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PROTECTING FROM ENDLESS HARM: A ROADMAP FOR COERCION CHALLENGES AFTER *N.F.I.B. V. SEBELIUS*

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INTRODUCTION

National Federation of Independent Business v. Sebelius[1] (*NFIB*) was one of the most anticipated Supreme Court decisions of all time, with most attention focused on whether the Patient Protection and Affordable Care Act's ("PPACA") "individual mandate" to buy healthcare coverage was constitutional. The individual mandate promised to be a re-examination of the Court's precedent on Congress' commerce clause power, federalism, and individual sovereignty. It came as a shock, therefore, when a plurality of the Supreme Court instead declared the act's Medicaid expansion unconstitutional for being "coercive."[2] Two separate opinions—one written by Chief Justice Roberts and joined by Justices Breyer and Kagan, the other a "Joint Dissent" joined by Justices Scalia, Kennedy, Thomas, and Alito—declared that Congress had "coerced" the States by threatening to withhold all or part of a State's existing Medicaid funding if that State failed to implement the Medicaid expansion.[3] Though the coercion argument has existed for decades,[4] *NFIB* marks the first time the Court has declared a congressional spending power program coercive.[5]

Both Chief Justice Roberts and the Joint Dissent refused to explicitly state when the Medicaid expansion became coercive.[6] Chief Justice Roberts did not elaborate on where the line between "persuasion" and coercion is crossed, simply stating that the Medicaid expansion crossed that line.[7] As a result of this vague language, a number of academic articles have been

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1. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. U.S. 2566 (2012).
2. *Id.* at 2604.
3. *See id.* at 2606-07.
4. *See* Chas. C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).
5. 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, 3 (2013).
6. *See NFIB*, 132 S. U.S. at 2607; *id.* at 2662 (joint dissent).
7. *Id.* at 2606-07 (Roberts, C.J., majority for Medicaid Expansion).

written focused solely around trying to determine just why the Medicaid expansion was coercive, and how states might use coercion to challenge other conditional spending programs.[8]

The need for a clear, workable coercion definition is critical to ensure that Congress can enact constitutional legislation, states are not forced into enacting programs against their will, and courts do not strike down non-coercive programs. Commentators have claimed that the door is open to attack for a wide variety of congressional spending power programs.[9] These programs ultimately affect every American, providing for healthcare, the environment, education, civil rights, and having dramatic impacts on state budgets and regulations. Indeed, the coercion doctrine has already been used to challenge federal spending power programs. For example, Texas, along with several other states, challenged the Environmental Protection Agency's (EPA) authority under the Clean Air Act to require States to amend their State Implementation Plans (SIP).[10] The EPA has the authority to sanction a state that fails to amend its SIP by reducing federal highway funding or construction bans.[11] After *NFIB,* Texas wasted little time submitting a notice of supplemental authority, arguing that the EPA's action is coercive: Congress gave Texas the "choice" of adopting the federal regulations, or facing severe sanctions.[12] The D.C. Circuit Court of Appeals rejected this argument, because the Clean Air Act's sanctions were "not comparable" to the Medicaid expansion's threat to take away significant state funding.[13]

8. *See*, *e.g*. Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 873-892 (2013) (suggesting coercion occurs when Congress threatens to withhold funds from a separate, independent program if a state does not implement a new program); *see also* David Orentlicher, *NFIB v. Sibelius: Proportionality in the Exercise of Congressional Power*, (Robert H. McKinney Sch. of Law, Legal Studies Research Paper No. 2012-32), *available at* http://ssrn.com/abstract=2178124 (suggesting coercion lies when the states loss, or the Government's action, is unduly disproportionate); James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011-2012 CATO SUP. CT. REV. 67 (viewing coercion through the lens contract law, and protecting against undue leverage when conditional spending 'contracts' are modified such as in *NFIB*).

9. Bagenstos, *supra* note 8, at 864.

10. Lawrence Hurley, *Texas Wastes No Time in Citing Supreme Court Health Care Ruling in Clean Air Act Litigation*, E & E PUBLISHING, LLC (August 1, 2012), http://www.eenews.net/public/Greenwire/2012/08/01/1.

11. JAMES E. MCCARTHY, ENV'T AND NATURAL RESOURCES POLICY DIV., 97-959 ENR, *HIGHWAY FUND SANCTIONS FOR CLEAN AIR ACT VIOLATIONS* 2 (Oct. 22, 1997), *available at* http://www.policyarchive.org/handle/10207/bitstreams/490.pdf.

12. *See* Richard Lazarus, *Texas Unconvincing In Clean Air Suit*, 29 THE ENVIRONMENTAL FORUM 12 (Sept./Oct. 2012), *available at* http://www.law.harvard.edu/faculty/rlazarus/docs/columns/LAZARUS_FORUM_2012_SEP-OCT.pdf.

13. Texas v. EPA, No. 10-1425, 2013 WL 3836226, at *15 (D.C. Cir. July 26, 2013).

Is coercion an argument that simply compares the impact of a challenged program against the impact of a state losing its entire Medicaid funding? If so, coercion is destined to go back into a dormant state, as no other conditional spending program even comes close to the financial impact of Medicaid.[14] This note works from a premise that Chief Justice Roberts and the Joint Dissenters did not intend the coercion argument to be *sui generis* to the PPACA's Medicaid expansion.

This note seeks to propose a test to use in future coercion cases that does not focus solely on a piece of legislation's economic impact. This test seeks to promote an accurate reading of *NFIB*'s coercion opinions, but does so by focusing on the policies underlying these opinions. By getting to the root of these policies, it is possible to present a coercion analysis that is less confusing than the face of *NFIB* and reduces the potential for arbitrary lawsuits and decision-making in future coercion cases.

Part I will examine the coercion argument's history. Part II will briefly explain how the existing Medicaid program operates and how the PPACA Medicaid expansion will operate, and then explains the States' challenge to the expansion. Part III will then outline the coercion opinions in *NFIB*. Part IV will ask and answer some of the outstanding questions *NFIB* poses, establish the policies underlying the opinions, and propose a new test—the "Harm" analysis—that consolidates the opinions' policies for future use. Finally, Part V applies this test to a hypothetical Clean Air Act challenge to examine how coercion cases should play out in a post-*NFIB* world.

I. COERCION'S QUIET HISTORY

The Supreme Court first encountered a coercion argument in 1937 in *Steward Mach. Co. v Davis*.[15] The petitioner challenged Title III of the Social Security Act, which appropriated tax incentives and funds to states for unemployment compensation programs if they implemented a tax on employers.[16] The petitioner argued that the Act coerced states by driving state legislators "under the whip" of the federal government to enact laws that the federal government wanted them to enact.[17]

Justice Cardozo strongly denounced this novel argument for failing to draw a line where a state stopped making a voluntary decision and started being coerced. "The difficulty with the petitioner's contention is that it confuses motive with coercion . . . . [T]o hold that motive or temptation is

14. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. U.S. 2566, 2663 (2012).
15. 301 U.S. 548 (1937).
16. *See id.* at 577-78.
17. *Id.* at 588.

equivalent to coercion is to plunge the law in endless difficulties."[18] Justice Cardozo did, however, acknowledge there was some point where "pressure turns into compulsion," but that this would be a "question of degree, at times, perhaps, of fact."[19] Unfortunately, Justice Cardozo did not elaborate.

The coercion argument doctrine essentially lay dormant at the Supreme Court level until *South Dakota v. Dole* in 1987.[20] South Dakota challenged as unconstitutional a federal statute directing the United States Secretary of Transportation to withhold five percent of a State's federal highway funds if that State's legal drinking age was less than twenty-one.[21]

While Chief Justice Rehnquist acknowledged Congress' broad authority under the spending power to attach conditions on the receipt of federal funds, he outlined four requirements that must be met for such conditions to be constitutional.[22] First, Congress' exercise of the spending power must be in pursuit of the general welfare; courts should defer substantially Congress on this point.[23] Second, if Congress attaches conditions on federal funds, it must do so unambiguously so that states can exercise their choice to accept or reject the funds knowingly.[24] Third, conditions on federal grants must be related to the federal interest in national projects or programs.[25] Finally, Congress cannot impose unconstitutional conditions on grants.[26] These conditions have become known as the "Dole" test.

