacement rule thus would pose a significant obstacle to Congress's efforts to adjust the terms of spending programs to meet current understandings

132. *NFIB*, 132 S. Ct. at 2606 n.14 (opinion of Roberts, C.J.) (quoting *NFIB*, 132 S. Ct. at 2636 (Ginsburg, J., dissenting)).

133. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (Supp. 2011).

134. A statute phrased in this way might have faced more political obstacles because opponents could deploy the line "Obamacare ends Medicaid" as a demagogic talking point. But it is hard to see a constitutional principle that requires Congress to enhance the power of demagogic opposition to its efforts to spend in accordance with the current understanding of the general welfare. This is the fundamental problem with the argument in Professor Blumstein's brief that the Medicaid expansion would have been constitutional if Congress had simply said Medicaid was repealed and replaced by "New Medicaid"—a program that would have the scope and rules that Congress imposed on Medicaid under the ACA. See Brief of James F. Blumstein, *supra* note 18, at 36.

135. Cf. Stuart Minor Benjamin, *Bootstrapping*, 75 LAW & CONTEMP. PROBS. 115, 134–43 (2012) (arguing that a rule prohibiting Congress from doing in a single law what it could concededly do in two separate laws passed nonsimultaneously would impose significant efficiency costs without offsetting benefits).

of the general welfare.

As I explained in section I.A., Chief Justice Roberts’s opinion, read as a whole, does not appear to say that it is impermissible for Congress to make fundamental, prospective changes to an ongoing spending program. And, as I have explained in this subsection, any such reading would be inconsistent with the very constitutional principles Chief Justice Roberts endorsed—particularly, the principle that Congress may spend according to its current view of the general welfare. There are, therefore, ample reasons not to read the Chief Justice as barring all changes to entrenched cooperative programs.

3. The Limits of the Notice Argument

Chief Justice Roberts’s *Pennhurst* argument might seem to complicate that conclusion. The argument, briefly, is this: Congress’s power to adjust cooperative spending programs to meet its current understanding of the general welfare necessarily depends on securing state consent to the “contract” that a program sets up. That, of course, is what the Court has held since *Pennhurst*.¹³⁶ And a state cannot consent without notice. The Roberts opinion argues that conditioning continued Medicaid participation on compliance with the ACA’s coverage expansion would violate the *Pennhurst* notice principle because states “could hardly anticipate” at the time they entered the Medicaid program that Congress retained “the power to transform it so dramatically.”¹³⁷

But a conclusion that the states must be able to anticipate at the time they enter a program all of the ways Congress might change that program *many decades later* would reflect a remarkable expansion of the *Pennhurst* notice principle.¹³⁸ *Pennhurst* held that a state must have unambiguous notice of the terms of a federal grant before the terms go into effect.¹³⁹ A necessary corollary of that holding is that a state must have the chance to withdraw from a federal grant program in which it currently participates before new grants are issued with different terms.¹⁴⁰ But the ACA’s Medicaid expansion fully complied with those principles. When Congress enacted the ACA in 2010, it made explicit that continued participation in Medicaid would be conditioned on expanding the

136. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

137. *NFIB*, 132 S. Ct. at 2606 (opinion of Roberts, C.J.).

138. In an article published five years ago, I predicted that expansion of the *Pennhurst* notice principle would be the Roberts Court’s most likely route for restricting Congress’s spending power. See Bagenstos, *supra* note 13, at 393–409. I did not predict this particular use of the principle, however.

139. *Pennhurst*, 451 U.S. at 17–18. The Court concluded that the statutory “findings” that Congress included in the law authorizing certain grants for developmental disability services were not clear enough to impose conditions on states that received those grants because, by their plain terms, the findings “represent[ed] general statements of federal policy, not newly created legal duties.” *Id.* at 22–23.

140. See, e.g., *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 596–97 (1983) (opinion of White, J.) (citing the *Pennhurst*, 451 U.S. at 29–30, and *Rosado v. Wyman*, 397 U.S. 397, 420–21 (1970)), as approaches of permitting states to withdraw from federal grant programs when terms are altered).

program to cover everyone up to 133% of the federal poverty level.¹⁴¹ But rather than imposing that new condition immediately, Congress gave the states more than three years, until January 2014, before it would go into effect.¹⁴² This period gave states ample time to decide whether to remain in the program with the new coverage conditions or instead to withdraw from it.

Read broadly, the Chief Justice's *Pennhurst* discussion would demand a different sort of notice than the Court has required in the past. Because states could not have known at the time they entered Medicaid that Congress would (perhaps more than forty years later) decide to amend it to require participating states to cover everyone up to 133% of the federal poverty level, under this reading, the expansion impermissibly "surpris[ed] participating States with post-acceptance or 'retroactive' conditions."¹⁴³ That would be true even though Congress did in fact give the states the opportunity to leave the Medicaid program if they wished to avoid the new condition.

There is no good justification for such a broad reading of *Pennhurst*. As both a positive and a normative matter, a state entering a conditional spending program should *always* have notice that the program might change—in ways big and small—at any subsequent point. So long as Congress gives the states notice and an opportunity to leave the program before new spending conditions take effect, the *Pennhurst* notice requirement should be understood as satisfied.

As a positive matter, Congress does in fact make changes to federal spending programs all the time. Some of these changes are significant indeed—so significant that one might say they have transformed the preexisting program. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), for example, fundamentally changed the welfare system by, among other things, requiring every state that wanted to continue to receive federal welfare funds to enforce strict lifetime limits on the eligibility of most recipients and to enact state legislation promoting child-support enforcement.¹⁴⁴ And the No Child Left Behind Act (NCLB) conditioned continued state participation in the Elementary and Secondary Education Act's Title I program on the adoption of a variety of standards and accountability measures¹⁴⁵—"remarkably ambitious and unusu-

141. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (Supp. 2011).

142. *Id.*

143. *NFIB*, 132 S. Ct. at 2606 (opinion of Roberts, C.J.) (quoting *Pennhurst*, 451 U.S. at 25) (internal quotation marks omitted).

144. Because the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) removed any individual entitlement to welfare and shifted to a block-grant model, it is often seen as unambiguously enhancing state flexibility. But the statute actually imposed significant new mandates on states that accepted federal welfare funds. See Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115 (1998); see also *Kansas v. United States*, 214 F.3d 1196 (10th Cir. 2000) (rejecting Spending Clause challenge to child support enforcement provisions of PRWORA), *cert. denied*, 531 U.S. 1035 (2000).

145. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

ally intrusive”¹⁴⁶ conditions that “represent[] a significant departure from the federal government’s traditional posture regarding policymaking for the nation’s public elementary and secondary schools.”¹⁴⁷

States never had any reason to expect that Medicaid would be exempt from these sorts of changes. Indeed, the Social Security Act (in which the Medicaid Act is embedded) is explicit that Congress has always reserved “[t]he right to alter, amend, or repeal any provision” of the statute that set forth the conditions of receipt of federal funds under the program.¹⁴⁸ Well before the ACA, Congress exercised this authority on numerous occasions throughout the years to expand the population that participating states must cover. As originally enacted, the Medicaid Act required participating states to cover only those individuals who received federally supported cash assistance.¹⁴⁹ By 1990, after a series of amendments, the statute required participating states to cover all children aged 6–18 who had family incomes under the federal poverty level, and all pregnant women and children up to age 6 who had family incomes up to 133% of the federal poverty level.¹⁵⁰ By 1995, the statute also required participating states to pay for the Medicare cost-sharing payments of Medicare-eligible individuals with family incomes up to 120% of the federal poverty level.¹⁵¹ Taken together, these changes “added millions to the Medicaid-eligible population.”¹⁵²

Chief Justice Roberts acknowledged that Congress had made these changes, and he seemed to accept that they were constitutional:

A State confronted with statutory language reserving the right to “alter” or “amend” the pertinent provisions of the Social Security Act might reasonably assume that Congress was entitled to make adjustments to the Medicaid program as it developed. Congress has in fact done so, sometimes conditioning only the new funding, other times both old and new.¹⁵³

But he concluded that, unlike these earlier changes, the ACA’s Medicaid expansion “accomplishes a shift in kind, not merely degree,”¹⁵⁴ and that states could not have anticipated such a fundamental transformation in the program.¹⁵⁵

146. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937 (2004).

147. Michael Heise, *The Unintended Legal and Policy Consequences of the No Child Left Behind Act*, 86 NEB. L. REV. 119, 122 (2007).

148. 42 U.S.C. § 1304 (West 2012).

149. See Social Security Act Amendments of 1965, Pub. L. No. 89-97, § 121, 79 Stat. 286, 343–52.

150. See *NFIB*, 132 S. Ct. 2566, 2631 (2012) (Ginsburg, J., concurring in part and dissenting in part).

151. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4501, 104 Stat. 1388, 1388–165.

152. *NFIB*, 132 S. Ct. at 2631 (Ginsburg, J., concurring in part and dissenting in part).

153. *Id.* at 2605 (opinion of Roberts, C.J.).

154. *Id.*

155. *Id.* at 2606.

The notion that states could not have anticipated such a fundamental change is unpersuasive. The Chief Justice explained that Medicaid originally was designed to cover “the disabled, the blind, the elderly, and needy families with dependent children,”¹⁵⁶ and that prior amendments “merely altered and expanded the boundaries of these categories.”¹⁵⁷ But because postexpansion Medicaid would cover “the entire nonelderly population with income below 133 percent of the poverty level,”¹⁵⁸ he said that it would “no longer [be] a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.”¹⁵⁹ That is an assertion, not an argument. Postexpansion Medicaid would still be a program to provide medical care—not early childhood education, housing, or anything else. And as Justice Ginsburg explained, “[s]ingle adults earning no more than \$14,856 per year—133% of the current federal poverty level—surely rank among the Nation’s poor.”¹⁶⁰ A Medicaid program that covers all individuals with a family income below 133% of the federal poverty level can readily be described as providing for “the neediest among us” and indeed appears to be an entirely foreseeable next step after the many incremental expansions of that program since 1965.

The Chief Justice also pointed to two aspects of the expanded Medicaid program that, he argued, demonstrated that Congress “recognized it was enlisting the States in a new health care program.”¹⁶¹ First, he noted that Congress agreed to pay a much higher federal share of the expanded program than of pre-ACA Medicaid: “While Congress pays 50 to 83 percent of the costs of covering individuals currently enrolled in Medicaid, once the expansion is fully implemented Congress will pay 90 percent of the costs for newly eligible persons.”¹⁶² Second, he noted that Congress permitted states to provide “newly eligible persons” with “a level of coverage that is less comprehensive than the traditional Medicaid benefit package.”¹⁶³

These differences are central to the anti-leveraging principle that I believe represents the best reading of the Chief Justice’s opinion. But they tell us absolutely nothing about whether states could have *anticipated* that Congress would at some point condition future participation in Medicaid on expanded coverage.¹⁶⁴ As the discussion above demonstrates, the ACA’s coverage expansion was in many respects just a further step in the same direction as the many expansions of Medicaid coverage Congress had previously enacted throughout

156. *Id.* at 2605–06.

157. *Id.* at 2606.

158. *Id.*

159. *Id.*

160. *Id.* at 2636 (Ginsburg, J., concurring in part and dissenting in part).

161. *Id.* at 2606 (opinion of Roberts, C.J.).

162. *Id.* (citations omitted).

163. *Id.*

164. Moreover, these provisions were designed to ease the burden of coverage expansion on the states, so it seems inapt to use them as the basis for holding that the expansion *coerced* the states.

the years. And it was hardly more radical a change to Medicaid than PRWORA was to welfare or No Child Left Behind was to Title I of the Elementary and Secondary Education Act (ESEA). States had every reason to anticipate, when they entered into and remained in the Medicaid program throughout the years, that Congress might eventually condition future participation on large further expansions of coverage.

