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NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. SEBELIUS: THE MISGUIDED APPLICATION AND PERPETUATION OF AN AMORPHOUS COERCION THEORY

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In *National Federation of Independent Business v. Sebelius* (*National Federation*),[1] the Supreme Court of the United States examined five issues that arose from challenges to the Patient Protection and Affordable Care Act.[2] The Court held that the individual mandate was a valid exercise of Congress's taxing powers but also concluded that the Medicaid expansion provision of the Act, which penalized nonparticipating states by eliminating their existing funding, was coercive and exceeded Congress's powers under the Spending Clause of the U.S. Constitution.[3] In finding the Medicaid expansion penalty provision unconstitutional, the Court abandoned the deference that had long been afforded to Congress in exercising its spending powers.[4] Moreover, the Court applied an amorphous coercion theory and left little guidance for evaluating coercion claims in the future.[5] Instead, the Court should have found that states had a real choice in whether to participate in the Medicaid expansion, and that where states have a real choice, there cannot be coercion.[6]

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

2. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code); *see also infra* Part I.

3. U.S. CONST. art. I, § 8, cl. 1; *see also infra* Part III.

4. *See infra* Part II.

5. *See infra* Part IV.

6. *See infra* Part IV.

I. THE CASE

In 2010, Congress enacted the Patient Protection and Affordable Care Act ("ACA")[7] to increase the number of Americans covered by health insurance and to decrease the cost of health care.[8] While the ACA is comprised of ten titles that contain hundreds of provisions, the two key provisions that were directly challenged in court were the individual mandate and the Medicaid expansion.[9]

The individual mandate seeks to reduce the number of uninsured U.S. residents as part of a broader set of regulations directed at reforming the health care system.[10] It requires most Americans to maintain "minimum essential" health insurance coverage.[11] Starting in 2014, those who do not comply with the individual mandate must make a "shared responsibility payment" to the federal government.[12] The ACA describes the shared responsibility payment as a penalty that would be paid to the Internal Revenue Service ("IRS") with an individual's taxes, and would be assessed and collected in the same manner as tax penalties.[13]

The Medicaid expansion increases the number of individuals states must cover.[14] The ACA requires state programs to provide Medicaid coverage to adults with incomes up to 133% of the federal poverty level.[15] The ACA increases federal funding to cover the expenses

7. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012) (citing Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code)).

8. *Id.*

9. *Id.*

10. *Id.* at 2613.

11. *Id.* at 2580 (citing I.R.C. § 5000A (2010)). The mandate contains exceptions for certain individuals, such as prisoners, undocumented aliens, and people with incomes below a specified level. *Id.* Individuals who are not exempt and do not receive insurance through their employers or government programs are required to purchase private insurance. *Id.* Plans and programs that qualify as minimum essential coverage are delineated in I.R.C. § 5000A(f) (2010).

12. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2580 (citing I.R.C. § 5000A(b)(1)). The payment is calculated as a percentage of household income subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance. *Id.*

13. *Id.* at 2571. The ACA bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. *Id.* at 2580.

14. *Id.* at 2581. The Medicaid program was enacted in 1965 and provides federal funding to states to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. *Id.* To receive Medicaid funding, states must comply with certain federal criteria about who receives care and what services are provided. *Id.* (citing 42 U.S.C. § 1396a(a)(10) (2006)).

15. *Id.* at 2582. Medicaid is a joint federal and state program that helps with medical costs for some people with limited resources and income. *Medicaid,* MEDICARE.GOV,

of expanding Medicaid, though states will eventually bear a portion of the costs.[16] Under the ACA, if a state does not comply with the new coverage requirements, it may lose all of its federal Medicaid funds.[17]