The highway spending conditions were lawful when applied to this test: First the general welfare requirement was met when Congress determined the differing drinking ages amongst the states created incentives for people to drink and drive to and from South Dakota.[27] Second, the conditions were clearly stated.[28] Third, the conditions on the grant were related to safe interstate highways, which is a national interest.[29] Fourth, it was not unconstitutional to take away funding for the highway program: the federal government was not forcing South Dakota to implement a drinking age; the state was free to keep its drinking laws unchanged.[30]

18. *Id.* at 589-90.
19. *Id.* at 590.
20. 483 U.S. 203 (1987).
21. *Id.* at 205-06.
22. *See id.* at 207.
23. *Id.*
24. *Id.*
25. *Id.* at 207-08.
26. *See id.* at 208.
27. *Id.*
28. *Id.*
29. *See id.* at 208-09.
30. *See id.* at 209-10.

Even though the highway conditions had passed this test, did it nonetheless coerce South Dakota into changing its drinking laws? After all, it gave the state the "choice" of changing its laws or losing funding. Chief Justice Rehnquist acknowledged that Justice Cardozo left the door open for coercion in *Steward Mach. Co*. by stating that "[i]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[31] Thus, he looked to the relatively small amount of funding at stake—five percent of South Dakota's federal highway funding—and held this was "mild encouragement" that left the choice to participate in the highway program up to South Dakota "not merely in theory but in fact."[32] "Encouraging" a state to change its policies by revoking five percent of a state's funding was permissible under Congress' Spending Power.[33]

Even after the coercion argument got a new look in *Dole*, it was never used to successfully attack a federal conditional spending statute until *NFIB*.[34] Coercion was effectively a dead argument. Prior to *NFIB*, a few federal circuits went so far as to hold that the coercion doctrine did not exist.[35] Given that the Supreme Court nearly rejected coercion in *Steward* and refused to apply it in a presumptively appropriate situation in *Dole*, the argument had little legal backing.[36]

Nonetheless, the coercion argument did see some success outside of conditional spending grants. *New York v United States* saw the Court strike down a federal regulatory statute as coercive.[37] The recently enacted Low-Level Radioactive Waste Policy Act had dictated that each State be responsible for disposing of radioactive waste generated within its borders.[38] The provision at issue required noncompliant states to take title to the radioactive waste and be liable for all damages incurred by the waste generated prior to taking title.[39] Justice Sandra Day O'Connor held that this provision "crossed the line distinguishing encouragement from coercion."[40] States were given two coercive choices if they did not implement the federal pro-

31. *Id.* at 211.

32. *Id.*

33. *Id.* at 211-12.

34. *See* Huberfeld, *supra* note 5, at 3.

35. *See* Fla. *ex rel.* Attorney Gen. v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235, 1265 (11th Cir. 2011), *aff'd in part*, *rev'd in part sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 U.S. 2566 (2012).

36. *See id.* at 1265-66 (discussing how the coercion argument was viewed prior to *NFIB*).

37. 505 U.S. 144 (1992).

38. *Id.* at 150-51.

39. *Id.* at 151.

40. *Id.* at 175.

gram: either take ownership of radioactive waste, or be liable for it.[41] This effectively "commandeered" the states into enacting a federal regulatory scheme, which was unconstitutionally coercive.[42]

Though *New York* did not involve a federal spending statute like *Dole* or *Steward Machine Co.*, Justice O'Connor's opinion would later prove important in *NFIB*. Justice O'Connor held that the coercion argument's main goal is to promote political "accountability."[43] When Congress leaves the States the option to enact or reject a program, then citizens of the States can reward or punish their legislators at the ballot box for choosing to implement a program.[44] On the other hand, if the States are coerced into enacting a program by the federal government, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from . . . their decision."[45]

Despite *N.Y.*'s holding, coercion remained an effectively dormant argument in attacking conditional spending programs until *N.F.I.B.*

II. MEDICAID EXPANSION AND STATE RESISTANCE

A. The PPACA Medicaid Expansion

To understand what was at stake in *NFIB,* the history, size, and structure of Medicaid must be explained. Medicaid is a voluntary, federal-state cooperative program.[46] The federal government pays anywhere from half to seventy-five percent of a state's overall Medicaid budget, with the federal government paying more to states with lower per capita wealth.[47] Medicaid spending, between both state and federal contributions, accounts for twenty percent of an average state's overall budget.[48] State Medicaid programs must cover certain population groups and provide certain benefits, but States retain a great amount of flexibility in structuring their programs to cover additional populations, provide additional services, or set differential reimbursement rates.[49] The Health and Human Services Secretary has

41. *Id.* at 176.
42. *See id.* at 176-77.
43. *See id.* at 168.
44. *See id.*
45. *Id* at 168-69.
46. John D. Blum & Gayland O. Hethcoat II, *Medicaid Governance in the Wake of National Federation of Independent Business v. Sebelius: Finding Federalism's Middle Pathway, from Administrative Law to State Compacts*, 45 J. MARSHALL L. REV. 601, 610 (2012).
47. *See* Huberfeld, *supra* note 5, at 18.
48. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 U.S. 2566, 2604 (2012).
49. *See* Huberfeld, *supra* note 5, at 17-20.

always had the statutory authority to revoke part or all of a states' federal Medicaid funding if it fails to meet the minimum federal guidelines, though the Secretary has never fully revoked a state's funding.[50]

Medicaid covered more than fifty five million Americans prior to the PPACA expansion at an annual combined federal-state cost of $400 billion and it is the nation's largest public health insurer.[51] Today, every State participates in Medicaid.[52] When Medicaid was enacted in 1965, it only required participating states to cover public aid recipients known then as the "deserving poor": the elderly, disabled, children, and their caretakers who were currently on welfare.[53] The Medicaid statute explicitly reserved the right for Congress to make changes to the program, however, and the Medicaid program is far more expansive today.[54] For example, in 1988, Congress expanded the minimum coverage to include pregnant women, children up to age five below 133% of the federal poverty level, and children up to age eighteen up to 100% of the federal poverty level.[55] In 2003 Medicaid saw its most substantial pre-PPACA expansion when Congress required dual Medicare-Medicaid enrollees to participate in Medicare Part D.[56]

The Patient Protection and Affordable Care Act included the largest expansion of the Medicaid coverage population in the program's history.[57] Beginning in 2013, the Act will require state Medicaid programs to cover all individuals under the age of 65 up to 133% of the federal poverty level[58], beginning in 2014.[59] The federal government would initially pay for 100% of the additional costs incurred by this expansion (other than administrative costs) with the federal contribution rate gradually lowering to 90% by 2020.[60] States could also offer any new enrollees cheaper, less compre-

50. *See id.* at 17.

51. Blum, *supra* note 45, at 610-11.

52. *See* Huberfeld, *supra* note 5, at 15.

53. *Id.* at 16.

54. *See id.* at 20-25.

55. *See id.* at 23. Undocumented Immigrants are not eligible for Medicaid, and there are substantial restrictions on qualified immigrants. *See Summary of Immigrant Eligibility Restrictions Under Current Law*, HHS.GOV, www.aspe.hhs.gov/hsp/immigration/restrictions-sum.shtml#secd.

56. *See* Huberfeld, *supra* note 5, at 23-24.

57. *See* Blum, *supra* note 45, at 611-12.

58. There is a "special deduction" for Medicaid enrollees within 5% of the federal poverty level, so effectively states were to be required to cover their populations up to 138% of the federal poverty level. *Id.* at 612.

59. *Id.*

60. *See* Huberfeld, *supra* note 5, at 27-28.

hensive "essential benefits" services than "traditional" Medicaid populations currently receive.[61]

The Medicaid expansion will have a significant impact on the states, even with the federal government's generous match, the Congressional Budget Office projects that 25.6 million additional people will enroll in Medicaid in the next decade, increasing state administrative costs by $12 billion and state Medicaid costs by $118 billion.[62] Spurred on at least ostensibly[63] by these costs, several states sought to challenge the Medicaid expansion in court.

B. The Coercion Challenge

Twenty-six state Attorney Generals ultimately joined a lawsuit that included a coercion challenge to PPACA's Medicaid expansion.[64] The suit argued that the Medicaid expansion was coercive because the Health and Human Services Secretary had the authority to withhold all existing Medicaid funding unless the states' Medicaid programs were expanded to include the new coverage population.[65] Furthermore, that states faced the practical reality of being forced to implement the expansion; the alternative was losing a massive amount of federal funding composing a large amount of their budget, and being forced to fully fund their indigent healthcare population on their own.[66] States could not take on the costs of covering their most needy citizens without Medicaid, and even if a state stopped participating in Medicaid, the federal government would still use tax dollars from that state to fund Medicaid programs in participating states.[67]

At both the District and Appellate Court stages, the coercion argument was unsuccessful. District Court Judge Roger Vinson rejected the argument

61. *Id.* at 26-27.

62. *See* Blum, *supra* note 46, at 613.