But even if the many past changes to Medicaid and other federal spending programs had not, as a positive matter, put states on notice of the possibility of future changes, as a normative matter, states *should* always anticipate that Congress might make fundamental changes to spending conditions. As I argued above, a fundamental premise of the Court's Spending Clause jurisprudence—a premise Chief Justice Roberts specifically endorsed—is that Congress may set spending terms according to its current conception of the general welfare.¹⁶⁵ And it is always foreseeable that political alignments, policy understandings, and background facts can change in ways that make the design of old spending programs appear obsolete to the current legislature. To hold that even purely prospective changes to old programs are coercive based on the assertion that states could not have anticipated those changes when they entered those programs is not necessary to implement *Pennhurst's* notice principle. Such a holding unduly limits Congress's ability to respond to current conceptions of the general welfare.

Nor would a rule prohibiting unanticipated but prospective changes to ongoing spending programs serve the goal of accountability. So long as Congress is doing nothing more than dictating rules governing the program for which it is providing money—and giving states a chance to opt out before those rules go into effect—voters can determine whether the federal money continues to be worthwhile in light of the new rules. The point holds even if—perhaps *especially* if—Congress has adopted new terms that work a *fundamental* change in the design of the program. PRWORA, for example, did not leave in place the old welfare program and condition continued state participation on agreement to participate in a *separate* program.¹⁶⁶ The federal government simply refused to continue providing funds for an open-ended, entitlement-based welfare system. If a state wished to continue receiving federal welfare funds, Congress declared, it must agree to transform its welfare system to one that imposed strict time limits and work requirements. NCLB could be described similarly.¹⁶⁷ PRWORA and NCLB created a clear choice point for states, the stakes of which were easily understandable by voters who could hold state officials accountable if those officials did not heed the voters' views.

Despite some of the language in the Chief Justice's opinion, that opinion is not best read as prohibiting large, fundamental, or unanticipated changes to

165. See *supra* section II.B.2.

166. See *supra* note 144 and accompanying text.

167. See *supra* note 145 and accompanying text.

ongoing spending programs. As I argued in section I.A., it was crucial to the Chief Justice's analysis that Congress did not merely change the terms of the ongoing Medicaid program but that it allowed states to remain in that program only if they would agree also to participate in what the Chief Justice characterized as a separate and independent program. If the opinion were interpreted to prohibit significant changes to ongoing spending programs without such cross-program leveraging, it could render unconstitutional laws such as PRWORA and NCLB. But the Chief Justice did not suggest that he would endorse any such result. And the constitutional principles on which he relied—accountability and responsiveness to Congress's current understanding of the general welfare—would be affirmatively *disserved* by a rule that would invalidate such laws.

C. IMPROPER PURPOSE—OR, THE NO-CONDITIONS-ABOUT-SEPARATE-PROGRAMS
PRINCIPLE

Some language in the Chief Justice's opinion suggests that the problem with the Medicaid expansion was not that states lacked a practical choice but that Congress acted out of an improper purpose in threatening to cut off all Medicaid funds. The Chief Justice, for example, agreed with the State plaintiffs that "this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act."¹⁶⁸ To support that argument, Chief Justice Roberts employed an analysis that resembles, but is importantly distinct from, the germaneness doctrine.¹⁶⁹ He noted that the Court had "upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions *on the use of those funds*, because that is the means by which Congress ensures that the funds are spent according to its view of the 'general Welfare.'"¹⁷⁰ But he concluded that when funding conditions "take the form of threats to terminate *other significant independent grants*, the conditions are properly viewed as a means of pressuring the States to accept policy changes."¹⁷¹ One might therefore read the Chief Justice as concluding that the ACA's Medicaid expansion provisions were unconstitutional because

168. *NFIB*, 132 S. Ct. at 2603 (opinion of Roberts, C.J.).

169. The Chief Justice's analysis resembles the germaneness doctrine because it inquires into the relatedness of the different functions paid for by the same offer of federal funds. The two inquiries differ in important respects, however. The Court's Spending Clause germaneness doctrine asks whether a spending condition is related to "the federal interest in" or "purpose[]" of the spending program at issue. *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (internal quotation marks omitted). The Chief Justice's inquiry asks whether Congress has tied together two "independent grants" or "programs"—even if they serve the same federal interests or purposes. The Chief Justice made the distinction clear in his discussion of *Dole*. He explained that the drinking-age condition satisfied the germaneness doctrine—it "was 'directly related to one of the main purposes for which highway funds are expended.'"¹⁷⁰ *NFIB*, 132 S. Ct. at 2604 (opinion of Roberts, C.J.) (quoting *Dole*, 483 U.S. at 208). But he concluded that the condition nonetheless "was not a restriction on how the highway funds—set aside for specific highway improvement and maintenance efforts—were to be used." *Id.* The drinking-age condition was germane, but it nonetheless constituted a threat to terminate an "independent grant[]." *Id.*

170. *Id.* at 2603–04 (emphasis added).

171. *Id.* at 2604 (emphasis added).

they conditioned continued state participation in one program (old Medicaid) on a state's agreement to participate in an independent "new health care program" (expanded Medicaid).¹⁷²

So understood, the Roberts opinion resonates strongly with the theory of coercion set forth by Professor Mitch Berman. Professor Berman argues that it is unconstitutional for the federal government to "penalize" states for asserting their Tenth Amendment rights, and that "a 'penalty' exists when the [federal government] imposes a burden for the purpose of discouraging or punishing assertion of a protected right."¹⁷³ To be sure, he acknowledges, Congress can legitimately use federal funds to bribe the states into taking action they could not otherwise be required to take. So, for example, even though states have a Tenth Amendment right not to build highways, Professor Berman acknowledges that Congress may provide states money for the purpose of building highways; if a state refuses to build the highways, the federal government can withhold the funds without imposing a "penalty."¹⁷⁴ In such a case, the federal government would withhold the funds even if it knew that the grant or withholding of federal highway funds would have no effect on the state's willingness to stand on its Tenth Amendment right and refuse to build the highways. The feds accordingly would "lack[] a (but-for) purpose to discourage exercise of the right."¹⁷⁵

But where Congress conditioned the receipt of full federal highway funds on a state's adoption of a 21-year-old drinking age,¹⁷⁶ Professor Berman argues, the threatened withholding of (some) federal funds was a "penalty."¹⁷⁷ If the federal government knew that a state would stand on its Tenth and Twenty-first Amendment right and refuse to raise its drinking age regardless of whether the state received full federal highway funds, he contends, the federal government would not withhold the funds. The interests that prompted Congress to extend the offer of federal highway funds in the first place would be better served by taking half a loaf—federally funded highways without a 21-year-old drinking age—than no loaf at all. Thus, he concludes that,

Withholding highway funds from states, like South Dakota, that are willing to use such funds for highway construction but are unwilling to raise their drinking ages, is designed to influence state behavior and for no other

172. *Id.* at 2606.

173. Berman, *supra* note 63, at 35.

174. *Id.* at 55 ("As an offer of reimbursement is logically dependent upon the offeree's incurring specified expenses, withholding the offered funds on the failure of the offeree actually to incur the expenses that qualify for reimbursement betrays no impermissible purpose. It merely reflects the absence of a factual predicate without which the reason for providing the benefit disappears.").

175. *Id.* at 37.

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

177. *See* Berman, *supra* note 63, at 35–42.

purpose; hence, penalizes exercise of a state's constitutional right to impose whatever [drinking age] it sees fit.¹⁷⁸

He thus argues that *South Dakota v. Dole* was wrongly decided.¹⁷⁹

In a blog post written while *NFIB* was pending, Professor Berman applied this analysis to the ACA's Medicaid expansion and concluded that it was unconstitutional:

[I]f the state is willing to pay the \$X demanded of it to provide health care benefits to disabled persons, then the federal government would have no legitimate, public-oriented reason for withholding its share of Medicaid funds destined for disabled persons just because the state decides not to pay the \$Y demanded of it to provide health care benefits to an entirely different class of beneficiaries. The federal government's reason for doing that would only be to punish the state for doing what it is entitled to do (or to deter other states from doing what they are entitled to do).¹⁸⁰

Professor Berman has expanded that argument in a recent draft paper.¹⁸¹

There are two significant problems with the improper-purpose analysis.¹⁸² The first is doctrinal. Unlike Professor Berman, Chief Justice Roberts embraces the Court's decision in *Dole*.¹⁸³ As the Chief Justice's discussion of *Dole* makes clear, his opinion does *not* conclude that it is inherently coercive for Congress to "threat[en] to terminate other significant independent grants"—even though the Chief Justice said that such a threat is "properly viewed as a means of pressuring the States to accept policy changes."¹⁸⁴ Rather, for the Roberts opinion, the conclusion that Congress had threatened to terminate an independent grant was just the starting point for the coercion analysis, one which led to the next question: whether the states had, in theory as well as in fact, a choice to refuse.¹⁸⁵ This analysis rests on the determination that the accountability concerns identified in the commandeering cases are present when Congress leaves states no meaningful ability to say no to a federal grant.¹⁸⁶ It

178. *Id.* at 40 (footnote omitted).

179. *Id.* at 36–42.

180. Mitch Berman, *Coercion, Compulsion, and the ACA*, BALKINIZATION (Apr. 6, 2012, 3:49 AM), <http://balkin.blogspot.com/2012/04/coercion-compulsion-and-aca.html>.

181. See Mitchell N. Berman, *Coercion, Compulsion, and Conditional Spending: Reflections on the Health Care Decision* (Oct. 29, 2012) (unpublished manuscript) (on file with author).

182. My argument in this section elaborates on my response to Professor Berman. Samuel Bagentos, *Conditional Federal Spending and the Public Interest*, BALKINIZATION (Apr. 9, 2012, 9:20 AM), <http://balkin.blogspot.com/2012/04/conditional-federal-spending-and-public.html>.

183. See *NFIB*, 132 S. Ct. 2566, 2604 (2012) (opinion of Roberts, C.J.).

184. *Id.*

185. See *supra* notes 35–42 and accompanying text.

186. See *NFIB*, 132 S. Ct. at 2602–03. Indeed, in his recent draft, Professor Berman more or less concedes that the Chief Justice did not adopt his view of conditional spending. Professor Berman argues that "insofar as the majority rested its holding of unconstitutionality on the ground that the amount of funds that a state would lose by not agreeing to the condition was so great as to give the state

cannot be based on the view that the federal government is barred from acting with the *purpose* to pressure the states to regulate, because the Chief Justice expressly recognized that Congress may constitutionally seek, through a conditional offer of federal funds, to “induce the States to adopt policies that the Federal Government itself could not impose.”¹⁸⁷

For Professor Berman, by contrast, the improper-motive inquiry is not just the beginning of the coercion analysis; it is the essential point of that analysis. Unlike the Chief Justice, Professor Berman specifically rejects the Court’s holding in *Dole*.¹⁸⁸ He argues that the drinking-age condition was unconstitutional precisely because withholding highway funds from noncomplying states “is designed to influence state behavior and for no other purpose” and “hence, penalizes exercise of a state’s constitutional right to impose whatever [drinking age] it sees fit.”¹⁸⁹ As his discussion of *Dole* makes clear, Professor Berman’s analysis would invalidate spending conditions that tie together distinct programs even if the state would give up so little money by declining the federal grant that the offer cannot be understood as imposing a meaningful limit on the state’s practical ability to choose.¹⁹⁰ But although a large amount of money at stake is not sufficient to create an offer states cannot refuse,¹⁹¹ it would seem to be a *necessary* element of such an offer in most circumstances.

The second problem with Professor Berman’s analysis is its broad implications. Taken seriously, that analysis could render unconstitutional any “package deal” Congress offers the states. So long as Congress is offering to reimburse state expenses for two or more conceptually or budgetarily separable activities, the states would have a constitutional entitlement to pick and choose the activities in which they wished to engage. Congress could not insist that if a state took federal money for one activity, it must agree to use federal money to engage in the others because its only reason for doing so would be to pressure the states to participate in the full package of services.