President Barack Obama signed the ACA on March 23, 2010.[18] Shortly after, twenty-six states,[19] several private individuals, and the National Federation of Independent Business brought an action in the United States District Court for the Northern District of Florida against the U.S. Department of Health and Human Services ("HHS"), the U.S. Department of the Treasury ("DOT"), the U.S. Department of Labor ("DOL"), and their respective secretaries (collectively "the government").[20] The plaintiffs challenged the individual mandate and Medicaid expansion provisions of the ACA, arguing that the individual mandate violated the Commerce Clause of the Constitution,[21] and that the expansion of Medicaid violated the Spending Clause.[22] The district court granted summary judgment in favor of the government on the plaintiffs' Medicaid expansion claim.[23] The district court found that the Medicaid expansion did not violate the Spending

http://www.medicare.gov/your-medicare-costs/help-paying-costs/medicaid/medicaid.html (last visited Apr. 22, 2013). Each state may have its own qualification criteria in addition to the federal requirements. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2582.

16. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2582 (citing 42 U.S.C. § 1396d(y)(1)). The ACA provides that the federal government will pay 100 percent of the costs of covering these newly eligible individuals through 2016. *Id.* After 2016, the federal payment level gradually decreases to a minimum of ninety percent. *Id.*

17. *Id.* (citing 42 U.S.C. § 1396(c), *invalidated by Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566 (2012)).

18. Sheryl Gay Stolberg and Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES (Mar. 23, 2010), *available at* http://www.nytimes.com/2010/03/24/health/policy/24health.html?_r=0.

19. The twenty-six states are: Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1263 n.1 (N.D. Fla.), *aff'd in part, rev'd in part sub nom.* Florida *ex rel.* Atty. Gen. v. U.S. Dep't of Health & 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 S. Ct. 2566 (2012).

20. *Id.* at 1263.

21. U.S. CONST. art. I, § 8, cl. 3.

22. *Bondi*, 780 F. Supp. 2d at 1265.

23. *Id.* at 1270. The district court reasoned that the Medicaid program has always been voluntary and thus states could not be coerced into participating. *Id.* at 1267. "When the freedom to 'opt out' of the program is viewed in light of the fact that Congress has expressly reserved the right to alter or amend the Medicaid program . . . and has done so many times over the years, . . . the plaintiffs' argument was not strong." *Id.* at 1268 (citation omitted). The court found that there was very little support for the coercion argument "as every single federal Court of Appeals called upon to consider the issue has rejected the coercion theory as a viable claim." *Id.*

Clause, and that a spending condition cannot be coercive and violate the Tenth Amendment.[24] Further, the district court held that Congress did not have the constitutional power to enact the individual mandate, and that the mandate could not be severed from the rest of the ACA.[25] Ultimately, the district court struck down the ACA in its entirety.[26]

The government appealed the district court's ruling, and the plaintiffs cross-appealed the district court's summary judgment ruling on their Medicaid expansion claim.[27] The United States Court of Appeals for the Eleventh Circuit affirmed the district court's holding that the individual mandate exceeded Congress's power under the Commerce Clause.[28] The government, however, argued in the alternative that the individual mandate was enacted validly as a tax under the Spending Clause.[29] The Eleventh Circuit disagreed, concluding that the individual mandate did not impose a tax and could not be authorized by Congress's power to "Lay and collect Taxes."[30] Unlike the district court, however, the Eleventh Circuit held that the individual mandate was severable from the rest of the ACA, and it left the remaining provisions intact.[31] With respect to the Medicaid expansion claim, the Eleventh Circuit unanimously held that the expansion of Medicaid was a valid exercise of Congress's power under the Spending Clause.[32] The Eleventh Circuit further held that the Medicaid expansion did not coerce states into compliance and thus did not

24. *Id.* at 1266.

25. *Id.* at 1305. The district court reasoned that the individual mandate was unconstitutional because the failure to purchase health insurance is "inactivity" and that the Commerce Clause can only reach individuals and entities engaged in an "activity." *Id.* at 1270.

26. *Id.* at 1305–06.

27. *See* Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & 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 S. Ct. 2566 (2012) (appealing the district court's decision in *Bondi*).

28. *Id.* at 1282, 1311.

29. *Id.* at 1313.

30. *Id.* at 1313–14 (quoting U.S. CONST. art. I, § 8, cl. 1) (internal quotation marks omitted).