63. It would be unrealistic to ignore the fact that opposition to the *PPACA*'s enactment, and subsequent legal challenges, were highly partisan in nature. This note focuses only on the legal aspects of the *PPACA*'s Medicaid expansion, however, and will not analyze political arguments. *See* Kevin Sack and Eric Lichtblau, For Attorneys General, Long Shot Brings Payoffs, N.Y. TIMES, June 30, 2012, at A18, *available at* http://www.nytimes.com/2012/07/01/us/politics/for-attorneys-general-health-law-long-shot-brings-payoffs.html?pagewanted=all.

64. *See* Fla. *ex rel.* Attorney Gen. v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235 (11th Cir. 2011), *aff'd in part*, *rev'd in part* sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 U.S. 2566 (2012).

65. Petition for Writ of Certiorari at 16-26, Florida. v. U.S. Dep't of Health and Human Servs., 132 U.S. 2566 (2012) (No. 11-400), 2011 WL 4500702.

66. *See id.* at 21-26.

67. *See id.*

based on the total lack of case law supporting the coercion argument.[68] On appeal, the Eleventh Circuit rejected the coercion argument not because coercion had little case law, but by finding that the PPACA's Medicaid expansion was not coercive.[69] Four factors went into this decision. First, the States were warned from the beginning that Congress reserved the right to change the Medicaid program.[70] Second, the federal government bore nearly all the costs associated with the expansion, leaving the States' financial coercion argument more "rhetoric than fact."[71] Third, the States had four years from the date the bill was enacted to decide implement the program and adjust accordingly, or develop a replacement program.[72] Fourth, even though the Health and Human Services Secretary had the authority to revoke all or part of a state's Medicaid funding for non-compliance; the Secretary was not necessarily going to exercise this authority.[73] Undaunted, the states petitioned the Supreme Court to review the coercion challenge.[74]

III. N.F.I.B. v. SEBELIUS

Many observers were surprised that the Supreme Court even granted certiorari on the Medicaid coercion challenge.[75] This surprise turned to shock when the Court actually applied the long dormant doctrine. This shock gave way to confusion as observers struggled to identify just why the Medicaid expansion was coercive as compared to other conditional spending programs. A careful reading of the three opinions in NFIB—Chief Justice Robert's majority, the Joint Dissent,[76] and Justice Ginsburg's dissent—is therefore the necessary starting point in the coercion analysis.

68. Fla. *ex rel.* Bondi v. U.S. Dep't of Health and Human Servs., 780 F. Supp. 2d 1256, 1269 (N.D. Fla. 2011), *aff'd in part*, *rev'd in part sub nom*. Fla. *ex rel.* Attorney Gen. v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235 (11th Cir. 2011), *aff'd in part*, *rev'd in part sub nom*. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 U.S. 2566 (2012).

69. Fla. *ex rel.* Attorney Gen. v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235, 1268 (11th Cir. 2011), *aff'd in part*, *rev'd in part sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 U.S. 2566 (2012).

70. *Id.* at 1267.

71. *Id.*

72. *Id* at 1268.

73. *Id.*

74. *See* Petition for Writ of Certiorari, *supra* note 65.

75. *See* Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 579 (2013).

76. Referring to the unsigned opinion as the "Joint Dissent" is a bit of a misnomer. Chief Justice Roberts' opinion, upholding the *PPACA*'s individual mandate was a tax and striking down the Medicaid expansion, was joined by Justices Breyer and Kagan. Justice Ginsburg's opinion, joined by Justice Sotomayor, joined the Chief Justice in upholding the individual mandate, but dissented in striking down the Medicaid expansion. The "Joint Dissent" dissented from the decision upholding the individual mandate, but joined the Chief Justice in striking down the Medicaid expansion. As the unsigned opinion has become popularly referred to as the "Joint Dissent," however, this note too shall refer to it as such.

A. Chief Justice Roberts: The Contractual Relationship

Chief Justice Roberts began his analysis by noting that Congress does have authority under the Spending Power to place conditions on grants to the states to pressure the states to take actions, such as expanding their Medicaid program, which Congress could not directly order them to take.[77] However, the federal government cannot simply require states to govern according to federal principles. In a nod to *New York v. U.S.*, the Chief Justice noted that only where states have a real choice to participate in a program can voters know who to reward or punish for the state participating in the program; otherwise "it may be state officials who will bear the brunt of public disapproval [of federal decisions], while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[78] Chief Justice Roberts noted that, in the "typical case," if a state does not want to implement the program, the state can and should defend their own sovereignty by simply "not yielding" to the federal offer: "The States are separate and independent sovereigns. Sometimes they have to act like it."[79]

However, Chief Justice Roberts found that this was not a typical case.[80] He considered the Medicaid expansion to be a threat to take away massive amounts of existing Medicaid funding from states that did not comply with the expansion.[81] This threat amounted to a "gun to the head" that left states "with no real option but to acquiesce in the Medicaid expansion."[82] Chief Justice Roberts contrasted the Medicaid expansion with the highway funding in *Dole*; a state losing five percent of its federal highway funding is small enough to simply be "encouragement" that ultimately left the final decision up to the state,[83] but the Medicaid expansion was more than encouragement. A noncompliant state was faced with the prospect of losing over ten percent of its overall budget in addition to having to replace the large regulatory schemes built up around the Medicaid system.[84] The financial and regulatory impact of losing all Medicaid funding would be so dramatic that no state could realistically turn down the Medicaid expansion.[85]

77. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 U.S. 2566, 2601-02 (2012).
78. *Id.* at 2602-03.
79. *Id.* at 2603.
80. *See id.*
81. *Id.* at 2604-05.
82. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 U.S. 2566, 2604-05 (2012).
83. *Id.* (citing South Dakota v. Dole, 483 U.S. 203, 212 (1987)).
84. *Id.* at 2604.
85. *Id*.

Finally, in the key part of his opinion, Chief Justice Roberts found that the Medicaid expansion was sufficiently different from "traditional" Medicaid to effectively constitute an entirely new, separate program. Thus Congress was threatening to take funds away from "traditional" Medicaid to force states to implement a new, separate healthcare program.[86] The Medicaid expansion "transformed" the program from one that covered only certain populations[87] into a "comprehensive national plan to provide universal health insurance coverage" to meet the "health care needs of the entire nonelderly population with income below 133 percent of the poverty level."[88] Second, Congress created a separate funding provision for the newly covered population; the federal government would cover the cost of new enrollees for at least six years, and ninety percent of their cost thereafter.[89] The new population can also receive a less-comprehensive benefits package than the traditional Medicaid population.[90]

Chief Justice Roberts found that these changes meant Congress "recognized it was enlisting the States in a new healthcare program."[91] Chief Justice Roberts, remember, emphasized that conditional spending grants are analyzed as if they were contracts.[92] The legitimacy of Congress' Spending Power "rests on whether the State voluntarily and knowingly accepts the terms of the contract," this ensures the "status of the States as independent sovereigns in our federal system." [93] Chief Justice Roberts acknowledged that while the Medicaid statute has always given Congress the right to amend any provision of it a state, at the time it agreed to the Medicaid "contract," "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."[94]

Despite finding that coercion existed in this case, Chief Justice Roberts ended his opinion by refusing to state just where coercion would apply in future cases. As "[t]he Court in *Steward Machine* did not 'attempt to 'fix the outermost line' where persuasion gives way to coercion,' . . . It is enough for today that wherever that line may be, this statute is surely beyond it."[95]

86. *See id.* at 2605-06.
87. *See id.*
88. *Id.* at 2606.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id*. at 2602.
93. *Id.* (internal quotations omitted).
94. *Id.* at 2606.
95. *Id*.

B. The Joint Dissent: Restricting Federal Power

The Joint Dissent, joined by Justices Scalia, Kennedy, Thomas, and Alito (hereafter the "Joint Dissenters"), also found the Medicaid expansion coercive. The Joint Dissenters' differed from Chief Justice Roberts' opinion however, in that they did not frame the Medicaid expansion as an entirely new program, nor did they focus on the States' ability to foresee the change. The Joint Dissenters instead turned their attention to the coercive manner in which Congress structured the Medicaid expansion.

The Joint Dissenters viewed the coercion argument as a way for states to defend their sovereignty.[96] Because the federal government has far more bargaining power than states do, the federal government could exercise its economic might to force states to enact new laws.[97] The Joint Dissenters used the following example: If the federal government imposed a new, heavy nationwide tax, in order to fund a conditional spending grant program designed to take over secondary education, states could not realistically refuse to accept the program; the state is going to see a dramatic tax increase regardless if it implements the program or not, and if it refuses to implement the program, their citizens would receive no benefits from this tax increase.[98] Just because states would be free as a matter of law to turn down the funding does not mean that they realistically could do so.