But under that analysis, Medicaid would have been unconstitutional even before Congress expanded it in the ACA. The Medicaid Act has always required states that participated in the program to cover certain mandatory populations.¹⁹² Before the ACA, these populations included both certain classes of

no choice but to accept, that is a highly dubious rationale,” and that “the more promising rationale would be the one merely hinted at by the Chief Justice.” Berman, *supra* note 181, at 3.

187. *NFIB*, 132 S. Ct. at 2579; *see also id.* at 2602 (“Congress may use its spending power to create incentives for States to act in accordance with federal policies.”).

188. *See* Berman, *supra* note 63, at 36–42.

189. *Id.* at 40.

190. Professor Berman is explicit about this. *See id.* at 41.

191. *See supra* section II.A.

192. *See* BRIGETTE COURTOT ET AL., KAISER COMM’N ON MEDICAID & THE UNINSURED, MEDICAID ENROLLMENT AND EXPENDITURES BY FEDERAL CORE REQUIREMENTS AND STATE OPTIONS 1 (2012), available at <http://www.kff.org/medicaid/upload/8239.pdf>. (“To receive federal Medicaid matching funds, states that choose to participate in the program must meet federal requirements, which include covering specified ‘federal core’ enrollee groups and mandatory health benefits.”).

poor people (for example, pregnant women and children under age 6 in families that earned up to 133% of the federal poverty level)¹⁹³ and certain classes of people with disabilities (for example, those who receive Supplemental Security Income).¹⁹⁴ The Act has also always required participating states to provide certain mandatory services to the individuals they cover.¹⁹⁵ Even before the ACA, those services included: physicians' services;¹⁹⁶ hospital services;¹⁹⁷ laboratory and x-ray services;¹⁹⁸ early and periodic screening, diagnostic, and treatment (EPSDT) services for people under 21;¹⁹⁹ and nursing facility services for people age 21 and older.²⁰⁰ Although the Medicaid Act gave states substantial discretion over many other questions, a participating state could not pick and choose which of these mandatory populations to cover or which of these services to offer.²⁰¹ If it chose to enter Medicaid at all, it was required to offer all of the mandatory services to all of the mandatory populations.²⁰²

Under Professor Berman's analysis, Congress's decision even before the ACA to give states an all-or-nothing choice about these mandatory populations and services would appear to be coercive. Congress was conditioning a state's participation in one program (for example, providing nursing-facility coverage to disabled recipients of Supplemental Security Income (SSI)) on a state's agreement to participate in a separate program (for example, providing EPSDT services to children under age 6 whose family incomes were below 133% of the federal poverty level). If a state wanted to provide medical coverage, but nothing else, to disabled SSI recipients, a federal government that really cared about the interests underlying the Medicaid program would prefer that half of the loaf. It would not withhold *all* Medicaid money simply because the state refused to provide other services to *other* potential beneficiaries, such as poor children under age 6.²⁰³

193. See 42 U.S.C. § 1396a(a)(10)(A)(i)(III)–(IV) (2006).

194. See *id.* § 1396a(a)(10)(A)(i)(II).

195. See *id.* § 1396a(a)(10)(A).

196. See *id.* § 1396d(a)(5)(A).

197. See *id.* § 1396d(a)(1)–(2)(A).

198. See *id.* § 1396d(a)(3).

199. See *id.* § 1396d(a)(4)(B).

200. See *id.* § 1396d(a)(4)(A).

201. See *id.* § 1396a(a)(10)(A)(i) (Supp. 2011).

202. See *id.*; *id.* § 1396d(a) (2006).

203. Professor Berman suggests that package deals might be permissible if Congress has a “legitimate, public-oriented reason” for tying together two analytically distinct funding conditions—by which he means a reason that goes beyond simply “punishing” the states for refusing to accept one of the conditions. See Berman, *supra* note 180. In his recent draft, Professor Berman expands on this analysis, see Berman, *supra* note 181, at 43–44, and also argues that package deals might be justifiable if disaggregation would “exacerbate[e] morally meaningful inequalities” or make Congress a “party to what it takes to be morally problematic behavior. *Id.* at 48. But how are we to determine when a legitimate, public-oriented reason, a morally meaningful inequality, or (what Congress takes to be) morally problematic behavior exists? Is it sufficient that Congress concludes that states can realize economies of scale by carrying out both funding conditions? That might be a “legitimate, public-oriented reason” that justifies *both* the tying together of the various mandatory populations and services

There is no good reason to hold package deals *ipso facto*—or even presumptively—unconstitutional. Professor Berman recognizes that Congress may permissibly offer single-purpose grants designed to encourage the states to regulate in accordance with federal priorities—grants that are “designed to influence state behavior and for no other purpose.”²⁰⁴ But when Congress offers the states the opportunity to participate in one program on the condition that they also participate in a separate program, it is doing something that is normatively no different. If one program is sufficiently attractive to states that they are willing to participate in the other, then the offer will successfully induce states to adopt a policy the federal government could not impose directly. If Congress may use money as a sweetener to encourage states to regulate in an area in which they have no obligation to regulate, it should be equally free to create grant programs that serve multiple purposes, the money for some of which will be the sweetener to induce states to accept the money for others.²⁰⁵

Unlike Professor Berman, Chief Justice Roberts did not appear to contend that package deals are generally coercive. Notably, the Chief Justice appeared to

in pre-ACA Medicaid *and* the tying together of the pre-ACA mandatory populations with everyone up to 133% of the federal poverty level in the Medicaid expansion. Would providing health coverage to disabled SSI recipients but not poor children exacerbate a morally meaningful inequality? Would failure to provide health coverage to poor children be morally problematic? What if the states disagree with Congress’s judgments on these points? Would the constitutionality of a “package deal” spending program turn on how a court decides these and other empirical and normative questions?

204. See Berman, *supra* note 63, at 40.

205. In a private communication, Professor Berman has argued that these two scenarios are importantly different. When the federal government offers the states money to influence their behavior—say by offering each state a \$1 billion bribe to raise its drinking age—there is no time at which the federal government is concurrently burdening a right of the states *and* acting for the purpose of inducing behavior it could not compel. He draws a distinction between the time the offer is extended and the time the federal government subsequently carries out the threat:

[A]t t1 (when extending the offer), the feds have a purpose of inducing behavior that they could not compel, but they are not burdening any right of the offeree. At t2 (when carrying out the threat), the feds are burdening a right, but they are not acting for the purpose of inducing behavior they could not compel.

E-mail from Mitch Berman to author (July 10, 2012) (on file with author). Crucial to this analysis is the determination that withholding money from a state that does not agree to the offer is not motivated by a “purpose to hang on to [the federal government’s] wealth when divesting [itself] of it would not bring [the federal government] equal or greater utility.” *Id.* Professor Berman argues that the *Dole* offer “is different” because there “[a]t t2, when carrying out the threat, the feds are burdening a right and are acting for the purpose of inducing behavior they could not compel.” *Id.* (Professor Berman defines “burden” for these purposes as embracing any occasion when the federal government “treats the [state that] has exercised [its] right less favorably than it would have had [the state] not exercised it.” Berman, *supra* note 63, at 35.)

The distinction between the two cases is not apparent to me. At t2 in both cases, the federal government is withholding what it offered because divesting itself of it would not bring the consideration Congress demanded—consideration that, in the view of Congress, presumably would bring “equal or greater utility” to whatever it was giving up. In both cases, the fairest characterization of the intent behind the initial offer is that Congress acted to induce the state to do something it could not compel, and the fairest characterization of the second stage is that Congress refused to carry out its half of the bargain because the state refused to carry out its half.

accept that Medicaid, as it existed prior to the ACA, was not unconstitutionally coercive, and that states therefore did not have a constitutional privilege to pick and choose which mandatory populations and services to cover. As I showed in section I.A, the Chief Justice's opinion rests crucially not just on the joining together of multiple distinguishable activities into a single-grant offer but also on at least two other factors: (1) the determination that Congress added a new and quite significantly different condition to a state's *continued* participation in an entrenched spending program; and (2) the large amount of money at stake. Professor Berman's anti-package-deal rule would sweep far more broadly than did the Chief Justice's analysis, and it would not be an attractive interpretation of the Roberts opinion.

III. AN UNEASY DEFENSE OF THE ANTI-LEVERAGING PRINCIPLE

As I have shown, neither the amount of money at stake, nor the imposition of new conditions on an entrenched grant program, nor the characterization of old and expanded Medicaid as different programs is sufficient *by itself* to describe or justify Chief Justice Roberts's conclusion that the Medicaid expansion provisions were unconstitutional. Rather, Chief Justice Roberts's opinion adopts a distinct principle, one that blends together the insights of each of the three theories of coercion that I discussed in Part II. I call that principle the "anti-leveraging principle." That principle, to repeat, is this: When Congress takes an entrenched federal program that provides large sums to the states and tells states that they can continue to participate in that program only if they *also* agree to participate in a separate and independent program, the condition is unconstitutionally coercive.

In this Part, I examine the anti-leveraging principle and offer an uneasy defense of it. As I show in section III.A, that principle responds to the clear desire of a majority of Justices to ensure that the coercion doctrine imposes *some* limit on Congress's spending power. It does so, moreover, without doing great violence to the constitutional principles the Court has long held to govern that power. Unlike each of the three possible rules I discussed in Part II, the anti-leveraging principle does not significantly constrain Congress's ability to adjust its spending priorities to meet its current understanding of the general welfare. It at least plausibly identifies those spending conditions that raise the greatest concerns from a *New York/Printz* accountability perspective. And because the anti-leveraging principle will not invalidate a spending condition unless it fails all three criteria—too much money at risk, a new condition on an entrenched program, *and* requiring participation in a separate and independent program—there is less at stake in the baseline and line-drawing problems with those criteria than if any one were to be used by itself. If the Justices believe it important to affirm that the coercion doctrine imposes a meaningful limit on conditional spending, they could do worse than adopt the anti-leveraging principle.

That said, the anti-leveraging principle has problems of its own. Those

problems make my defense an uneasy one. I discuss the most salient objections in section III.B. First, one might challenge the premise that a coercion doctrine with bite is necessary to constrain Congress's spending power. Second, one might challenge, empirically and normatively, the idea that entrenched spending programs engender a form of addiction that saps states' ability to make meaningful choices. Finally, one might note that the key concept of a separate and independent program is extremely malleable and may seem to invite courts to substitute their policy views for those of Congress. Notwithstanding the force of these objections, I contend that the anti-leveraging principle offered the Justices the best available tool for giving content to the coercion doctrine without seriously upsetting other important constitutional principles.

A. THE DEFENSE

Since the beginnings of the "Federalist Revival" in the Rehnquist Court, the notion that there must be *some* judicially enforceable federalism-based limits to Congress's authority has been a driving force of the Court's jurisprudence.²⁰⁶ This notion formed a central theme of the decision of five Justices that the ACA's individual mandate exceeded Congress's Commerce Clause authority. Both Chief Justice Roberts and the joint dissent endorsed a constitutional action/inaction distinction on the ground that if Congress can force people to participate in commerce, there are no limits to its power under that clause.²⁰⁷

A similar sense that there must be a limit runs through the Spending Clause discussion of both the Roberts opinion and the joint dissent. Both opinions start with the premise that the coercion doctrine must be interpreted as imposing *some* meaningful limit on Congress's spending power.²⁰⁸ Thus, the Roberts opinion argues that "wherever [the coercion] line may be, this statute is surely beyond it."²⁰⁹ More pointedly, the joint dissent argues that "[i]f the anticoercion rule does not apply in this case, then there is no such rule,"²¹⁰ and it criticizes the federal government's defense of the ACA as "at best pay[ing] lip service to the anticoercion principle."²¹¹

Accepting for a moment the premise that the coercion doctrine must be interpreted to impose *some* meaningful limits, the relevant question is whether the Chief Justice's anti-leveraging principle represents the best way of identify-

206. See, e.g., Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 37–38.

207. See *NFIB*, 132 S. Ct. 2566, 2589 (2012) (opinion of Roberts, C.J.); *id.* at 2646–48 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). For criticism of this conclusion, see *id.* at 2623–25 (Ginsburg, J., concurring in part and dissenting in part); see also Richard Primus, *How the Gun-Free School Zones Act Saved the Individual Mandate*, 110 MICH. L. REV. FIRST IMPRESSIONS 44, 47 (2012) (arguing, prior to the Court's decision, that an action/inaction distinction was not necessary to ensure that there were limits to the commerce power).