31. *Id.* at 1327–28. Other federal courts of appeals also heard challenges to the individual mandate. *See, e.g.*, Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011); Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011); Liberty Univ., Inc. v. Geithner, 671 F.3d 391 (4th Cir. 2011). The courts of appeals upheld the mandate as a valid exercise of Congress's commerce power. *Thomas More Law Ctr.*, 651 F.3d at 534; *Seven-Sky*, 661 F.3d at 4–5. The Fourth Circuit reasoned that the individual mandate's penalty is a tax within the meaning of the Anti-Injunction Act and therefore that the individual mandate could not be challenged until after the penalty had been paid. *Liberty Univ., Inc.*, 671 F.3d at 397–98.

32. *Florida ex rel. Att'y Gen.*, 648 F.3d at 1262.

violate the Tenth Amendment[33] The Supreme Court granted certiorari to review the judgment of the Eleventh Circuit with regard to the individual mandate and Medicaid expansion.[34] Additionally, the Court determined that there were two other arguments that warranted evaluation that had not been asserted by either party. Thus, the Court appointed amicus curiae to argue that: (1) the Anti-Injunction Act, which prohibits suits involving the collection of taxes from being heard before the tax is assessed, prevented the challenges to the individual mandate from being heard; and (2) the individual mandate could be severed from the Act.[35]

II. LEGAL BACKGROUND

The Supreme Court has long recognized Congress's power under the Spending Clause to condition the receipt of federal funds by the states.[36] The power to encourage states to take specific actions is limited by certain criteria.[37] In addition to the defined criteria, the Supreme Court has also recognized the coercion theory as a limit to Congress's spending power.[38] The coercion theory has been discussed twice in the Supreme Court related to spending power cases.[39] In each case, the Court recognized a possibility that Congress might one day cross a line where states no longer have an actual choice but to participate in a particular program.[40] There is limited case law that

33. *Id.* at 1267. The Eleventh Circuit noted, "[i]f anything can be said of the coercion doctrine in the Spending Clause context, however, it is that it is an amorphous one, honest in theory but complicated in application." *Id.* at 1266. The Eleventh Circuit reasoned that the Medicaid expansion was not unduly coercive for four reasons. *Id.* at 1267–68. First, the states had warning that Congress could amend or alter the program; second, the federal government would cover almost all of the costs associated with the expansion; third, states had plenty of notice about the changes; and lastly, states have the choice to not participate in the program. *Id.* Further, the court noted that the Medicaid Act gives HHS the discretion to withhold all or merely a portion of funding from a noncompliant state, not guaranteeing that a state would lose all of its funding. *Id.* at 1268.

34. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2582 (2012).

35. *Id.*

36. *See, e.g.*, New York v. United States, 505 U.S. 144, 158 (1992) (noting the Supreme Court's broad construction of Congress's power under the Spending Clause); *see infra* Part II.A.

37. *See infra* Part II.A.2.

38. *See infra* Part II.A.1.

39. *See infra* Part II.A.1–2.

40. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 211 (1987) (indicating that there are circumstances that would prohibit Congress from offering financial inducements that would convert "pressure" to "compulsion"). The Court did not discuss what circumstances might cause legislation to be coercive; rather, it noted that the spending power is not unlimited and in the future there may be situations that require looking at coercion. *Id.*

has applied the coercion doctrine. Prior to the Supreme Court decision in *National Federation,* the Supreme Court had never ruled that the terms of any grant program crossed the line between encouragement and coercion.[41] Other federal courts have recognized the existence of the coercion theory, but have interpreted it and applied it in different ways.[42]

Part II.A discusses the Spending Clause and the criteria established to evaluate the use of Congress's spending powers. It also discusses the limited development and application of the coercion theory in the Supreme Court. Part II.B discusses the inconsistent interpretation and application of the coercion theory by federal appellate courts. First, it examines federal appellate courts that avoided applying the coercion theory after it was introduced in *Steward Machine Company v. Davis*.[43] Second, it examines federal appellate courts that hesitated to recognize the coercion theory as valid and were reluctant to find coercion after *South Dakota v. Dole*,[44] even when an increasing amount of federal funds were at stake.[45] Finally, it examines the reluctance of federal appellate courts to apply the coercion theory in instances where a state could lose all or part of its Medicaid funds.[46]