In line with this hypothetical, the Joint Dissenters determined that the possibility of a state losing all its Medicaid funding was a dire prospect. The Joint Dissenters, like Chief Justice Roberts, again explained that the Medicaid expansion went well beyond *Dole*, where the loss was less than one percent of South Dakota's budget.[99] The Joint Dissenters noted that the Medicaid program's sheer size and the practical inability of a State to adequately replace it made the expansion "unlike anything we have seen in a prior spending-power case."[100]

But the Joint Dissenters placed their greatest emphasis on the Medicaid expansion's inherently coercive design. The Joint Dissenters wrote that the Medicaid expansion's stated goal is "near-universal health care coverage."[101] Pursuant to this goal, Congress "transform[ed] [Medicaid] from a program covering only members of a limited list of vulnerable

96. *See id.* at 2659 (joint dissent).
97. *See id.*
98. *See id.* at 2661-62.
99. *Id.* at 2664.
100. *Id.*
101. *Id.*

groups into a" universal healthcare program.[102] Achieving universal healthcare coverage could only happen if every state chose to participate in the Medicaid expansion. If any state chose not to participate, "there would be a gaping hole in the ACA's coverage."[103] The Joint Dissenters use this logic to conclude that, "if Congress had thought that States might actually refuse to go along with the expansion of Medicaid, Congress would surely have devised a backup scheme," something which the Medicaid expansion does not include.[104] In contrast, the other major reform of the PPACA—the "Health Benefit Exchanges"—allowed the federal government to implement and run an exchange in the state if the state chose not to implement the program.[105] "These features of the [Medicaid expansion] convey an unmistakable message: Congress never dreamed that any State would refuse to go along with the expansion of Medicaid. Congress well understood that refusal was not a practical option."[106]

C. Justice Ginsburg's Opinion: The Dole Approach

Justice Ginsburg's opinion, joined by Justice Sotomayor, strongly rejected the idea that the Medicaid expansion is coercive. Justice Ginsburg's opinion was reactive to the arguments in Chief Justice Roberts' opinion and the Joint Dissent. The opinion argued against coercion as a matter of policy. As a result, for this note, it is helpful mostly in framing some of the concerns that the coercion doctrine brings to constitutional law.

Justice Ginsburg found that the Medicaid expansion met the *Dole* conditional spending test, and thus the coercion argument should not have even been entertained.[107] In *Dole*, the federal government was attempting to pressure states into imposing a federally-approved drinking age, which the federal government arguably does not have the power to impose on its own, and the drinking age was arguably unrelated to the goals of the national highway program.[108] These issues are the reason, Justice Ginsburg argues, that the *Dole* Court was even willing to analyze the coercion argument in the first place.[109] The Medicaid expansion, in contrast, "relates solely to the federally funded program; if States choose not to comply, Congress has not threatened to withhold funds earmarked for any other

102. *Id.* at 2664-65.
103. *See id.* at 2665.
104. *Id.*
105. *See id.*
106. *Id.*
107. *See id.* at 2634 (Ginsburg, J., dissenting).
108. *See id.*
109. *See id.*

program. Nor does the ACA use Medicaid funding to induce States to take action Congress itself could not undertake."[110] Since this expansion would survive under *Dole*, Justice Ginsburg found that Chief Justice Roberts never should have considered the coercion analysis.[111]

Justice Ginsburg attacked Chief Justice Roberts' finding that the Medicaid expansion took states by surprise by transforming the program in a way the states could not have predicted in 1965.[112] The Medicaid Act expressly gave Congress the right to alter, amend, or repeal any provision, giving states clear notice of a change of this scope.[113] The Medicaid expansion, which does not take effect until 2014, clearly told states they must extend eligibility to adults with incomes below 133% of the federal poverty level.[114] The "contractual" terms of a conditional spending program should be viewed from the time states are to receive new funding, not when the states sign up for the program to receive funds in the first place.[115]

Finally, Justice Ginsburg ended by echoing Justice Cardozo's concerns in *Steward Machine*: "When future Spending Clause challenges arrive, as they likely will in the wake of today's decision, how will litigants and judges assess whether 'a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds?'"[116] In failing to set a line where financial inducement gives way to coercion, the Court has left litigants and judges with no guidance on how to determine if a State has a legitimate choice whether to accept the federal conditions in exchange for funds. "Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State's budget at stake? And which State's—or States'—budget is determinative[?]"[117]

110. *Id.*
111. *Id.* at 2634-35.
112. *See id.* at 2635-39.
113. *Id.* at 2636-38.
114. *See id.* at 2637.
115. *See id.* at 2638.
116. *Id*. at 2640.
117. *Id* at 2640-41. Justice Ginsburg ended her opinion by stating that the coercion doctrine is based in a flawed premise: that states are entitled to funds attached to voluntary conditional spending programs. *See id*. at 2641. This is arguably the strongest criticism of the "coercion" argument, as it effectively transforms expensive, voluntary conditional spending programs like Medicaid into an entitlement for states. As the purpose of this note is not to debate the merits of the coercion argument, however, Justice Ginsburg's criticism will not be explored further.

IV. THE HARM ANALYSIS

An ideal framework for identifying unconstitutional coercion encompasses as much of the policies in *NFIB*, as possible, while reducing the potential for differential treatment or arbitrary decision-making. To build this framework, I will first identify and answer the major questions left unanswered by NFIB, and then outline the major policies of the *NFIB* opinions. These analyses lay the groundwork for the framework I will then propose, which I call the "Harm" analysis.

A. Outstanding Questions After NFIB

Three outstanding questions are pivotal in developing a framework for future coercion cases: First, what is the status of the *Dole* conditional spending test after *NFIB*? Second, does the economic impact of the challenged program determine if the program is coercive? Third, what is the significance of Chief Justice Roberts' "separate program" analysis?

1. Does *Dole* have a role after *NFIB?*

Though "*Dole* has long been the definitive test for determining whether conditions placed on federal spending are constitutional,"[118] the test has been criticized as toothless, conceptually inconsistent with other federalism doctrines, and too deferential to Congress.[119] At the District Court level, Judge Roger Vinson even suggested that the Supreme Court reconsider its Spending Power precedent in light of *Dole*'s inadequacy.[120] The States' petition for cert did not even raise the issue of the *Dole* test,[121] and only Justice Ginsburg's opinion explicitly analyzed *Dole* as it relates to the Medicaid expansion.[122]

Chief Justice Roberts did not ignore *Dole*, however. The *Dole* court, the Chief Justice found, conducted its coercion analysis after it found that the drinking age condition on the highway funding was not a restriction on how funds were to be used, and was therefore a tool for Congress to enact

118. Huberfeld, *supra* note 5, at 50.

119. *See generally* 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 (2003).

120. Fla. *ex rel.* Bondi v. U.S. Dep't of Health and Human Servs., 780 F. Supp. 2d 1256, 1269 (N.D. Fla. 2011), *aff'd in part*, *rev'd in part sub nom*. Fla. *ex rel.* Attorney Gen. v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235 (11th Cir. 2011), *aff'd in part*, *rev'd in part sub nom*. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 U.S. 2566 (2012).

121. *See* Petition for Writ of Certiorari, Fla. *ex. rel.* Attorney Gen, *supra* note 65.

122. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 U.S. 2566, 2634-35 (2012).

policy changes in the state.[123] In *NFIB*, Chief Justice Roberts similarly determined that the condition attached to the Medicaid expansion—revoking all of a state's Medicaid funding if it did not implement the expansion—was used to pressure the states into enacting policy changes, not to govern the use of Medicaid funds.[124] Chief Justice Roberts then began his analysis of whether this pressure passes the point to where it turns into compulsion.[125] Had Chief Justice Roberts determined that the conditions attached to the Medicaid expansion acted only to govern the use of Medicaid funding, the *Dole* test suggests he could have avoided the coercion argument completely. Because the Chief Justice arguably considered *Dole* in reaching his opinion, this suggests that the *Dole* analysis has not been rendered moot by *NFIB*.