208. This is a contestable premise, as I show in section III.B below.

209. *NFIB*, 132 S. Ct. at 2606 (opinion of Roberts, C.J.).

210. *Id.* at 2662 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

211. *Id.* at 2661.

ing those limits. In particular, one might look to the two constitutional principles that the Chief Justice invoked throughout his opinion: that Congress may spend according to its current understanding of the general welfare; and that Congress may not, by commandeering the states, impermissibly blur the lines of accountability to the citizens. Measured against these principles, the anti-leveraging principle does tolerably well—and far better than any of the three possible rules I discussed in Part II.

The anti-leveraging principle does not significantly restrict Congress's ability to adjust its spending priorities to meet its current conception of the general welfare. That principle does not prohibit Congress from making changes—even fundamental changes—to entrenched spending programs. If Congress wishes to massively restructure its program of aid to the states in a particular area—as it did in PRWORA and NCLB—the Chief Justice's analysis does not prevent it from doing so. In such cases, Congress is saying that, according to its current understanding of proper policy, it no longer makes sense to continue the programs that existed under their previous rules. So, in PRWORA, Congress was declaring that open-ended welfare entitlements without work requirements were not sufficiently in the public's interest. And in NCLB, Congress was declaring that formula-based education funding without standards and accountability was not, either. Allowing Congress to restructure spending programs when the old rules governing those programs do not fit current policy views simply ensures that Congress's money is “spent according to its view of the general Welfare.”²¹²

Things are different when Congress does wish to continue the old program, with its old rules, but simply wants states *also* to agree to accept “significant independent grants.”²¹³ In that case, Congress has declared that the old program, with its old rules, still serves the public interest—that is why it has left the old program in place. It simply would like to tie that program to a separate new one that, in its view, also serves the public interest. Allowing the states to continue to participate in the old program without also participating in the new one does not prevent Congress from spending according to its current understanding of the general welfare. Congress just has to provide a separate enticement to the states for each program. It may be harder for Congress to get states to agree to participate in both programs, but that is a far cry from a rule that would require Congress to continue spending in a way that (as in pre-PRWORA welfare) clashes with its current understanding of the general welfare.

It is less clear how the anti-leveraging principle promotes accountability. Perhaps the best that can be said for the principle on that front is this: Although any cooperative federal–state program might blur the lines of accountability to some extent, it is plausible to believe that conditional spending offers that violate the anti-leveraging principle will often raise more significant accountabil-

212. *Id.* at 2604 (opinion of Roberts, C.J.) (internal quotation marks omitted).

213. *Id.*

ity concerns. When Congress creates a program and offers the states funds for participating in that program, a state's initial decision to participate creates a highly salient accountability moment—even, perhaps especially, if the program is a large one that is attached to a great deal of federal money. When Congress fundamentally restructures an existing program, as it did in PRWORA and NCLB, states face a similar accountability moment in deciding whether to continue to participate after the restructuring. But when Congress uses a state's desire to continue participating in an ongoing program—a program Congress does not itself change—as leverage to get the state to agree to participate in a separate and independent program as well, perhaps it is more difficult for voters to focus on a single moment of accountability. State officials who agreed to participate in the new separate program to continue participating in the old program may deflect any complaints by pointing to the decisions other officials made many years earlier to enter the old program in the first place.²¹⁴

Finally, the anti-leveraging principle avoids—or at least contains—many of the baseline and line-drawing problems of alternative efforts to give content to the coercion doctrine. For example, a too-big-to-refuse rule would raise serious baseline questions: How can withholding a large grant coerce the states when the states had no entitlement to the grant in the first place? Can it really be true that a grant offer becomes more coercive as it gets larger and more generous? Even if we could answer those questions, we still would have the difficult line-drawing problem of identifying just when an offer of funds became large enough to become coercive. The anti-leveraging principle does not avoid these problems entirely, but it does domesticate them. Under that principle, the court need not even ask whether a grant was too big to refuse unless it first determines that Congress has conditioned continued participation in an entrenched funding program on a state's agreement also to participate in a separate and independent program. Challenges to the terms of new funding programs, or of laws that change the terms of existing funding programs without tying them to participation in separate programs, can be resolved without deciding whether the grant at issue was so large as to deny states a meaningful choice. Courts can thus avoid the too-big-to-refuse question in a large number of cases.²¹⁵

On the other hand, a simple no-conditions-about-separate-programs principle would raise serious line-drawing questions of its own. Single-subject and germaneness rules are notoriously indeterminate. Their application depends crucially on the level of generality at which the relevant subject is described, and those rules typically tell us little about what level of generality is proper.²¹⁶ If

214. I acknowledge that this defense has a bit of the ring of a just-so story. But accountability arguments invoked by the Supreme Court often have that ring. See *supra* note 67 and accompanying text. The argument I sketch in text is at least as plausible as the accountability arguments the Court has invoked in this area.

215. For examples, see *infra* Part IV.

216. See, e.g., Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 709–12 (2010) (discussing single-subject rules for

courts had to, in every coercion case, determine whether the federal grant at issue combined separate programs, they would be left in a morass. The anti-leveraging principle helps contain this problem. A court need determine whether a grant combines separate programs only if Congress has attached new conditions to an entrenched source of federal grant money to the states—so it will not have to ask the question to decide a challenge to an entirely new source of federal grants. And a court need ask the question only if such a large amount of money is at stake that the states lack a practical ability to refuse the new condition, so it will not have to ask the question where a relatively small amount of money is at stake, as in *Dole*.²¹⁷ Courts can thus avoid the separate-programs inquiry in a large number of cases.

If one believes, as a majority of the Justices do, that the coercion doctrine must impose *some* limits on Congress's conditional spending authority, the anti-leveraging principle does a reasonably good job of providing those limits. It imposes limits without preventing Congress from adjusting its spending priorities to meet its current understanding of the general welfare; it targets congressional action that plausibly raises more significant accountability concerns; and it avoids many of the baseline and line-drawing problems that alternative interpretations of coercion would create. Chief Justice Roberts could have done worse than adopt the anti-leveraging principle.

B. THE UNEASE

Although the anti-leveraging principle Chief Justice Roberts adopted is defensible, one can offer several objections to it. First, one might challenge the premise—that the Court needs to adopt some judicially enforceable coercion doctrine with bite in order to limit the spending power. After all, many observers thought that the Court's Spending Clause doctrine went along fine for a long time without imposing a meaningful coercion limitation. Before *NFIB*, the coercion test was, in the words of an amicus brief filed in that case, “always more a whisper than a doctrine.”²¹⁸ Not only had the Court never *invalidated* a spending condition as coercing the states, it had not even articulated a clear basis in constitutional text or precedent for finding a spending condition coercive.²¹⁹

There is, of course, a longstanding debate regarding whether constitutional principles of federalism should be judicially enforceable *at all*.²²⁰ But the

initiatives or legislation); Bagenstos, *supra* note 13, at 367–69 (discussing the germaneness rule for conditional spending); Sullivan, *supra* note 69, at 1474 (discussing the germaneness rule for unconstitutional conditions).

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

218. Brief for the American Hospital Ass'n et al. as Amici Curiae in Support of Respondents with Respect to Medicaid at 5, *Florida v. Dep't of Health & Human Serv.* (No. 11-400), 2012 WL588464.

219. For a discussion of the failure of Spending Clause coercion doctrine in the cases, see Bagenstos, *supra* note 13, at 372–74.

220. For the classic argument that federalism principles often should not be judicially enforceable, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composi-*

question here is much more narrow: not whether there are judicially enforceable limits on federal power in general—or on Congress’s conditional spending power in particular—but whether the Spending Clause coercion doctrine is an appropriate source of such limits. Even without that doctrine, there is a quite substantial, judicially enforceable limit to Congress’s conditional spending power—one that is so straightforward that it is easy to overlook. The limit is that the regulatory directives Congress imposes on states must be attached to a grant of federal money that states are legally free to turn down. If Congress were to invoke the spending power to defend a statute that simply ordered states to regulate—even if the federal government funded the cost of that regulation—a court would quite properly invalidate the statute under *New York and Printz*. The joint dissenters in *NFIB* treated this point as “at best pay[ing] lip service” to the relevant constitutional principles,²²¹ but the limitation imposed by a requirement that the federal government pay the state’s reservation price is a meaningful one, particularly in times of federal budgetary retrenchment.²²²

The Court itself has identified three other judicially enforceable limits on the conditional spending power: that Congress must provide adequate notice of the conditions; that the conditions must be sufficiently related to the purpose of the federal grant; and that the conditions must not violate any independent constitutional bar.²²³ Not all of these limitations are likely to have equal bite in practice,²²⁴ but they all respond to the Court’s apparent concern that there must be some judicially enforceable limit on the spending power. They do so, moreover, without raising the prospect of “plung[ing] the law in endless difficulties” by forcing courts to draw the line between offers that were too good to refuse (noncoercive) and offers that could not be refused (coercive).²²⁵ Although the anti-leveraging principle avoids some of these difficulties, it still requires courts to make fine distinctions, with high stakes for the constitutionality of federal enactments, based on extremely contestable judgments.

For example, one might legitimately question whether states have developed anything like an addiction or dependence on the existing Medicaid program that justifies the conclusion that the ACA’s addition of new eligibility standards was

tion and Selection of the National Government, 54 COLUM. L. REV. 543, 559–60 (1954). For a prominent recent argument that they should be, see Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 78 (2001).

221. *NFIB*, 132 S. Ct. 2566, 2661 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

222. See Galle, *supra* note 80, at 159 (“Although in theory the Spending Clause may grant Congress the ability to obtain results it could not under its other enumerated powers, as a practical matter transaction costs will usually kill such projects. Thus, unlike in many other areas of legislation, states have a built-in incentive to resist federal expansion, and powerful means for doing so.”).

223. *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987).

224. For an argument that the notice requirement is the one most likely to have bite—an argument undermined to some extent by the *NFIB* decision—see Bagenstos, *supra* note 13, at 401–04.

225. *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). For an argument that the *NFIB* Spending Clause holding threatens this result, see Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1, 88 (2013).

coercive. It is important to distinguish two reasons why a state might find it difficult to leave the Medicaid program, even in the face of new terms that it would prefer not to assume. First, a state's residents may have come to rely on the services provided by that program. These residents may include the individuals who receive health insurance through Medicaid, the health-care providers who are paid by Medicaid, or others. They might well place pressure on state elected officials to continue to participate in the Medicaid program with the new conditions, even if those officials believe those new conditions are noxious.²²⁶

It is difficult to see this sort of pressure as constitutionally problematic, however. When state officials heed the wishes of their constituents and agree to continue to participate in a federal program, they are demonstrating accountability to the people. As I have shown, both Chief Justice Roberts and the joint dissenters urged that the point of prohibiting federal coercion was to promote the accountability of state officials to their residents. It makes no difference if the people who urged the state to continue to participate in postexpansion Medicaid would have preferred the option of remaining in the program without the expansion. One is not coerced simply by not being offered the best possible deal, and nothing in the principle of accountability requires that states receive their first best option.