A. The Spending Clause Criteria and the Supreme Court's Limited Development of the Coercion Theory

Congress's power under the Spending Clause enables it to encourage states to take certain actions that it could not otherwise require them to take.[47] Thus, the Spending Clause allows Congress some influence over states' policy choices.[48] The power to encourage states to take certain actions is not unlimited; the Supreme Court has previously established four criteria that must be satisfied to trigger judicial deference to Congress's use of conditional grants.[49] In addition to the four criteria, the Supreme Court has at times recognized the coercion theory as an additional consideration for spending power limitations.[50] The theory is that the proposed legislation cannot be so

41. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2634.

42. *See infra* Part II.B.

43. 301 U.S. 548 (1937); *see infra* Part II.B.1.

44. 483 U.S. 203 (1987).

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

46. *See infra* Part II.B.3.

47. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 668 (1999).

48. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012).

49. *See infra* text accompanying notes 60–64.

50. *See infra* Parts II.A.1–2.

coercive as to force the participation of the states in a federal program.[51] The Court has never developed a test to apply the theory.[52]

1. Introduction of the Coercion Theory: Steward Machine Co. v. Davis

In *Steward Machine Co. v. Davis*,[53] a corporation challenged the imposition of an employment tax under the newly enacted Social Security Act ("SSA").[54] The corporation argued that the SSA improperly coerced states into participation in an unemployment compensation fund, violating the Tenth Amendment.[55] The Court held that the statute was within the spending powers of Congress.[56] The Court further held that the statute did not improperly coerce states into participation, distinguishing temptation and coercion:

> But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. . . . Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact.[57]

51. The Supreme Court has recognized that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" South Dakota v. Dole, 483 U.S. 203, 211 (1987) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 589 (1937)).

52. *See, e.g.*, Florida *ex rel.* Atty. Gen. v. U.S. Dep't of Health & 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, 132 S. Ct. 2566 (2012) ("The limited case law on the doctrine of coercion and the fact that the Supreme Court has never devised a test to apply it has left many circuits with the conclusion that the doctrine, twice recognized by the Supreme Court, is not a viable defense to Spending Clause legislation.").

53. 301 U.S. 548 (1937).

54. Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified at 42 U.S.C. §§ 301–1397mm (2006)); Steward Mach. Co., 301 U.S. at 578.

55. Steward Mach. Co., 301 U.S. at 585. The SSA established a federal payroll tax on employers but allowed employers to pay taxes to a state unemployment compensation fund and then credit those payments toward the federal tax. *Id.* at 574–76.

56. *Id.* at 585. In finding it a valid exercise of Congress's spending power, the Court reasoned that the SSA was enacted for the general welfare of the people, given the pervasive unemployment problems across the country. *Id.* at 586–87.

57. *Id.* at 589–90.

The Court declined to "fix the outermost line" at which inducement or persuasion goes beyond the bounds of power: "[F]or present purposes . . . wherever the line may be, this statute is within it."[58]

2. Development of Spending Clause Criteria: South Dakota v. Dole

In *South Dakota v. Dole*,[59] the State of South Dakota challenged Congress's spending powers exercised by a federal highway funding program, and the Supreme Court established the criteria for Congress's use of the spending powers for federal funding programs.[60] South Dakota challenged a statute that directed the Secretary of Transportation to withhold a percentage of federal highway funds if states failed to maintain a minimum drinking-age requirement of twenty-one years.[61] The Court held that the statute was a valid use of Congress's spending power, and identified four criteria to evaluate proper use of the Spending Clause.[62] First, the exercise of the spending power must be in pursuit of "the general welfare."[63] Second, the conditions placed on receipt of federal funds must be reasonably related to the legislation's stated goal.[64] Third, the intent to condition funds on a particular action must be unambiguous and must enable the states to exercise knowingly their choice to participate.[65] Finally, the legislation cannot induce the states to engage in activities that would be unconstitutional.[66]