Dole should also continue to play a role in coercion cases for consistency and precedential purposes. *Dole*, at its heart, is largely a restatement of federalism-based limits that the Supreme Court has placed on conconditional spending grants throughout history. *Dole* protects both state sovereignty and Congress' broad spending power by requiring that spending be in the general welfare, that states be given clear notice to the conditions, that the conditions be related to a national interest, and that the conditions be constitutional. *Dole* also gives clear standards for Congress, states, and courts to follow in making at least an initial determination of whether such grants are legal. And while *Dole* is extremely deferential to Congress, this is not necessarily a fault of the test—courts have always been highly deferential to Congress' spending power.[126]

2. Does the economic impact of the program determine coercion?

Both Chief Justice Roberts and the Joint Dissenters go into detail about the Medicaid expansion's size, and the substantial burden states would face if federal funding were revoked. This attention to the Medicaid expansion's economic impact could reasonably lead one to believe this aspect is determinative in a coercion analysis. But finding coercion based solely on economic factors is sure to lead to Justice Cardozo's "endless difficulties," as economic analyses have few clear guidelines.[127]

123. *See id.* at 2604. Justice Ginsburg likewise concluded that *Dole* only considered the coercion argument after finding that the conditions were unrelated to the highway program and not a restriction on how funds were to be used. *Id.* at 2634.

124. *See id.* at 2604; *see also* Huberfeld, *supra* note 5, at 50-60 (examining if and how Chief Justice Roberts and the Joint Dissent applied the *Dole* test).

125. *See NFIB*, 132 U.S. at 2604.

126. *See generally* Edwin Chemerinsky, *Protecting The Spending Power*, 4 CHAP. L. REV. 89, 90-97 (2001) (discussing why Congress should continue to enjoy broad spending powers).

127. Chas. C. Steward Mach. Co. v. Davis, 301 U.S. at 589-90.

Chief Justice Roberts listed a number of statistics showing the economic impact that Medicaid has on states: Medicaid accounts for 20 percent of an average states total budget, with federal funds covering 50% to 83% percent of those costs; the federal government will pay out approximately $3.3 trillion between 2010 and 2019 simply to cover pre-expansion Medicaid; and States have intricate statutory and administrative regimes for Pre-existing Medicaid.[128] Chief Justice Roberts contrasted this data with *Dole*: Whereas all South Dakota stood to lose was less than half of one percent of its budget, an average state rejecting the Medicaid expansion stood to lose over ten percent of its budget.[129] The Joint Dissent made a very similar argument: Medicaid is by far the largest federal grant to states and state expenditure program.[130] The Joint Dissent noted that it is unrealistic for states to raise their own revenue to replace the program, using Arizona as an example, where federal Medicaid grants make up one third of that State's budget.[131]

Neither of these opinions, however, clearly state just why these factors, nor if only these factors, are the reason the Medicaid expansion was coercive. If coercion is based solely on the economic impact of a program, courts will determine whether future conditional spending clause cases are closer to *Dole*'s one half of one percent of state funding or *NFIB*'s ten percent of an average state's overall budget, since no current program even remotely reaches Medicaid's cost level. Are courts supposed to take into account the distinct economic natures of each state? The grant's impact on each state? The grant's impact on the nation as a whole, even on states not joined in the suit? In addition, how should courts determine whether a program is sufficiently "entrenched" in a state?[132] The amount of state workers working in the program? The number of residents participating? The impact the program has on other state institutions? Such questions are nearly impossible to answer in the abstract, and help explain why both Chief Justice Roberts and the Joint Dissenters might have refused to draw a line in determining where coercion occurs.

128. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 U.S. 2566, 2604 (2012).
129. *Id.* at 2604-05.
130. *See id.* at 2663 (joint dissent).
131. *See id.*
132. *Id.* at 2605 (Roberts, C.J., majority for Medicaid Expansion).

3. What is the significance of Chief Justice Roberts' "Separate Program" Analysis?

Chief Justice Robert's "separate program" analysis is a critical part of his opinion. The Chief Justice declares that the Medicaid expansion is an entirely separate program from "traditional" Medicaid due to the many differences in coverage and funding in the expansion itself.[133] What is the relevance of this portion of the opinion? Professor Samuel Bagenstos makes a persuasive case for using the "separate program" analysis to find coercion, which he labels the "anti-leveraging principle": Congress cannot take a large, entrenched federal program that provides large amounts of funds to the states, and tell states that their continued participation is dependent on participation on a separate, independent program.[134] Under this analysis, when the Medicaid expansion became a separate and independent program from pre-existing Medicaid, Congress acted coercively by forcing states to implement this new program, or risk losing all funding for a separate, independent program.[135] This analysis seems to come close to how Chief Justice Roberts operated in *NFIB*. Upon finding the Medicaid expansion to be a new program, he held that it was coercive to leverage funding for traditional Medicaid upon implementing the new program.

Professor Bagenstos' "anti-leveraging principle" is a very persuasive method. However, it is not clear from the Chief Justice's opinion that coercion necessarily boils down to whether Congress has threatened funding for a separate program in order to coerce states into implementing a new program. If this were the case, why would the Chief Justice go into detail about what states could have foreseen when they entered into the Medicaid program? Why elaborate that conditional spending grant programs, like Medicaid, are viewed in the nature of a contract? If the Medicaid expansion was an entirely separate program from traditional Medicaid, it was irrelevant whether states could have foreseen Medicaid changing in such a dramatic manner. The coercion lies in leveraging funds for one program while implementing a separate program, not in states catching by surprise. While the anti-leveraging principle provides a clear coercion test, it does not answer why the separate program analysis was made in the first place.

Professor James Blumstein's "clear notice" analysis, on the other hand, provides a convincing answer as to why the "separate program" analysis mattered.[136] Professor Blumstein writes that Chief Justice Roberts,

133. *Id.* at 2605.
134. *See* Bagenstos, *supra* note 8, at 864-65.
135. *See id.* at 864-73.
136. *See* Blumstein, *supra* note 8, at 93.

in line with his contractual analysis, found that the federal government failed to put the states on clear notice of the nature, scope, and magnitude of their obligations when they originally signed up for the Medicaid program.[137] The contractual requirement of clear notice safeguards states against enforcing new terms and conditions when states could not anticipate them at contract formation.[138] Chief Justice Roberts' "separate program" finding was the remedy for this solution. As "clear notice" in contract formation suggests that states should be bound only by obligations they could have foreseen at the outset, the Medicaid expansion would be considered a new program given its dramatic differences from traditional Medicaid.[139]

Professor Blumstein's clear notice analysis properly recognizes that the Chief Justice's "separate program" analysis was part of a broader "contract" analysis. Chief Justice Roberts wrote that even though Congress has always reserved the right to alter, amend, or repeal the Medicaid statute, Congress did not have the power to surprise states with unforeseeable conditions.[140] The Medicaid expansion exceed Congress' power to legislate under the spending power by "surprising participating States with post-acceptance or 'retroactive' conditions . . . [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."[141]

B. Main Policies of the NFIB Majority

Justice Cardozo was correct in holding that "endless difficulties" would arise in a purely economic impact analysis. But by looking beyond the opinion's face, and into the opinion's policies, we can dig out of these difficulties.

First, neither the Chief Justice nor the Joint Dissent directly stated that the economic impact alone is the reason the Medicaid expansion was coercive. The economic factors were certainly important—referring to the expansion as a "gun to the head"[142] and "unlike anything we have ever seen"[143] make that clear. But both opinions emphasize that the expansion is not simply coercive merely because it was economically burdensome.

137. *See id.* at 94-99.
138. *Id*. at 98-99.
139. *See id*.
140. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 U.S. 2566, 2605-06 (2012).
141. *Id.* at 2606 (citation omitted).
142. *Id.* at 2604.
143. *Id.* at 2664.

Chief Justice Roberts' opinion placed special importance on viewing the Medicaid expansion in the nature of a contract. Chief Justice Roberts wrote "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[144] States could not have foreseen Medicaid being transformed into a "universal health insurance coverage"[145] program in 1965. Congress understood it was transforming the program by creating a new funding mechanism, coverage population, and level of coverage through the expansion.[146] Congress, the Chief Justice wrote, cannot surprise states 50 years into an agreement with such a dramatic change.[147] This unilateral and dramatic change in the contract, then, seems to be more important to the Chief Justice's opinion than purely economic factors. After all, the Chief Justice explained that Medicaid is already a tremendous burden on state budgets, and previous expansions comcompounded this burden. But the Chief Justice differentiated the Medicaid expansion from previous expansions not because it placed a greater economic burden on states, but because this particular Medicaid expansion changed the program in a way previous expansions did not.

The Joint Dissent placed special importance on the power of the federal government.[148] The Joint Dissent rejected the federal government's argument that coercion cannot exist if a State is free as a matter of law to reject the expansion, as such a holding would allow the federal government to exploit political realities of states and use its superior economic strength to take over traditional state activities via conditional spending grants.[149] The Joint Dissenters discuss the Medicaid program's structure, which they concluded Congress designed knowing that no state could realistically opt out.[150] The Joint Dissent found that the expansion's goal was universal coverage, and Congress' failure to provide a "back-up plan" indicated that they did not believe States had a realistic option but to accept the expansion.[151] This "structural" analysis seems more important to the Joint Dissenters than the economic analysis. In other words, the issue is not so much that the Medicaid expansion put more of an already outstanding burden on states; rather, the issue is that the states had no choice but to accept this burden.