Second, a state may find it difficult to leave Medicaid because it has set up an infrastructure that assumes its continued participation in that program, and that creates intolerable transition costs that would deter an effort to leave that program and set up its own. But there is little basis to conclude that prior investments in Medicaid infrastructure would impose intolerable transition costs on a state that chose to exit the program. Medicaid has always been essentially an insurance program that reimburses healthcare providers for their services in the way a private insurance company would.²²⁷ A new, state-only program could rely on the same providers. As with a change to a new insurance company, a change from the Medicaid program to a new state-only health program might require investments in new forms or computer programs, but it would not require any significant new investments in the provider infrastructure on which the state would rely. Even if the transition costs a state would incur in

226. This is the sense in which the states-plaintiffs invoked the notion of “dependency” in the *NFIB* litigation. See Brief of State Petitioners on Medicaid at 40–42, *Florida v. U.S. Dep’t of Health & Human Serv.* (No. 11-400), 2012 WL 105551. It is not clear, by the way, that the constituencies who urged their states to continue to participate in postexpansion Medicaid did in fact find the expansion noxious. To the contrary, the expansion is likely to serve the interests of many health-care providers, as well as of some employers who currently provide health insurance to low-wage workers. See, e.g., Jay Hancock, *Businesses Will Push Perry to Rethink Medicaid Expansion*, KAISER HEALTH NEWS (July 18, 2012), <http://www.kaiserhealthnews.org/stories/2012/july/18/texas-medicaid-expansion-business.aspx>. In the text, I simply assume arguendo that the constituents urging the state to continue to participate in the Medicaid program found the expansion noxious because that presents the dependency argument in its strongest possible light.

227. Although the ACA amended the Medicaid Act to reaffirm that the state’s obligation is to ensure that covered services are provided, not just that claims are reimbursed when submitted, see 42 U.S.C. § 1396d(a) (2006), it did not change this essential insurance-based nature.

departing a conditional federal spending program could trump Congress's power to tailor spending conditions to current understandings of the general welfare, there is no basis for concluding that sufficient transition costs are present in the Medicaid program to justify such a result. Chief Justice Roberts did not even engage these empirical questions. He simply presumed that once a conditional spending program is large and entrenched enough states will be unable as a practical matter to resist efforts to tie continued participation in that program to participation in a separate program.

Finally, the very idea of a separate, independent program, which serves as the analytic fulcrum of Chief Justice Roberts's opinion, is itself extremely problematic. The Chief Justice quite plainly did not argue that Medicaid, as it existed prior to the ACA, impermissibly tied together separate, independent programs. But his opinion provides no reason why pre-ACA Medicaid should *not* be understood as having tied together separate programs.²²⁸ Do we describe Medicaid as a single program that provides medical insurance to a group of deserving and needy residents—though one under which different beneficiaries may be deemed deserving and needy for different reasons and may have different medical procedures reimbursed? Or do we describe it as a collection of separate programs that provide analytically distinct benefits to identifiably different groups of people (and that might in theory be separated into different line items on a state's budget)?

The notion that Congress cannot combine separate programs does not in and of itself tell us *anything* about the level of abstraction at which the relevant program should be defined. All we know from Chief Justice Roberts's opinion is that pre-ACA Medicaid appears to have been "properly viewed" as a single program, but that providing Medicaid to all previously uncovered individuals below 133% of the Federal Poverty Level would be "properly viewed" as a separate, independent program.²²⁹ Future courts thus have little guidance in how to draw the same-program, separate-program line in challenges to other statutes.

Unless courts accord great deference to Congress in drawing that line, they may engage in an analysis that comes dangerously close to second-guessing legislative policy judgments.²³⁰ If, for example, Congress required all states that want to continue to receive ESEA Title I money (for K–12 education) to also accept a new source of grants for universal preschool, would that trigger the anti-leveraging principle? On the surface, such a law appears similar to the ACA's Medicaid expansion. But what if Congress concluded that early child-

228. This is an example of the "levels-of-abstraction problem," Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1084–85 (1981), that often trips up efforts to enforce germaneness requirements. See *supra* note 216 and accompanying text.

229. *NFIB*, 132 S. Ct. 2566, 2605 (2012).

230. Cf. Bagenstos, *supra* note 13, at 365–67 (discussing how a too-stringent germaneness requirement can lead to judicial second-guessing of congressional policy judgments).

hood and K–12 education are synergistic, such that the full benefits of K–12 education cannot be achieved without universal preschool? If Congress’s conclusion is correct, then the new education-funding law looks a lot more like NCLB—imposing new requirements on an old program to ensure that, according to Congress’s best current understanding of the policy questions, the old program would best serve its original goals. Must courts second-guess such determinations, or must they defer to them? Chief Justice Roberts’s opinion does not say.

These are true drawbacks of the anti-leveraging principle. And they make my defense of that principle a distinctly uneasy one. But nothing here undermines the basic point: Once one accepts, as a majority of Justices did, that the coercion doctrine must provide a meaningful judicially enforceable check on the conditional spending power, the anti-leveraging principle serves the relevant constitutional interests about as well as one could hope—and it serves those interests better, and with fewer drawbacks, than any alternative principle that has been proposed to give content to the coercion doctrine.

IV. POSSIBLE FUTURE APPLICATIONS

To this point, my argument has been essentially backward looking. I have argued that the Chief Justice’s pivotal opinion in *NFIB* adopts an anti-leveraging principle and that this principle, though not without its drawbacks, is superior to other ways of giving content to the Spending Clause coercion doctrine. In this Part, I turn my gaze forward. The *NFIB* decision raises questions about the constitutionality of a variety of cooperative spending statutes. The questions seem particularly acute for three categories of those statutes: entrenched cooperative programs, such as Medicaid itself; cross-cutting conditions, such as various civil-rights requirements, that apply to the receipt of funds under any program; and “crossover” conditions, such as the Clean Air Act, that threaten to withdraw funds for some preexisting program from states that do not adopt new regulations.

I argue that, properly understood, the anti-leveraging principle should not render most of these enactments unconstitutional. In this respect, that principle is quite different from the alternative readings of the *NFIB* decision I discussed above. But statutes imposing cross-over conditions are the ones that seem to me most vulnerable to an anti-leveraging attack. And the uncertainties surrounding the application of the anti-leveraging principle will give states important leverage of their own in their negotiations with the agencies that administer federal spending programs. That shift in negotiating power to the states may be the most important implication of the Chief Justice’s Spending Clause analysis.

A. ENTRENCHED COOPERATIVE PROGRAMS

A natural first context in which to assess the implications of *NFIB*’s Spending Clause ruling is the context of entrenched cooperative spending programs like

Medicaid itself. Medicaid and federal education funding are the most prominent of these programs, but others provide significant sources of revenue for various important state activities.²³¹ Despite efforts over time to move toward a block-grant model in which states have a great deal of flexibility in determining how to spend the money they receive from the federal government, the larger federal spending programs still impose quite detailed requirements on states.²³² Crucially, these programs often are presented as package deals, such that states cannot pick and choose which activities funded by the program they wish to perform. And Congress makes numerous changes to these programs over time—some large and some small—and conditions continued state participation on agreement to those changes.²³³ It is easy to see how the *NFIB* ruling might call into question some aspects of these programs.

NFIB might come into play at two distinct moments in the life cycle of these large, entrenched spending programs. First, it might come into play, as in the ACA itself, at a moment of reauthorization or substantial change to such a program. The No Child Left Behind Act, for example, is overdue for reauthorization. And prominent NCLB reauthorization proposals would impose important new requirements on states that continue to participate in the Title I program. In a white paper prepared for his presidential campaign, Governor Romney proposed that any state that accepts Title I or Individuals with Disabilities Education Act (IDEA) funds should be required to, among other things: give those funds to eligible students in the form of “portable” vouchers that can be used at any public or charter school or at private providers of supplemental tutoring or digital courses; “adopt open-enrollment policies that permit eligible students to attend public schools outside of their school district that have the capacity to serve them;” and eliminate state-law caps on the enrollment of charter schools and “digital”—that is, online—schools.²³⁴ *NFIB* calls the constitutionality of such a proposal into question. More generally, it sets forth a constitutional framework to which Congress must attend when it reauthorizes or significantly changes an entrenched spending program.

Second, even outside of such reauthorizations, states might seek to use *NFIB* as a tool to enable them to disaggregate the package deals Congress has offered

231. The federal government, for example, provides about half of the funds that states spend on child welfare, CASEY FAMILY PROGRAMS, ENSURING SAFE, NURTURING AND PERMANENT FAMILIES FOR CHILDREN: THE NEED TO REAUTHORIZE AND EXPAND TITLE IV-E WAIVERS 1 (2010), available at <http://www.casey.org/resources/publications/pdf/NeedForWaivers.pdf>, and about three-fourths of operating expenditures for state vocational rehabilitation programs. See 34 C.F.R. § 361.60(a) (2008).

232. See, e.g., Tim Conlan & Paul Posner, *Pathways of Policy Making: The Political Dynamics of Intergovernmental Lawmaking and Reform in the United States*, in POLICY, PERFORMANCE AND MANAGEMENT IN GOVERNANCE AND INTERGOVERNMENTAL RELATIONS: TRANSATLANTIC PERSPECTIVES 7, 10 (Edoardo Ongaro et al. eds., 2011).

233. See *supra* section II.B.

234. ROMNEY FOR PRESIDENT, INC., A CHANCE FOR EVERY CHILD: MITT ROMNEY’S PLAN FOR RESTORING THE PROMISE OF AMERICAN EDUCATION 3, 24 (2012). This white paper was originally found on Governor Romney’s presidential campaign website, but since the November 2012 election, that website can no longer be accessed.

them, and to choose to participate in only those aspects of an entrenched program that they prefer. A state might argue, for example, that it is happy to cover poor children under Medicaid but that requiring it also to cover adults with disabilities is coercive.²³⁵ Maine Governor Paul LePage has argued that *NFIB* renders unconstitutional the maintenance-of-effort rule, first included in the 2009 stimulus package and reaffirmed in the ACA, that generally prohibits states that continue to participate in Medicaid from imposing more restrictive “eligibility standards, methodologies, or procedures” than they applied on March 23, 2010—even if those eligibility standards went beyond what the Medicaid Act itself required.²³⁶ A state that relies on *NFIB* to pick and choose the spending conditions it wishes to assume might simply stop complying with (and seeking reimbursement for) the conditions it does not like and wait for the federal government or a private party to bring an enforcement action. It could then test its *NFIB* argument in court. Alternatively, such a state might ask the federal government for a waiver of the spending condition it does not like, while threatening (implicitly or explicitly) to challenge the condition as unconstitutional if the waiver is denied.

Whether constitutional challenges like these will be successful will depend crucially on the legal principle *NFIB* is understood as adopting. If *NFIB* were interpreted as adopting the too-big-to-refuse principle, Governor LePage’s challenge to the Medicaid maintenance-of-effort requirement would be quite strong, as would possible state challenges to the requirement that Medicaid-participating states cover all of the mandatory services and populations. A state that refuses to comply with either of these requirements stands to lose all of its Medicaid funds—just as states that refused to go along with the ACA’s Medicaid expansion did.²³⁷ Indeed, Governor LePage has pointed to precisely this consequence as the crucial reason for his conclusion that *NFIB* makes the maintenance-of-effort requirement unconstitutional.²³⁸

The possible constitutional challenge to the Romney NCLB proposal would also be quite strong under the too-big-to-refuse principle. Under the NCLB proposal, any state that refused to create vouchers, open-enrollment policies, and uncapped charter and cyber school slots would put at risk its continued Title

235. In the mid-1990s, a number of states and state officials sued the federal government to claim that the Medicaid Act was coercive to the extent that it required them to provide coverage to unauthorized aliens as a condition of receiving Medicaid funds. The courts rejected that argument. *See California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997); *Padavan v. United States*, 82 F.3d 23, 29 (2d Cir. 1996).