The Court examined the claim that threatening to withhold highway funds coerced states into implementing the minimum drinking-age requirement and found that the statute was not coercive.[67] The Court recognized that there might be circumstances where the financial inducement offered by Congress could be considered coercive, but found that those circumstances were not present in South Dakota's case.[68] According to the Court, withholding five percent of federal funds for not complying with a legal drinking-age requirement amounted to a relatively mild encouragement, not coercion.[69]

58. *Id.* at 591.
59. 483 U.S. 203 (1987).
60. *Id.* at 203, 207.
61. *Id.* at 203.
62. *Id.* at 204, 207–08.
63. *Id.* at 207 (citing Helvering v. Davis, 301 U.S. 619, 639 (1937)).
64. *Id.* (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 16 (1981)).
65. *Id.*
66. *Id.* at 208.
67. *Id.* at 211.
68. *Id.*
69. *Id.*

The Court also noted that the ultimate success of a federal grant program in reaching its objective was not an indication of coercion.[70] The Court found that South Dakota still had the choice to accept or reject the funding, and thus, according to the Court, the coercion argument was "more rhetoric than fact."[71] In sum, while the Court recognized the coercion theory discussed in *Steward Machine Co.*, it declined to find any coercion present because of the relatively small amount of money at stake and the ability of states to choose whether to accept federal funding.[72]

B. Inconsistent Interpretation and Application of Coercion Theory by Federal Appellate Courts

The Supreme Court's discussion of the coercion theory in *Steward Machine Co.* and *Dole* did not establish guidelines for applying a coercion test.[73] As a result, some courts have made efforts to apply a coercion test, while others have been hesitant to recognize it as a valid theory.[74] No other court has used the coercion theory to invalidate a federal spending program.[75]

1. Many Federal Appellate Courts Avoided Applying Coercion Theory After Steward Machine Co. v. Davis

Following the decision in *Steward Machine Co.*, many federal appellate courts avoided applying the coercion theory when considering whether to invalidate a federal spending program that imposed specific requirements upon the states.[76] In *New Hampshire Department of*

70. *Id.*

71. *Id.*

72. *Id.*

73. The court did not discuss the point at which encouragement becomes coercion, or the circumstances of the legislation that should be examined. *See, e.g.*, Florida *ex rel.* Atty. Gen. v. U.S. Dep't of Health & 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, 132 S. Ct. 2566 (2012) (noting that "the Supreme Court has never devised a test to apply [the doctrine of coercion]").

74. *See infra* Parts II.B.1–2.

75. *Florida ex rel. Att'y Gen.*, 648 F.3d at 1266.

76. *See, e.g.*, N.H. Dep't of Emp't Sec. v. Marshall, 616 F.2d 240 (1st Cir. 1980) (deciding whether to invalidate a federal spending program on other grounds); Oklahoma v. Schweiker, 655 F.2d 401 (D.C. Cir. 1981) (same). Other courts have similarly declined to recognize the presence of coercion. *See* North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 532, 535 (E.D.N.C. 1977) ("[W]henever the condition attached by Congress to an appropriation grant available to States relates to a 'legitimately national' purpose, inducement or temptation to conform does not go beyond the bounds of the federal government's legitimate spending power and is not coercion in any constitutional sense. . . . Moreover, the 'coercive' effect of a termination of federal assistance on the plaintiff North

Employment Security v. Marshall,[77] for example, the United States Court of Appeals for the First Circuit examined whether the New Hampshire Unemployment Compensation Law failed to conform in six respects with the requirements of the Federal Unemployment Tax Act ("FUTA").[78] The State of New Hampshire argued that the FUTA, which gave states the option to receive tax credits up to ninety percent of the tax due if they conformed to federal law, itself was unconstitutional.[79]