144. *Id.* at 2605.
145. *Id.* at 2605-06.
146. *See id.* at 2606.
147. *See id.*
148. *See id.* at 2662 (joint dissent).
149. *See id.* at 2661-62.
150. *See id.* at 2664-65.
151. *See id.* at 2665.

Taking these policies into consideration, it appears that both the Chief Justice and the Joint Dissenters used the coercion argument to "level the playing field" between the federal government and states. The Chief Justice embraced coercion so that the federal government would no longer have the sole ability to surprise states with post-acceptance conditions. The Joint Dissenters embraced the coercion argument so that the federal government could not leverage its superior economic position to leave states no choice but to change their own laws.

C. Proposed Framework: The "Harm" Analysis

Taking into consideration the policies stated above, I propose the following framework, titled the "harm analysis," for conditional spending challenges: If the conditions attached to the program are both directly related to the program's goals, and restrict how the funds are to be used, the program is presumptively constitutional under *Dole*. If the conditions attached do not directly govern the use of the funds offered to a state, the challenger must next show that the federal government threatens to "harm" the states into compliance, either by showing that Congress has changed the program in such a way that was unforeseeable when the state entered into the program, or structured the program in such a way where states have no choice but to implement it. Finally, if there is harm, then the court must ask whether the totality of the circumstances, including the economic impact, reaches the point where coercion is present.

1. *Dole* Analysis

The first requirement of the Harm analysis asks if the conditions attached to funding are a restriction on how the funds are to be used. If conditions on a program are restrictions on how the programs funds are to be used, applying the coercion test is not necessary, as the program is presumptively within Congress' power to spend according to the general welfare.[152] This first prong of the analysis is labeled the "*Dole* analysis" because the *Dole* court, according to the Chief Justice, did not consider whether the highway funding condition was coercive until it found that the drinking age did not to govern the use of highway funding.[153] The "*Dole*

152. *See* Bagenstos, *supra* note 8, at 869. Professor Bagenstos has also suggested that the *Dole* test be seen as the "trigger" for a coercion analysis; emphasizing that it is met when a program acts to terminate other significant independent grants. *See id.* The "harm" analysis likewise includes a "*Dole* trigger," but presumes that coercive conditions can exist beyond simply threatening one program to pressure states into implementing another. *Id.*

153. *See NFIB*, 132 U.S. at 2604 (Roberts, C.J., majority for Medicaid Expansion).

analysis" therefore does not take into account the full *Dole* test, though it presumes that a conditional spending program will be applied to the *Dole* test.

2. Harm Analysis

The next step requires a party to show "harm" by showing that Congress changed the program in such a way that the state could not have foreseen when it entered into the program, or structured it in such a way where it gives the states no choice but to implement the program. It is likely that truly coercive legislation will have both types of harm, though showing significant portions of one type of harm alone is likely to satisfy this analysis.

a. Programmatic Harm

The first type of harm asks whether a program has been changed in a way that the state could not have reasonably expected. This is in line with Chief Justice Roberts' view of conditional spending grants in the nature of a contract.[154] To consider whether a program has changed in such a way that a state could not have foreseen it when it signed up, a court should, like Chief Justice Roberts did in *NFIB*, take into account objective factors, determining whether the expansion has changed the purpose or goals of the program; whether Congress has dramatically expanded the scope of the program; whether the states obligations will change; and whether the statute that Congress first enacted gave adequate notice that an expansion of this type will occur.[155]

b. Structural Harm

The second type of harm exists where Congress structures a program in such a way to force states to implement the program and it can apply in every coercion challenge. In this analysis, the penultimate question is whether Congress has structured the program in such a way as to force states choice to implement the program. To find this, courts should analyze whether Congress has required states to either change their own laws or face a funding cut or tax increase, or whether Congress has included a backup option or alternative to prevent a state from being forced to act against its will. Though a thorough economic analysis is not proper at this stage of the analysis, the court should also consider whether Congress has

154. *See id.* at 2602.
155. *See id.* at 2605-06.

structured the statute in such a way where the state will lose funding by failing to implement the program. This analysis should also take into consideration how "entrenched" a program is in the state, i.e. the impact that accepting or rejecting the program would have on citizens and state and private agencies.[156] While conditions are likely to change with most every conditional spending program at one point or another, and oftentimes in ways states likely could not have foreseen at the outset, this "surprise" is almost certainly not coercive if it affects, say, a relatively insignificant grant program, as compared to a significant portion of that state's citizens and budget as in Medicaid.

3. Totality of the Circumstances

Finally, once harm is shown, the court must determine whether the totality of the circumstances, including the economic impact of the program, constitutes coercion. I propose that the economic analysis act as a way for the federal government to rebut the presumption of coercion. Should a state show that *Dole* is inapplicable and that harm existed, then a program is presumptively coercive. But the federal government can argue that the economic impact is slight enough to where the state ultimately retained its decision-making ability. "Economic impact" should be analyzed from multiple angles: The total dollar loss a state faces, the percentage of a state's budget lost; the ability for a state to replace the program or handle its loss; the impact of the program on the state's citizens, institutions, and economy; the size of a program, and any other financial impact the program might have.

The facts of *Dole* provide for a good hypothetical of this part of the analysis. The drinking age condition acted as a way for the federal government to pressure states into changing their laws, not as a restriction on how states were to spend highway funding.[157] And the statute removed this funding from any state that had yet to set their drinking age to 21, leaving the state with no options besides changing their laws or facing a penalty. Thus it was thus structured in a way to leave a state no real choice but to implement the program.[158] At this point of the analysis, the statute in *Dole* was presumably coercive, but the federal government was able to rebut this presumption by showing the extremely slight economic impact, namely less than five percent of the state's highway funding.[159]

156. *See id.* at 2604.
157. South Dakota v. Dole, 483 U.S. 203, 209-10 (1987).
158. *Id.*
159. *Id.* at 210-11.

4. Defending the harm analysis

A brief explanation of why the harm analysis is structured in this manner is in order. The consistency and legitimacy of future coercion cases will almost certainly be increased if rested, at least in part, on showing objective harm done to states in the way Congress structured or changed the program. Courts would no longer have to begin and end their analysis on whether the economic impact of a program is coercive, relying on the paltry language in *NFIB*. Instead, the analysis will focus on substantive issues such as the language of the statute, the details of the federal-state relationship, how the program impacts federal and state governments, and what the expectations of the states were when they signed up for the program. While these concepts are hardly simple, they are less subjective than the economic analyses of *Dole* or *NFIB*.

Beginning with the *Dole* analysis allows for courts to make an initial determination of whether the challenged statute is clearly within Congress' spending power. If conditions attached to a grant are a restriction on how they are to be used, then the grant should be analyzed under the *Dole* conditional spending test, not coercion. Thus, a condition that simply revokes funding for not enacting policy changes—e.g. the highway funding in *Dole* or the ability to revoke Medicaid funding in *NFIB*—would fail this *Dole* analysis.

The two "harm" analyses, "programmatic" and "structural," recognize the two main concerns that the Chief Justice and the Joint Dissenters had in *NFIB*. The programmatic harm analysis draws largely from the Chief Justice's opinion, and the structural analysis largely from the Joint Dissent. There has been some discussion as to whether the Chief Justice's opinion and the Joint Dissent's opinion are actually two separate analyses, and if so, whether coercion cases will play out differently under each analysis.[160] It is true that the Chief Justice focused more on notice, whereas the Joint Dissent focused more on the design of the statute. But these analyses largely compliment and overlap one another. For example, a program will almost certainly not be coercive if Congress has surprised the state with dramatically different conditions, but the state is free to back out of the program without incurring any loss. Likewise, a program is almost certainly not coercive if Congress has structured the program's conditions in a manner where a state has little choice but to implement the new program, but the changes were reasonably foreseeable or expected when the state

160. *See, e.g.*, Pasachoff, *supra* note 75, at 595 (finding that the Chief Justice focused on separate programs, notice, and economic dragooning to see whether coercion existed; whereas the Joint Dissent's coercion analyses focused nearly entirely on "economic dragooning").

entered into the program. Coercion thus will likely arise only where there has been both programmatic and structural harm. Nor does a state necessarily have to suffer a significant level of both programmatic and structural harm. Arguably, the Medicaid expansion's structure—threatening to revoke all of a states Medicaid funding— was far more coercive to the states than the unexpected new conditions were.