236. 42 U.S.C. § 1396a(gg) (Supp. 2011); *see* Phil Galewitz, *Sebelius Signals to States: Don’t Roll Back Medicaid Eligibility*, KAISER HEALTH NEWS (July 11, 2012), <http://www.kaiserhealthnews.org/Stories/2012/July/11/sebelius-letter-governors-health-law.aspx>; Katherine Jett Hayes, *Update: Legal Challenges to the Affordable Care Act’s Medicaid Maintenance of Effort Provisions*, HEALTHREFORMGPS (Sept. 26, 2012), <http://healthreformgps.org/resources/update-legal-challenges-to-the-affordable-care-acts-medicare-maintenance-of-effort-provisions/>.

237. *See* 42 U.S.C. § 1396a(a)(74), (gg) (Supp. 2011).

238. *See* Galewitz, *supra* note 236.

I and IDEA funding. Although federal education funding under these two programs accounts for considerably less of the average state's budget than does Medicaid funding—a point the *NFIB* joint dissenters noted²³⁹—it is still large and entrenched. The average state receives nearly half a billion dollars each year under Title I and the IDEA,²⁴⁰ and primary and secondary education makes up just over a fifth of the average state's budget.²⁴¹ Although “states could, in theory, opt out” of the requirements Congress imposes for continued participation in these programs, the funding sources are “so large and ingrained that it is almost inconceivable for states to refuse them.”²⁴²

Similar results might well follow if *NFIB* were interpreted as adopting the no-new-conditions principle. Congress imposed the maintenance-of-effort requirement, and added a number of the mandatory populations and services, many years after the states originally entered the Medicaid program. And Governor Romney's proposed reauthorization of NCLB would have occurred nearly fifty years after states entered the Title I program. If one were to take the Chief Justice's discussion of *Pennhurst* as encapsulating the rule that emerges from his opinion, one would have to ask whether states could, at the time they entered the Medicaid and Title I programs, have anticipated the changes these later enactments made to them. On that score, perhaps the Medicaid changes would not be deemed coercive. Maintenance-of-effort requirements, after all, are common in federal spending programs, so perhaps states should always be on notice that Congress might impose one in the future.²⁴³ And the Chief Justice himself recognized that the states could have anticipated the accretion of new mandatory populations and services under Medicaid through the years.²⁴⁴ Governor Romney's NCLB proposal, by contrast, would seem to “accomplish[] a shift in kind, not merely degree”²⁴⁵ that would have been extremely hard for states to anticipate when they entered the Title I program in 1965. That proposal would transform Title I from a program of supporting school districts that have a large proportion of disadvantaged students to one of providing aid directly to those students and promoting their ability to use that aid in local, charter, or cyber schools throughout the state.

As I have shown, however, the Chief Justice's pivotal opinion did *not* adopt

239. See *NFIB*, 132 S. Ct. 2566, 2663–64 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

240. See U.S. DEP'T OF EDUC., GUIDE TO U.S. DEPARTMENT OF EDUCATION PROGRAMS, FISCAL YEAR 2011, 53, 245 (2011).

241. See NAT'L ASS'N OF STATE BUDGET OFFICERS, FISCAL YEAR 2010 STATE EXPENDITURE REPORT 3 (2011).

242. RAND CORP., FEDERAL AND STATE ROLES AND CAPACITY FOR IMPROVING SCHOOLS 5, 6 n.3 (2011).

243. See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2569 (2005). For examples of earlier maintenance-of-effort requirements in Medicaid, see Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509 § 9401(b), 100 Stat. 1874, 2051; Act of July 30, 1965, Pub. L. No. 89-97 § 405, 79 Stat. 286, 420–421.

244. See *NFIB*, 132 S. Ct. at 2605 (opinion of Roberts, C.J.).

245. *Id.*

either the too-big-to-refuse or the no-new-conditions principle. Under the anti-leveraging principle, a funding condition is not coercive simply because it is attached to a large grant of federal funds, nor is it coercive simply because it imposes an unanticipated new requirement on continued participation in an entrenched funding program. Coercion is present only when the new condition ties continued participation in an entrenched and lucrative funding program to a state's agreement *also* to participate in a separate and independent program. From an anti-leveraging perspective, the crucial question in assessing Governor Romney's NCLB reauthorization proposal, the Medicaid maintenance-of-effort requirement, *or* the various new mandatory populations and services added to Medicaid throughout the years is this: Are those requirements best understood as tying continued participation in an old funding program to a state's agreement also to participate in a separate and independent new program?

None of these spending conditions, in my view, violates the anti-leveraging principle. All of them are best understood as “govern[ing] the use of the funds” Congress offers, rather than as “threat[ening] to terminate other significant independent grants.”²⁴⁶

Take Governor Romney's proposed reauthorization of NCLB first. That proposal—using a state's desire to continue participating in Title I as leverage to get the state also to participate in a separate voucher program—would not leave the existing Title I program in place. Rather, under that proposal there would effectively be *no* Title I program outside of the voucher program. In this respect, Governor Romney's proposal is very different than the ACA, which continued to fund essentially the same mandatory Medicaid populations and services, under essentially the same rules as had applied before, but which said that states that wished to continue to receive those funds were required also to agree to cover a new mandatory population. Rather, it is far more like PRWORA or NCLB itself—laws in which Congress decided it would no longer fund pre-existing programs unless they assumed a fundamentally different form. As I argued in section II.B, preventing Congress from making such major prospective changes to ongoing cooperative programs would undercut Congress's authority to tailor spending to its current understanding of what serves the general welfare—an authority that Chief Justice Roberts expressly endorsed.

As to the changes in mandatory Medicaid populations and services through the years, the Chief Justice recognized that they were not coercive—even though in making those changes Congress “sometimes condition[ed] only the new funding, other times both old and new.”²⁴⁷ Those changes, he explained, “merely altered and expanded the boundaries” of the “categories of the needy” that Medicaid had always covered; they did not “enlist[] the States in a new health care program.”²⁴⁸ As I argued above, the Chief Justice's argument on this

246. *Id.* at 2604.

247. *Id.* at 2605.

248. *Id.* at 2605–06.

point can be criticized on the ground that the ACA's Medicaid expansion was no different.²⁴⁹ But whether or not the line is an ultimately sensible one, it is clear that the Chief Justice did draw a line between the pre-ACA changes to Medicaid (which merely altered the existing program) and the ACA's Medicaid expansion (which enlisted states in a new program alongside the existing one). Efforts to disaggregate the Medicaid program, and to challenge the requirement that participating states must cover all of the mandatory populations and services, are therefore inconsistent with the Chief Justice's pivotal opinion and should fail in the courts.

A fortiori, Governor LePage's challenge to the maintenance-of-effort requirement should fail. Unlike the expansion, the maintenance-of-effort provision does not add *any* new populations or services to the Medicaid program. It merely requires states that continue to participate in Medicaid to continue, for a period of time, to provide services they have already been providing under that program. That provision does remove some of the flexibility that states previously had to cut back on optional Medicaid services, but it does not create any new programs or services.

Although constitutional challenges like these should ultimately fail if the courts take the Chief Justice's *NFIB* opinion seriously, the federal agencies that administer cooperative programs like Medicaid and Title I may not be willing to take that risk. In most such programs, the funding agency has the authority in a variety of circumstances to waive the spending conditions Congress has set forth.²⁵⁰ Waivers have become such an important tool in the administration of Medicaid that commentators have described the program as a model of "Federalism by Waiver."²⁵¹ The Obama administration has aggressively used waivers to advance its policy interests in health-care, education, and human-services programs to a degree that has proved controversial on the political right.²⁵² The *NFIB* decision is likely to accelerate the trend toward granting states waivers of

249. See *supra* section III.B.

250. See, e.g., 42 U.S.C. § 1315 (2010).

251. E.g., Frank J. Thompson & Courtney Burke, *Federalism by Waiver: Medicaid and the Transformation of Long-Term Care*, 39 *PUBLIUS* 22 (2008). For earlier discussions of the importance of Medicaid waivers, see, for example, Judith M. Rosenberg & David T. Zaring, *Managing Medicaid Waivers: Section 1115 and State Health Care Reform*, 32 *HARV. J. ON LEGIS.* 545 (1995); Sandra K. Schneider, *Medicaid Section 1115 Waivers: Shifting Health Care Reform to the States*, 27 *PUBLIUS* 89 (1997); and Bruce C. Vladeck, *Medicaid 1115 Demonstrations: Progress Through Partnership*, 14 *HEALTH AFF.* 217 (1995). Focusing on the waivers many states received to experiment with the welfare system prior to the enactment of PRWORA, Professors Bulman-Pozen and Gerken describe waivers as a form of potentially productive "uncooperative federalism." Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1274–76 (2009).

252. See, e.g., Richard A. Epstein, *Government by Waiver*, *NAT'L AFF.*, Spring 2011, at 39, 39–42; Richard A. Epstein, *Government by Waiver: No Child Left Behind Follows the Health Care Precedent*, *EDUCATIONNEXT* (Aug. 11, 2011), <http://educationnext.org/government-by-waiver-no-child-left-behind-follows-the-health-care-precedent/>; Robert Rector & Kiki Bradley, *Obama Guts Welfare Reform*, *FOUNDRY* (July 12, 2012), <http://blog.heritage.org/2012/07/12/obama-guts-welfare-reform/>.

requirements imposed by these programs.²⁵³ Now, a state that seeks a waiver of a requirement in a large, entrenched federal spending program can threaten, if the waiver is not granted, to sue to challenge the requirement itself as unconstitutionally coercive. Even if such a suit will not ultimately succeed, the agency may not want to run the risk that it will—or submit to the delay and expense of litigating the question. In many cases, the easier course for the federal government will be to grant the waiver request and avoid a constitutional challenge. *NFIB* thus gives states substantial additional leverage in their efforts to obtain waivers of the requirements of large, entrenched federal spending programs.

B. CROSS-CUTTING CONDITIONS, WITH A SPECIAL FOCUS ON CIVIL RIGHTS

An important class of Spending Clause statutes imposes cross-cutting conditions, not tied to any particular federal spending program, on the states' receipt of federal funds. Congress has frequently relied on such cross-cutting conditions to advance civil-rights goals.²⁵⁴ Title VI of the Civil Rights Act of 1964 provided the template. That statute prohibits race discrimination "under any program or activity receiving Federal financial assistance."²⁵⁵ Congress used the same model in Title IX of the Education Amendments of 1972 (which prohibits sex discrimination "under any education program or activity receiving Federal financial assistance")²⁵⁶ and in Section 504 of the Rehabilitation Act of 1973 (which prohibits disability discrimination "under any program or activity receiving Federal financial assistance").²⁵⁷ For purposes of all of these laws, Congress has defined "program or activity" as including "all of the operations of" a department, agency, or instrumentality of state government, "any part of which is extended Federal financial assistance."²⁵⁸

Because these conditions are not tied to any particular spending program but instead run with every dollar of federal assistance a state receives, states, judges, and commentators have long questioned whether the Spending Clause empowers Congress to impose them.²⁵⁹ For Title VI and Title IX, these ques-

253. For further elaboration of this argument, see Samuel R. Bagenstos, *Federalism by Waiver after the Health Care Case*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* (Gillian Metzger, Trevor Morrison & Nathaniel Persily eds., forthcoming 2013).

254. For an excellent discussion of the levers that Congress has used to ensure that federal spending promotes (and at times impedes) civil rights goals, see Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154 (2011).

255. 42 U.S.C. § 2000d (2006).

256. 20 U.S.C. § 1681(a) (2006).

257. 29 U.S.C. § 794(a) (2006).

258. *Id.* § 794(b); accord 20 U.S.C. § 1687 (2006); 42 U.S.C. § 2000d-4a (2006). The institutionalized-persons provisions of the Religious Land Use and Institutionalized Persons Act similarly require religious accommodation of residents of institutions that are "in a program or activity that receives Federal financial assistance," 42 U.S.C. § 2000cc-1(b)(1) (2006), with "program or activity" defined the same way as under the Title VI line of statutes. See 42 U.S.C. § 2000cc-5(6) (2006).