New Hampshire argued that the ability of the state to refuse to participate in the program was illusory because the severe financial consequences that would follow such refusal would negate any real choice that the state might have.[80] The First Circuit rejected this argument, noting, "[W]e do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stakes that controls, but the rules of the game."[81] The court also noted that the basic design and mechanism of the FUTA had not changed since 1935, even though the coverage had been extended.[82]

A year later, the United States Court of Appeals for the District of Columbia Circuit heard an appeal from thirteen states challenging the constitutionality of a "pass-through" provision of the Supplemental Security Income Program of the Social Security Act ("SSI").[83] In *Oklahoma v. Schweiker*,[84] the states alleged that the "pass-through" provision was not a proper exercise of power under the Spending Clause, that it violated the Tenth Amendment, and that it was unduly coercive.[85] The D.C. Circuit declined to analyze whether the provision was coercive but noted:

Carolina seems quite unreal. The actual loss . . . would be less than fifty million dollars."); *see also* Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 526 (1937) ("It is unnecessary to repeat now those considerations which have led to our decision in [*Steward Machine Co.*], that the Social Security Act has no such coercive effect. As the Social Security Act is not coercive in its operation, the Unemployment Compensation Act cannot be set aside as an unconstitutional product of coercion.").

77. 616 F.2d 240 (1st Cir. 1980).

78. *Id.* at 241.

79. *Id.* at 241–43.

80. *Id.* at 246.

81. *Id.*

82. *Id.*

83. Oklahoma v. Schweiker, 655 F.2d 401, 401, 404 (D.C. Cir. 1981). Under the "pass-through" provision, states are required to maintain certain levels of state payments to the SSI program as a condition of receiving federal Medicaid funds. *Id.* at 404.

84. 655 F.2d 401 (D.C. Cir. 1981).

85. *Id.* at 403.

> The Supreme Court admonished in *Steward Machine Co.* that courts should attempt to avoid becoming entangled in ascertaining the point at which federal inducement to comply with a condition becomes compulsion. . . . The courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely a hard choice. . . . We therefore follow the lead of other courts that have explicitly declined to enter this thicket when similar funding conditions have been at issue.[86]

The D.C. Circuit held that the provision was a valid use of Congress's spending powers because it was reasonably related to the general welfare.[87] The Court further held that the provision did not violate the Tenth Amendment because states could choose either to conform to the requirements or forgo federal funds.[88]

2. *After* Dole*, Federal Appellate Courts Declined to Find Coercion in the Face of Increasing Amounts of Federal Funds at Stake, While Simultaneously Discounting the Coercion Theory*

In *Dole*, the Supreme Court did not place a limit on the percentage of funding that would amount to coercion and instead found that five percent was within the unspecified limit.[89] It specified no boundaries for how much withheld funding might be coercive. Thus, some circuit courts that attempted to follow *Dole* questioned the applicability of the coercion theory and deferred to Congress's power under the Spending Clause.

For example, in *Nevada v. Skinner*,[90] the State of Nevada relied on the Spending Clause to challenge the constitutionality of a national speed limit.[91] The state alleged that the Emergency Highway Energy Conservation Act,[92] which required states to post a maximum speed limit of fifty-five miles per hour on all highways as a precondition to receiving federal funds, left the state no real choice but to comply, violating the coercion limitation on Congress's spending power.[93] If Nevada refused to comply, it would lose ninety-five percent of its

86. *Id.* at 413–14.
87. *Id.* at 411.
88. *Id.* at 411–12.
89. South Dakota v. Dole, 483 U.S. 203, 211 (1987).
90. 884 F.2d 445 (9th Cir. 1989).
91. *Id.* at 446.
92. Pub. L. No. 93-239, 87 Stat. 1046 (1974).
93. *Skinner*, 884 F.2d at 446.

highway funds.[94] The United States Court of Appeals for the Ninth Circuit recognized the coercion theory, but noted that it was infrequently applied and never applied in favor of the challenging party.[95] Declining to engage in a detailed analysis, the court stated that "[t]he difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments."[96] The Ninth Circuit ultimately determined that the coercion theory was not important in the case because imposing a national speed limit would be a valid exercise of the Commerce Clause, and thus the lesser restraint of losing federal funds for failure to comply with the highway safety statute was permissible.[97]