Analyzing the economic impact of a program is a necessarily evil. Part IV discussed the inherent difficulty and arbitrary nature of the economic analysis. Despite these serious flaws, not including an economic analysis would result in a flawed coercion framework. First, *Dole*'s coercion analysis focused solely on the economic impact,[161] and both Chief Justice Roberts and the Joint Dissenters placed tremendous emphasis on it.[162] Ignoring the two main coercion opinions is not good policy. Second, it is hard to imagine any situation where a state had no choice but to implement a programmatic expansion because, and only because, it could not have foreseen the expansion or Congress designed the expansion to be difficult to turn down. States, being sovereigns, are free to reject the programs. But if there is a substantial economic impact, this dramatically increases the likelihood that states had their hands tied.

Finally, the "harm" analysis intentionally does not ask the court to consider any "separate program" analysis. Some commentators have identified the "separate program" factor as the key to future coercion analyses.[163] For example, Professor Eloise Pascahoff has developed a coercion analysis that first focuses on whether funding for a significant, independent grant is threatened.[164]

Alternatively, the harm analysis is premised on the idea that legislation can be coercive even if it does not terminate an independent grant. The harm analysis does not ignore the fact that terminating significant independent grants is coercive; in fact, any program that does so would be coercive under the harm analysis. But based on the policies and themes of the *NFIB* opinions, coercion can apply where there is lack of notice or structural harm, regardless of whether independent grants are at stake. Indeed, the Joint Dissent's hypothetical of levying a heavy tax on states to pay for a secondary education program is an instance where no independent grants are terminated, but coercion arguably exists.[165]

161. *Dole*, 483 U.S. at 211.
162. *See NFIB*, 132 U.S. at 2604, 2663.
163. *See* Bagenstos, *supra* note 8.
164. *See* Pasachoff, *supra* note 75, at 594.
165. *See NFIB*, 132 U.S. at 2662 (joint dissent).

V. HARM ANALYSIS IN ACTION: THE CLEAN AIR ACT

The Clean Air Act has been mentioned as a likely target for a coercion argument due to the structure of the program.[166] In fact, it already has been the target of a coercion challenge. Texas, along with other states, challenged the EPA's ability to require states to regulate greenhouse gases from motor vehicles, or face sanctions.[167] After *NFIB* was decided, Texas filed a notice of supplemental authority, arguing that the EPA's ability to take away funding or impose a construction ban on areas noncompliant with new regulations is coercive.[168] The D.C. Court of Appeals rejected this argument, holding that the Clean Air Act's conditions were "not at all comparable" to the "magnitude" of the Medicaid expansion.[169] While Clean Air Act's provisions have already been held non-coercive, Texas may well still appeal this case to the Supreme Court. In any event, the Clean Air Act is a good case study to analyze the harm analysis, given how its conditions act in a somewhat similar fashion to the Medicaid expansion.

A. The Clean Air Act

The current Clean Air Act was enacted in 1970, creating a state-federal program to combat pollution.[170] The Clean Air Act operates, in part, by the EPA promulgating minimum pollution standards, after which states create "state implementation plans" (or SIPS) that meet these standards.[171] In return, the states receive grants from the EPA paying up to sixty percent of the state's costs for their pollution control programs.[172] The EPA Administrator has discretion, should a state fail to submit a plan that meets EPA guidelines, to effectively prohibit highway funding in the state or prevent construction of any building that requires a pollution permit.[173] If however, a state has an EPA-designated "non-attainment" area where pollution is deemed especially troublesome, the sanctions become mandatory

166. *See* Brad Plumer, *How the Supreme Court's Health Care Ruling Could Weaken The Clean Air Act*, WONKBLOG, (July 27, 2012, 1:36 PM), www.washingtonpost.com/blogs/wonkblog/wp/2012/07/27/how-the-supreme-courts-health-care-ruling-could-weaken-the-clean-air-act/; *see also* Jonathan Adler, *Could the Health Care Decision Hobble the Clean Air Act?*, THE PERCOLATOR, http://perc.org/blog/could-health-care-decision-hobble-clean-air-act (last visited June 6, 2013).

167. *See* Brief for Petitioners, Texas v. EPA, 726 F.3d 180 (D.C. Cir. 2013) (No. 11-1037), 2013 WL 3836226.

168. *See* Hurley, *supra* note 10.

169. Texas v. EPA, 726 F.3d 180, 197 (D.C. Cir. 2013).

170. *History of the Clean Air Act*, EPA.GOV, www.epa.gov/oar/caa/caa_history.html (last updated February, 17, 2012).

171. *See* 42 U.S.C. § 7410 (2012).

172. 42 U.S.C. § 7405 (2012).

173. *See* 42 U.S.C. §§ 7410, 7509 (2012).

for that particular non-attainment area.[174] These sanctions are not permanent—the EPA can effectively take over pollution control in the state or non-compliant area by implementing a "federal implementation plan," and must do so within two years of noncompliance.[175]

Unlike Medicaid noncompliance, sanctions for C.A.A. noncompliance are frequent. From 1990 to 1997, the EPA imposed sanctions on fourteen occasions.[176] When the EPA determines a state is noncompliant, it must give that state a reasonable deadline in order to submit a plan.[177] Such was the case when the EPA, having recently received Supreme Court approval to regulate greenhouse gases emitted from motor vehicles,[178] promulgated new greenhouse gas guidelines that state SIPs must follow.[179] When several states failed to meet these guidelines, they were given three months to act before the EPA would implement its own federal implementation plan in the state.[180]

B. Harm Analysis In Action

I will apply the "harm" analysis to a simple yet still plausible Clean Air Act challenge: A state challenging the constitutionality of the Clean Air Act after facing EPA sanctions by failing to revise its SIP to comply with sweeping new EPA guidelines.

1. *Dole* Analysis

The first part of the Harm analysis asks whether the conditions are directly related to the purposes of the Clean Air Act, and whether the conditions place a restriction on how the funds are to be used. Threatening to revoke federal highway funding for program noncompliance appears, on its face, to be the exact same condition as *Dole*. The Clean Air Act may be even more coercive than *Dole*. As Jonathan Adler points out, the Clean Air Act's sanctions can revoke far more than just five percent of highway funding.[181] However, the *Dole* analysis first requires us to see if the conditions may be related to the program's goals, and not simply to compare the program to *Dole*'s highway funding. The Clean Air Act's stated purpose is "to

174. *See* 42 U.S.C. § 7509.
175. *See* 42 U.S.C. § 7410.
176. *See* McCarthy, *supra* note 11, at 3-4.
177. *See* 42 U.S.C. § 7410.
178. *See* Massachusetts v. EPA, 549 U.S. 497 (2007).
179. *See* Brief of Petitioners, *supra* note 167.
180. *See id.*
181. *See* Adler, *supra* note 166.

protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population"[182] A ban on highway construction may seem only tangentially related to accomplishing this goal. But the Clean Air Act's conditions are more specific than *Dole*'s bare funding reduction; non-compliant states may still spend highway funding on highway programs designed to improve safety or environmental standards.[183] In addition, as David Baake points out, the sanctions will generally only target certain non-attainment areas within a state, unlike *Dole*, where Congress targeted South Dakota as a whole for cuts to highway spending.[184] The highway funding condition under the Clean Air Act is therefore much closer to restricting funds for the purposes of the Clean Air Act, and further from simply being a policy tool to force states to make policy changes. On the other hand, Jonathan Adler points out that highway funding is a separate program entirely from the Clean Air Act, with Congress threatening the receipt of grants for one program on implementation of another program, not unlike conditioning traditional Medicaid funding on implementing the Medicaid expansion in *NFIB*.[185]

If a court were to apply an "anti-leveraging" analysis to a Clean Air Act coercion challenge, Adler's concern would play a very significant role. In the harm analysis, however, the fact that the Clean Air Act's sanctions affect funding for an independent program is largely something to take into consideration in determining whether the conditions are a restriction on how funds are to be used. The fact that the Clean Air Act's sanctions affect funding for an independent program goes towards the Clean Air Act failing the *Dole* analysis. However, given that the Clean Air Act's highway funding condition is much closer to achieving program goals than the bare funding reductions in *Dole* or *NFIB*, it is possible to make the argument that the conditions are simply a restriction on how funds are to be spent, meaning the Clean Air Act would not even reach prongs two and three of the harm analysis.

2. Harm Analysis

For the sake of argument, assume that the Clean Air Act's sanctions fail the *Dole* analysis. The Harm analysis, then, asks whether the states

182. 42 U.S.C. § 7401.

183. *See* 42 U.S.C. § 7509.