259. For judicial arguments that these enactments lie beyond Congress's spending power, see *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1172–73 (D.C. Cir. 2004) (Sentelle, J., dissenting); *Jim C. v. United States*, 235 F.3d 1079, 1084 (8th Cir. 2000) (en banc) (Bowman, J.,

tions are largely academic. Even aside from the spending power, those statutes are readily justified as exercises of Congress's authority to enforce the Fourteenth Amendment.²⁶⁰ But Section 504 is not. The Supreme Court's decisions in *Tennessee v. Lane*²⁶¹ and *United States v. Georgia*²⁶² held that Congress has the Fourteenth Amendment power to prohibit disability discrimination in individual cases or classes of cases in which that discrimination implicates fundamental rights.²⁶³ But the Court's decision in *Board of Trustees v. Garrett* indicates that not all disability discrimination by state governments is reachable under that power.²⁶⁴ To be sure, *some* of the sweep of Section 504 that falls outside of the Fourteenth Amendment enforcement power can be justified under Congress's commerce power. The statute's applications to employment, professional licensing, and other state regulations of economic activity are obvious examples. But it is unlikely that *all* of the applications of Section 504 can be justified by either the Fourteenth Amendment or the commerce power under current law. In any event, Section 504 expressly overrides the states' sovereign immunity against suits for violations of the statute.²⁶⁵ The commerce power alone is not sufficient to justify that step;²⁶⁶ only the Fourteenth Amendment²⁶⁷ or spending power²⁶⁸ can do so. Section 504 thus raises the question of the constitutionality of cross-cutting spending conditions especially sharply. I will focus on that statute in the remainder of this section, though the bulk of my analysis could apply to any cross-cutting condition.

Although the constitutional challenges to Section 504 have thus far been unsuccessful, there is little doubt that *NFIB* will provoke a new round of those challenges. Because Section 504's requirements are attached to every dollar of federal funds a state receives, the only way a state can entirely avoid those requirements is to give up all federal grants. If the ACA's Medicaid expansion was coercive because a state would have to give up all Medicaid funds to avoid participating, then a condition that a state can avoid only by giving up *all* federal funds should, *a fortiori*, be coercive. Furthermore, Congress adopted Section 504 in 1973, nearly a decade after states began participating in the largest federal spending programs: Medicaid and Title I. If the ACA's Medicaid expansion was coercive because it constituted a midstream change in the terms

dissenting). For an argument by three prominent academics to that effect, see Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How To "Fix" Florida Prepaid (and How Not To)*, 79 TEX. L. REV. 1037, 1143–46 (2001).

260. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

261. 541 U.S. 509 (2004).

262. 546 U.S. 151 (2006).

263. *Id.* at 158; *Tennessee v. Lane*, 541 U.S. at 533–34.

264. See 531 U.S. 356, 365–67 (2001).

265. See 42 U.S.C. § 2000d-7(a) (2006).

266. See *Seminole Tribe v. Florida*, 517 U.S. 44, 72–73 (1996).

267. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

268. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686–87 (1999).

that govern the ongoing Medicaid program, then Section 504 would be coercive by the same logic.²⁶⁹ Finally, just as the Chief Justice determined that the ACA tied together two distinct Medicaid “programs,”²⁷⁰ one might argue that Section 504 requires states that wish to accept federal funds for one program—for health care, for education, or anything else—to agree to participate in a separate and independent program of antidiscrimination and accommodation for people with disabilities.²⁷¹

At first glance, these appear to be powerful arguments. But I think they reflect a misreading of *NFIB* and the anti-leveraging principle it adopts. The key issue, as it often will be in applying the anti-leveraging principle, is determining whether Section 504 “govern[s] the use of the funds” Congress has offered the states or whether it instead is a “threat[] to terminate other significant independent grants.”²⁷² As I have argued, the Chief Justice’s opinion leaves Congress free to adopt new rules governing the use of the funds it offers the states—even if Congress adopts those rules long after a funding program is large and entrenched. If Congress could not do so, it would lack the authority—one the Chief Justice himself recognized—to ensure that federal funds are spent according to Congress’s current understanding of the general welfare.²⁷³

For the following reasons, Section 504 is best understood as merely governing the use of the funds that Congress has provided to the states under particular spending programs, rather than as threatening to terminate significant independent grants. It is useful to consider the question in three stages: First, would a requirement that states that accept money under a particular federal program (such as Medicaid) agree not to discriminate *under that program* be a condition that merely governs the use of the funds Congress provides under that particular program? Second, does Congress’s decision to impose such a requirement in a single, cross-cutting statute—rather than setting it forth separately in each statute that authorizes a separate program—change the analysis? Third, does Section 504’s broad definition of “program or activity”—including all of the operations of a state department, agency, or instrumentality that receives federal

269. One might think that Section 504 is different from the Medicaid expansion because states have continued to accept federal funds for nearly four decades with full knowledge that Section 504 applies to them, while states challenged the Medicaid expansion before it went into effect. Such an argument, which invokes principles of laches, has some intuitive appeal. I am not sure the argument works, however. If Section 504 was coercive when Congress adopted it in 1973, because the sources of federal funding on which states relied were already so large and entrenched at that point that states could not turn them down, it is hard to see how the coercion would have dissipated over time. To the contrary, the fact that states have continued to receive and rely on the same federal funds for another forty years would plausibly make Section 504 even *more* coercive today.

270. *NFIB*, 132 S. Ct. 2566, 2605–06 (2012).

271. The judges who would have held Section 504 unconstitutional before *NFIB* made essentially this argument. *See* *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1172 (D.C. Cir. 2004) (Sentelle, J., dissenting); *Jim C. v. United States*, 235 F.3d 1079, 1084 (8th Cir. 2000) (en banc) (Bowman, J., dissenting).

272. *NFIB*, 132 S. Ct. at 2604 (opinion of Roberts, C.J.).

273. *See supra* section II.B.2.

funds²⁷⁴—change the analysis?

As to the first question, a law that required states that participated in Medicaid to avoid disability discrimination in the Medicaid program would clearly do nothing more than govern how a state was to use the funds provided for that program. To the extent that the law prohibited discrimination against Medicaid *beneficiaries* with disabilities, it would simply be directing the states to ensure that certain individuals were not excluded from receiving the services that are the very purpose of the program. Such a prohibition on discrimination would be indistinguishable from the many provisions that describe the qualifications of Medicaid beneficiaries (age, income, disability status, etc . . .)—provisions that the Chief Justice treated as obviously governing the use of Medicaid funds.²⁷⁵ And to the extent that the law prohibited discrimination against *employees* with disabilities who work in the state Medicaid program, it would simply be setting the ground rules for how the money provided to the state would be spent. Here, the rule would prohibit the use of federal money to subsidize discrimination. In this respect, it would be analogous to the Hatch Act provision, upheld in *Oklahoma v. U.S. Civil Service Commission*,²⁷⁶ that required state employees who worked on federally funded programs to refrain from partisan political activity.²⁷⁷

Second, the analysis should not be different simply because Congress has chosen to adopt the funding condition in a single, cross-cutting statute, rather than by adding the condition to each separate funding statute individually. The legal effect, after all, is the same: if a state accepts money for a given program, it assumes the obligation to avoid disability discrimination under that program, but it does not assume any obligations *outside* of that program. The cross-cutting statute just provides a convenient off-the-rack term. Doing so saves Congress the time and effort of going back and amending every funding statute that has ever been enacted in the past—and of remembering to include the provision in every funding statute that will be enacted in the future. But the difference in form makes no *legal* difference.²⁷⁸

Third, Congress's broad definition of "program or activity" should not change the analysis either. By covering all of the operations of a department or agency that receives federal funds, Section 504 does nothing more than recognize that "[m]oney is fungible."²⁷⁹ Professor Super explains the point this way: "[I]f the federal government gives a state \$100 million for law enforcement purposes,

274. See *supra* note 258 and accompanying text.

275. See *NFIB*, 132 S. Ct. at 2605.

276. 330 U.S. 127 (1947).

277. *Id.* at 143.

278. I could imagine that a cross-cutting spending condition might be written in such an obscure manner that a state would not have notice of it when it agreed to accept federal funds. If so, the condition would not be enforceable under the *Pennhurst* notice doctrine. This does not strike me as likely to happen very often—and certainly Section 504 and the other cross-cutting civil rights statutes are well known and highly salient to states.

279. *Sabri v. United States*, 541 U.S. 600, 606 (2004).

the state may expand its police budget or, alternatively, may seek to reduce its own spending on police and reallocate those funds to sanitation, highway construction, tax cuts, or other priorities.”²⁸⁰ As Professor Dorf argues, “Insofar as money is fungible, Congress might legitimately worry that funds expended for one purpose could free the state to use other funds for a purpose that Congress, but not the state, regards as improper.”²⁸¹ To bring the point back to Section 504, when a state’s health department receives money under Medicaid, and it then discriminates against an employee in the department on the basis of disability, there is no way to ensure that the Medicaid money did not subsidize that discrimination.²⁸²

The fungibility of money might justify a law that required a state that accepted *any* federal funds to agree to avoid discrimination in *all* of its activities. But Section 504 does not go nearly so far. Rather, it provides that any state that receives federal funds for the activities of a particular state department or agency must agree to avoid discrimination in the activities of *that department or agency*. Unlike with the ACA’s Medicaid expansion, a state does not face an all-or-nothing choice under Section 504. If a state accepts any federal funds for its prisons, to be sure, it must avoid disability discrimination throughout its prison system.²⁸³ But the same obligations do not extend to the operations of a state’s highway, housing, or health departments. If a state wants to avoid Section 504’s requirements *entirely*, it must forego all federal funds, but it can avoid those requirements for any given department of state government by simply refusing federal funds offered to that department. Section 504 thus seems quite different than the Medicaid expansion from the perspective of the anti-leveraging principle.

C. CROSS-OVER CONDITIONS, WITH A SPECIAL FOCUS ON THE CLEAN AIR ACT

A final category of spending conditions is likely to raise especially serious questions under the Chief Justice’s *NFIB* opinion. That is the category of “cross-over conditions” that threaten to “withdraw future funds provided under some specific preexisting grant program” if a state does not “enact some new

280. Super, *supra* note 243, at 2561.

281. Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 337 (2007).

282. This is not to say that money is *perfectly* fungible in practice. As Professor Brian Galle notes, there is substantial evidence that “targeted grants often increase recipient-jurisdiction spending in the targeted category, sometimes by nearly as much as the grant amount.” Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 896–97 (2008). But the basic point holds. Federal money earmarked for a particular program cannot be, and typically *will* not be, contained within that program. If Congress is concerned about avoiding its money being used to subsidize discrimination, it must recognize the point by extending nondiscrimination rules beyond the particular narrow program that is the intended recipient of federal funds.