Similarly, in *Kansas v. United States*,[98] the state, relying on the coercion theory, challenged conditions imposed under the Personal Responsibility and Work Opportunity Reconciliation Act[99] ("PRWORA").[100] Also known as "welfare reform,"[101] PRWORA comprehensively changed to how states address low-income households,[102] requiring states to reach certain goals or adhere to certain guidelines before receiving federal funds.[103] Kansas claimed that parts of the amended program requirements were too onerous and expensive, and because $130 million in federal funds were at stake, Kansas also argued that it was being coerced into implementing the program requirements.[104] In examining the coercion claim, the United States Court of Appeals for the Tenth Circuit noted that "[t]he boundary between incentive and coercion has never been made clear, and courts have found no coercion in situations where similarly large amounts of federal money were at stake."[105] According to the Tenth

94. *Id.*

95. *Id.* at 448.

96. *Id.*

97. *Id.* at 454.

98. 214 F.3d 1196 (10th Cir. 2000).

99. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended primarily in scattered sections of 42 U.S.C.).

100. *Kansas*, 214 F.3d at 1197–98.

101. *Id.* at 1197.

102. *Id.*

103. If a state wants a federal block grant for child support services, for example, PRWORA requires the state to enact laws for genetic testing to establish paternity, and laws that authorize "state child support agencies to take expedited enforcement action against non-paying noncustodial parents." *Id.* at 1198; *see also* 42 U.S.C. § 666(a)(5) & (c) (2006) (outlining certain requirements for federal funding).

104. *Kansas*, 214 F.3d at 1198. Specifically, Kansas asserted that the coercion violated the Spending Clause and the Tenth Amendment. *Id.*

105. *Id.* at 1202.

Circuit, "the coercion theory is unclear, suspect, and has little precedent to support its application."[106] Ultimately, the court held that the requirements contained in parts of the PRWORA were not impermissibly coercive.[107]

The coercion theory appeared again in *Jim C. v. United States*,[108] where two parents sued the Arkansas Department of Education alleging violations of section 504 of the Rehabilitation Act,[109] part of which prohibits any program or activity that receives federal funding from discriminating against a qualified individual with a disability.[110] The government argued that the waiver requirement of section 504 exceeded Congress's spending power "by placing overly broad and . . . coercive conditions on federal funds."[111] The Eight Circuit noted that "[t]he sacrifice of all federal education funds, approximately $250 million or 12 per cent. [sic] of the annual state education budget . . . would be politically painful, but [the court could not] say that it compels Arkansas's choice."[112] The Eight Circuit held that the waiver requirement was a valid use of Congress's spending powers and found no coercive interference because the state could avoid the requirements by declining federal education funds.[113] Thus, despite the substantial amount of funding at stake, the Eighth Circuit followed the trend of other federal appellate courts and rejected the coercion claim.

106. *Id.*

107. *Id.*

108. 235 F.3d 1079 (8th Cir. 2000).

109. 29 U.S.C. § 794 (2006).

110. *Jim C.*, 235 F.3d at 1080. The defendant moved to dismiss the case by asserting sovereign immunity under the Eleventh Amendment. *Id.* The Eighth Circuit held that section 504 was a valid exercise of Congress's spending power, and that Arkansas waived its immunity for section 504 suits by accepting federal funding. *Id.*

111. *Id.* at 1081.

112. *Id.* at 1082.

113. *Id.* In *Pace v. Bogalusa City*, 403 F.3d 272 (5th Cir. 2005), the Fifth Circuit considered a similar challenge to the validity of a waiver of the state's Eleventh Amendment immunity to section 504 claims. The court declined to recognize coercion in the case, noting that a state can prevent suits by refusing the federal funds. *Id.* at 287. The court also reasoned that because states have the independent power to lay and collect taxes, they retain the ability to avoid the imposition of unwanted federal regulation simply by rejecting federal funds. *Id.* at 278.