184. *See* David Baake, *Federalism in the Air: Is the Clean Air Act's "My Way or No Highway" Provision Constitutional After NFIB v. Sebelius*, 37 HARV. ENVTL. L. REV. ONLINE 1, 4-5 (2012).

185. *See* Adler, *supra* note 166.

could have foreseen the change in the program when they agreed to implement it, or alternatively, has Congress has styled the program in such a way that a state has no choice but to implement it.

The Clean Air Act has had a very different history than Medicaid. Whereas the states' Medicaid obligations have been repeatedly expanded by statute,[186] the Clean Air Act has only seen major statutory changes twice since its enactment.[187] The Environmental Protection Agency instead frequently changes the states' responsibilities under the Clean Air Act through new administrative guidelines and orders, some of which can be significant, such as when greenhouse gases from motor vehicles were required to be regulated for the first time in 2007.[188]

But this is not necessarily a violation of the Chief Justice Roberts' "contract" theory of conditional spending grants. States were aware when they signed up for the "contract" that the EPA would frequently issue new standards, and that the states would have to adjust their SIPS accordingly.[189] The EPA's new greenhouse gas requirements did not dramatically change what the program covered or how it would be operated, and was the latest in a long line of new pollution standards, which are expected to change. In contrast, the Medicaid expansion dramatically changed the coverage population and funding mechanism in a way that was not expected in 1965.[190] Put another way, states had "clear notice" that greenhouse gases from motor vehicles were a pollutant in 1970, and theoretically within reach of the Clean Air Act's regulations; states did not have "clear notice" that Medicaid would expand beyond certain classes of "deserving poor" in 1965.[191]

The Clean Air Act also does not appear to be the same sort of "structural" harm that the Joint Dissenters saw in the Medicaid expansion. Most significantly, the Clean Air Act has a backup plan: states can simply choose not to act, and petition the federal government to implement a federal implementation plan within the state.[192] This backup plan gives states an alternative between implementation and harm, something that the Joint Dissenters placed tremendous emphasis on.[193] There are other structural mechanisms in place that make the Clean Air Act less coercive than the

186. *See* Huberfeld, *supra* note 5, at 21-23.
187. *See History of the Clean Air Act*, *supra* note 170.
188. *See* Massachusetts v. EPA, 549 U.S. 497, 497 (2007).
189. *See* 42 U.S.C. § 7410 (2012).
190. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 U.S. 2566, 2606 (2012).
191. *See* Blumstein, *supra* note 8, at 96-98.
192. *See* Baake, *supra* note 184, at 6-7.
193. *See NFIB*, 132 U.S. at 2665 (joint dissent).

Medicaid program. For example, the EPA, as a rule, must "take over" control from the state via a federal implementation plan whenever a state petitions the EPA to do so, which relieves a state of Clean Air Act sanctions.[194]

However, the Clean Air Act is much closer to being "structurally" harmful towards states with non-attainment areas. Whereas the EPA Administrator does not have to sanction a typical state, sanctions are mandatory for non-attainment areas.[195] While the EPA is required to promulgate a FIP within two years of non-compliance,[196] that is still two years that a state may have to live with a significant loss of highway funding. A state could rightfully fear for a lack of real choice between enacting new guidelines against its will or two years of harmful sanctions. Even though there remains a "backup plan," states still face tremendous pressure to enact a compliant SIP up front rather than face uncertain sanctions. This may well be an example of the federal government using its leverage on a state to get it to implement policies against its will.

3. Totality of the Circumstances

Assuming again that the court finds that Congress has structured the Clean Air Act in a way that harms states, we finally look to the totality of the circumstances to see if states are truly coerced into compliance with the Clean Air Act. As explained earlier, there is no easy way to do this, and it involves a variety of factors. A good starting spot is determining what funds are at stake. In 2010, the national appropriation to states for highway funding that would be affected by Clean Air Act sanctions was $33 billion.[197] However, if sanctions are placed in a non-attainment area, those sanctions apply *only* to the non-attainment area; i.e., a state would still be free to continue its highway program outside the area.[198] In addition, the sanctions are, by design, limited in duration. The sanctions cannot go into effect until eighteen months after the EPA determines a SIP is in noncompliance. And the EPA is required to promulgate a FIP within 24 months of noncompliance.[199] By design, a state would not have to create an entirely new program or take full responsibility for its existing pollution programs, because the EPA would take them over. Taking these factors into account with the "harm" analysis, does the Clean Air Act rise to the level where a

194. *See* Baake, *supra* note 184, at 6-7.

195. *See* 42 U.S.C. § 7509 (2012).

196. *See* 42 U.S.C. § 7410 (2012).

197. Total highway funding appropriation in 2010 was $62 billion, of which all but $33 billion would not be affected by a Clean Air Act Sanction. *See* Baake, *supra* note 184, at 8.

198. *See* 42 U.S.C. § 7509.

199. 42 U.S.C. § 7410.

state truly is coerced into accepting its conditions? The funding at stake is far less than the twenty percent of an average state's budget at stake in the Medicaid expansion,[200] but more than the five percent of South Dakota's federal highway funding in *Dole*.[201] Unlike in *NFIB* or *Dole*, the effect is substantially limited both in a geographical and temporal sense—sanctions are limited to one area, for at most six months, until a federal implementation plan is put into place.[202] Like in *Dole*, and unlike in *NFIB*, the effect on the state's citizens and programs would be limited, as the federal government would take over responsibility. Indeed, the D.C. Circuit Court of Appeals held that this relatively limited impact made the Clean Air Act incomparable to the Medicaid expansion.[203] Thus, even if the Clean Air Act's conditions are meant mostly to pressure states, and even if the Clean Air Act is structured in a way to get states to comply, states ultimately retain the final decision-making authority, given the relatively meager impact that noncompliance would have.

CONCLUSION

NFIB has created to two separate Medicaid systems in this country. As of this writing, twenty-six states and the District of Columbia have announced their intentions to implement the Medicaid expansion, while thirteen states have announced plans to reject the expansion.[204] This outcome was not the intent of Congress in passing the PPACA and will almost certainly lead to numerous unintended consequences that will require further congressional action.[205] The revival of the coercion argument itself could, likewise, lead to unintended consequences if applied arbitrarily or in an inconsistent manner. If coercion remains a mystery wrapped up in an enigma, then it will ironically have a negative impact on federalism principles. Congress will no longer know how to properly promulgate or expand a program. States, if they decide they would rather not implement a politically popular program, could avoid citizen anger by arguing "coercion" in the courts regardless of how coercive the measure truly is. Citizens would

200. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 U.S. 2566, 2604-05 (2012).

201. South Dakota v. Dole, 483 U.S. 203, 205 (1987).

202. 42 U.S.C. § 7410 (2012).

203. Texas v. EPA, No. 10-1425, 2013 WL 3836226 at *15 (D.C. Cir. July 26, 2013).

204. *Where Each State Stands On ACA's Medicaid Expansion*, ADVISORY.COM (June 14, 2013), www.advisory.com/Daily-Briefing/2012/11/09/MedicaidMap (last visited July 25, 2013).

205. One example of such a consequence is the possibility of a 'coverage gap' for citizens in a non-expanding state, who make too much money to qualify for traditional Medicaid but not enough to qualify for federal subsidies through the Health Exchange program of the PPACA; *see* Jennifer Lubell, *Rejecting Medicaid Expansion Adds New Dimension To Poverty Line*, AMERICAN MED. NEWS (January 14, 2013), http://www.ama-assn.org/amednews/2013/01/14/gvl20114.htm.

not know where reward or blame lies. Perhaps most importantly, the citizens who benefit or suffer due to these conditional-spending programs would see their lives thrown into limbo based on flimsy doctrine.

Because all Americans have at least some stake in conditional spending programs, all Americans have a stake in developing a consistent, correct coercion reading in the post-*NFIB* challenges. Requiring an initial *Dole* analysis recognizes Congress' broad power under the Spending Clause, incorporates Chief Justice Roberts' analysis of whether the conditions restricted the use of the funding in line with the general welfare, and keeps decades of Supreme Court precedent intact. Requiring "harm," in the form of a breach of contract or structural takeover as the next step in the coercion analysis takes into account the policies underlying the *NFIB* opinion. Finally, looking to the totality of the circumstances, only if both *Dole* is inapplicable and harm is shown are the courts allowed to analyze more concrete arguments, ensuring the rudderless economic analysis does not become the sole basis for a holding. Incorporating Supreme Court precedent and policy into the *NFIB* analysis, and applying it in a manner that reduces the possibility for arbitrary decision-making, is a sound, pragmatic way to approach the coercion argument without wading into endless difficulties.