283. See, e.g., *Koslow v. Pennsylvania*, 302 F.3d 161, 175–76 (3d Cir. 2002) (holding that a state that accepted federal funds to reimburse expenditures for incarcerating criminal aliens was prohibited from disability-based discrimination against prison employee, even in the absence of proof that the employee worked with incarcerated criminal aliens).

federally mandated regulation.”²⁸⁴ The Clean Air Act (CAA) offers a model of this sort of funding condition.²⁸⁵ Under that statute, states must submit State Implementation Plans (SIPs) to the Environmental Protection Agency to explain how they will ensure compliance with the National Ambient Air Quality Standards (NAAQS).²⁸⁶ A state that fails to submit a sufficient SIP is subject to sanctions, including the potential loss of a large swath of its federal highway funds.²⁸⁷ But, as Professor Jonathan Adler argues:

Nothing in the CAA requires any connection to highways, mobile sources, or even the specific pollutants most associated with vehicular traffic. Failure to adopt a sufficiently rigorous stationary source permit scheme, sufficiently stringent emission regulations on dry cleaners, bakeries and other “area” sources, or even failure to provide adequate citizen suit access to state courts can provide the basis for rejecting an SIP and imposing sanctions.²⁸⁸

Needless to say, the federal highway program is large and entrenched—and was large and entrenched at the time Congress adopted the CAA—and states rely heavily on federal funds in their transportation budgets.²⁸⁹ The argument that the CAA violates the anti-leveraging principle thus appears straightforward: Congress has told states that wish to continue participating in the entrenched and lucrative federal highway program that they can do so only if they *also* agree to participate in a separate and independent program for reducing air pollution. In the aftermath of *NFIB*, Professor Adler has argued that the Chief Justice’s opinion makes this aspect of the CAA especially vulnerable.²⁹⁰

To a far greater extent than the other spending conditions I have discussed in this Part, the Clean Air Act presses against the crucial ambiguities in Chief Justice Roberts’s *NFIB* opinion. The statute raises two key questions under the Chief Justice’s analysis: First, is the CAA separate and independent from the federal highway program? Second, does the threat to shut off access to federal highway funds leave states a real choice “not merely in theory but in fact”²⁹¹ whether to agree to the CAA’s requirements?

For a number of years, states and commentators have argued that the requirements imposed by the CAA are not germane to the purposes of federal

284. Hills, *supra* note 72, at 865–66 n.184.

285. See 42 U.S.C. § 7401 (2006).

286. See *id.* § 7410(a)(1).

287. See *id.* § 7509(a)–(b).

288. Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 449–50 (2005).

289. See *id.* at 449.

290. Jonathan H. Adler, *Could the Health Care Decision Hobble the Clean Air Act?*, PERCOLATOR, (July 23, 2012), <http://percolatorblog.org/2012/07/23/could-the-health-care-decision-hobble-the-clean-air-act/>.

291. *NFIB*, 132 S. Ct. 2566, 2604 (opinion of Roberts, C.J.) (quoting *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987)).

highway funding.²⁹² Applying *Dole*'s germaneness test, lower courts have rejected that argument. They have concluded that the bills authorizing federal highway spending express Congress's "desire that highway construction be carried out in a manner that does not contribute to air pollution,"²⁹³ and that the CAA furthers that purpose because both automobiles and stationary sources contribute to "the overall problem of air pollution."²⁹⁴ In support of that conclusion, one might note that the statute specifically includes grants for road construction projects that will reduce air pollution—such as those for public transit, bus and high-occupancy-vehicle lanes, and other means of reducing traffic congestion—as among those that the federal government may not withhold as a sanction for failing to submit a sufficient SIP.²⁹⁵ Federal funding of these pollution-reducing road projects highlights the degree to which pollution reduction is one of the goals of the federal highway program. Professor Adler has questioned that conclusion.²⁹⁶ But even if the CAA's threatened highway-funding sanctions satisfy the germaneness test, that is not enough to satisfy the Chief Justice's anti-leveraging principle.

This point is evident, again, from the Chief Justice's treatment of *Dole*. The Chief Justice noted that the drinking-age condition at issue there satisfied the germaneness test: it "was 'directly related to one of the main purposes for which highway funds are expended—safe interstate travel.'"²⁹⁷ But, he explained, that condition triggered the anti-leveraging principle because it "was not a restriction on how the highway funds—set aside for specific highway improvement and maintenance efforts—were to be used."²⁹⁸ The drinking-age requirement was, in the terms I have been using, separate and independent from the highway-grant program.

Insofar as they address stationary sources of pollution, the CAA's requirements would appear, on the same analysis, to be separate and independent from the highway-grant program. Those requirements do not govern how states should construct and maintain highways. Nor do they govern the processes by which states should choose *which* highways to construct and maintain.²⁹⁹ And they do not even govern the *use* of the highways constructed or maintained with

292. See, e.g., Adler, *supra* note 288, at 433–52.

293. *Missouri v. United States*, 918 F. Supp. 1320, 1333 (E.D. Mo. 1996).

294. *Virginia v. Browner*, 80 F.3d 869, 882 (4th Cir. 1996).

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

296. See Adler, *supra* note 288, at 449–50.

297. *NFIB*, 132 S. Ct. 2566, 2604 (opinion of Roberts, C.J.) (quoting *South Dakota v. Dole*, 483 U.S. 203, 208 (1987)).

298. *Id.*

299. In this respect, the CAA is quite unlike the statute upheld on Commerce Clause grounds in *Pierce County v. Guillen*, 537 U.S. 129 (2003). That statute, which created an evidentiary privilege for information compiled or collected for the purpose of identifying hazards on roads funded by federal highway safety programs, was also a proper exercise of Congress's spending authority to govern the use of the funds it granted the states under those programs. See Bagenstos, *supra* note 13, at 366–67.

federal funds.³⁰⁰ Like the drinking-age condition in *Dole*, these aspects of the CAA regulate something that is related to one of the *purposes* of federal highway funding but that is not a restriction on how federal highway funds should be used.

Under the Chief Justice's anti-leveraging principle, the determination that a funding condition takes the form of a "threat[] to terminate other significant independent grants" is just the starting point for analysis.³⁰¹ The next question is whether the threatened cutoff of funds leaves states "with a 'prerogative' to reject Congress's desired policy, 'not merely in theory but in fact.'"³⁰² As I discussed above, it is conceptually difficult to identify a point at which the amount of federal funds at stake is so great that a state has no realistic option to refuse.³⁰³ The average state receives more than three-quarters of a billion dollars a year in federal transportation funds.³⁰⁴ That is an undeniably large number. But it is significantly less than the amount states receive in Medicaid (more than four billion dollars a year).³⁰⁵ Unlike with Medicaid, where federal money pays for nearly two-thirds of the average state's spending,³⁰⁶ federal money pays for less than a third of the average state's transportation spending.³⁰⁷ And transportation funding makes up a far smaller portion of the average state's budget than does Medicaid: Medicaid accounts for more than 22% of the average state's budget, while transportation accounts for less than 8% of the average state's budget.³⁰⁸ Although it is not at all clear where the Chief Justice would draw the line, the threat to shut off highway funds seems far less a "gun to the head"³⁰⁹ of the states than the threat to shut off Medicaid funds.

Moreover, the CAA does *not* require that *all* federal highway funds be cut off from a state that fails to submit an adequate SIP. Rather, the EPA Administrator may bar funds only for "nonattainment area[s]"—those parts of the state that have not met the NAAQS.³¹⁰ As noted above, the Clean Air Act also exempts a number of categories of transit funds from its sanctions, including funds for projects that address safety problems and funds for certain types of projects that are likely to reduce emissions.³¹¹ And the Administrator need not impose a fund

300. Contrast the CAA in this respect with the national 55-mile-per-hour speed limit, which, while it was in effect, necessarily governed the use of the highways constructed and maintained with federal funds. See *Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989).

301. *NFIB*, 132 S. Ct. at 2604 (opinion of Roberts, C.J.).

302. *Id.* at 2604–05 (quoting *Dole*, 483 U.S. at 211–12).

303. See *supra* section II.A.

304. See ROBERT S. KIRK, CONG. RESEARCH SERV., R41869, THE DONOR-DONEE STATE ISSUE IN HIGHWAY FINANCE 10–12 tbl.1 (2011); NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 241, at 64 tbl.38.

305. See NAT'L ASS'N. OF STATE BUDGET OFFICERS, *supra* note 241, at 44–46.

306. See *id.* at 46 fig.16.

307. See *id.* at 62 fig.18.

308. See *id.* at 5 fig.4.

309. *NFIB*, 132 S. Ct. 2566, 2604 (opinion of Roberts, C.J.).

310. 42 U.S.C. § 7509(b)(1)(A) (2006).

311. *Id.* § 7509(b)(1).

cutoff at all unless she finds a lack of good faith or the state has failed to comply for two years after the determination that the SIP was insufficient.³¹² In any event, the Administrator has only very rarely cut off highway funds for failure to submit a sufficient SIP.³¹³ All of these limitations make the CAA's sanctions even less like the threat to cut off all Medicaid funds that the Court found unconstitutional in *NFIB*.

Because it is unclear at exactly what point a state should be understood to lack a real choice to refuse a federal grant, it is impossible to predict precisely how courts will apply *NFIB* to the CAA. But if the Administrator were to shut off *all* federal highway funds to a state based on the state's failure to provide a sufficient response to *stationary* sources of pollution, her actions would raise serious questions under the Chief Justice's opinion. That is not to say that those actions would be unconstitutional. The federal government provides far less money to the states—and states are far less reliant on it—in the transportation area than in Medicaid. The threat to withhold federal highway funds thus may well trigger the Chief Justice's principle that sometimes sovereign states “have to act like it.”³¹⁴ But as with the large, entrenched spending programs I discussed in section IV.A, the federal executive may not want to take the chance that courts will disagree. Just as in waiver negotiations under the Medicaid, education, and welfare programs, the threat to challenge the constitutionality of the proposed sanction will give states new leverage in negotiations with the EPA Administrator over possible CAA violations. Given that the EPA has already been accused of bending over backwards to avoid the “politically difficult” action of cutting off highway funds,³¹⁵ the risk of drawing a constitutional challenge may completely deter the agency from cutting off those funds in the future. The *NFIB* decision thus may have its greatest impact, in the environmental as well as in the social-welfare context, in setting a new, state-friendly context for vertical intergovernmental negotiations.

CONCLUSION

NFIB's Spending Clause holding is exceptionally important. Never before has the Court invalidated a spending condition as unconstitutionally coercing the states. By holding that the ACA's Medicaid expansion provisions were unconstitutionally coercive, the Court has opened the field for challenges to a wide range of conditional-spending laws. If lower courts treat the broadest

312. *Id.* § 7509(a).

313. See CONG. RESEARCH SERV., CLEAN AIR ACT ISSUES IN THE 106TH CONGRESS II (2000), available at <http://cnie.org/NLE/CRSreports/air/air-24a.cfm> (noting that between 1990 and 1999, the EPA formally notified the states of its intent to impose CAA sanctions on 858 occasions but actually cut off highway funds only two times; as of March 1999, a highway-fund cutoff was in effect for only “one small area (East Helena, Montana)”).

314. *NFIB*, 132 S. Ct. at 2603 (opinion of Roberts, C.J.).

315. David M. Driesen, *Five Lessons from the Clean Air Act Implementation*, 14 PACE ENVTL. L. REV. 51, 56 (1996).

language of the Roberts opinion and the joint dissent as stating the “rule” of *NFIB*, these laws could be quite vulnerable indeed.

I have argued, however, that *NFIB* should not be read so broadly. The anti-leveraging principle better fits both what the Chief Justice actually said in his pivotal opinion and the constitutional values at play in interpreting the Spending Clause. If courts faithfully apply the anti-leveraging principle, most post-*NFIB* challenges to conditional-spending laws should ultimately fail. But challenges to cross-over conditions such as the imposition of highway funding sanctions under the CAA stand a far greater chance of success.

The most significant effect of *NFIB*’s Spending Clause holding is unlikely to appear in judicial decisions at all. That is the effect of the decision in creating a more state-friendly context for bargaining between state and federal officials in the day-to-day administration of cooperative spending programs. When states seek waivers of the requirements of entrenched programs such as Medicaid, the ESEA Title I program, or Temporary Assistance to Needy Families—or when they are negotiating the penalties for violating statutes like the CAA—they can now credibly threaten to sue to challenge the constitutionality of the underlying spending condition if they do not get their way. Given the uncertainties surrounding the interpretation of the *NFIB* decision—uncertainties that may not be resolved, if at all, for a number of years—federal administrators will have a strong incentive to give the states what they want and avoid a fight in the courts. As a result, *NFIB* is likely to accelerate the trend toward federalism by waiver—a trend that, perhaps ironically, has been vigorously criticized by the same conservatives who cheered the Court’s Medicaid holding.