3. Federal Appellate Courts Were Equally Reluctant to Apply the Coercion Theory in the Face of States Losing All or Part of Medicaid Funds

Several cases have discussed the coercion theory in the context of a state at risk of losing all or part of its Medicaid funds. In those cases, the state was often concerned with the dependence of its medical system on federal funds. Still, the courts remained unwilling to find coercion present, relying on language from the HHS and the fact that states have a choice to accept or reject federal funds.[114]

In *West Virginia v. U.S. Department of Health and Human Services*,[115] the United States Court of Appeals for the Fourth Circuit refused to find coercion, even where a state's Medicaid funding was at stake.[116] The State of West Virginia challenged the constitutionality of amendments to the Medicaid program that required the state to adopt a program to recover expenditures from estates of deceased Medicaid beneficiaries.[117] West Virginia initially resisted implementation of the program and received notification from HHS that it could lose all or part of its funding for Medicaid.[118] West Virginia filed suit against HHS, claiming that the estate recovery program provisions were unduly coercive.[119] The state argued that the penalty of withholding all Medicaid funding was disproportionate compared to the money obtained from the estate recovery plan.[120] The court noted that the Supreme Court had "provided little guidance for determining when the line between encouragement and coercion is crossed."[121]

114. The Secretary of HHS is not required to withhold all funding for noncompliant states. The Medicaid Act gives the Secretary the ability to impose a less drastic penalty, such as withholding funding from a specific part of the program. West Virginia v. U.S. Dep't of Health & Human Servs., 289 F.3d 281, 292 (4th Cir. 2002). The Fourth Circuit also observed that "[i]f the conditions imposed on the federal grant are repugnant to the state, the state may decline to accept the funds." *Id.* at 296.

115. 289 F.3d 281 (4th Cir. 2002).

116. *Id.* at 292.

117. *Id.* at 283–84. Before 1993, the Medicaid Act allowed states to recover medical costs paid by Medicaid from the beneficiary's estate under certain circumstances. *Id.* at 284. In 1993, Congress amended the Act to require states to recover certain Medicaid costs from the estates of certain deceased beneficiaries. *Id.*

118. *Id.* at 285.

119. *Id.* at 287. Specifically, West Virginia argued that it had no choice but to comply with the estate recovery program because it was largely dependent on federal Medicaid dollars and without those dollars its health care system would effectively collapse. *Id.*

120. *Id.* at 285.

121. *Id.* at 289. The court also acknowledged that "the coercion theory is somewhat amorphous and cannot easily be reduced to a neat set of black-letter rules" and that the Supreme Court had not struck down an exercise of Congress's spending powers. *Id.* at 288–89.

Nonetheless, because HHS had the option of withholding "all or part of" the funding, the Court held that the program was not unduly coercive.[122]

In another case in which a state challenged provisions that could put its Medicaid funding at risk, California brought suit against the United States for violating the Tenth Amendment by conditioning receipt of Medicaid funds on the agreement to provide emergency medical services to illegal aliens.[123] California argued that it had no choice but to agree to the new conditions to prevent a collapse of its medical system.[124] The Ninth Circuit, returning to its reasoning in *Skinner*,[125] found that "to the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record."[126]

While a number of cases have commented on the coercion theory, its parameters have never been established.[127] The Supreme Court has discussed but never expounded on the extent of the coercion theory, and no court has relied on the coercion theory to invalidate a federal spending program enacted by Congress.[128]

III. THE COURT'S REASONING

In *National Federation*, the Supreme Court upheld the constitutionality of the individual mandate but struck down the expansion of Medicare under the ACA.[129] In so holding, the Court addressed five main issues. First, the Court held that the penalty for not complying with the individual mandate does not have to be treated as a tax for purposes of the Anti-Injunction Act.[130] As a result, the suit was not barred and the Court moved on to examine the other challenges raised.[131] Second, the Court held that the individual mandate exceeded Congress's power under the Commerce Clause and the Necessary and Proper Clause.[132] Third, the Court held that the ACA's re-

122. *Id.* at 291–92. West Virginia received over $1 billion in Medicaid funds each year but recovered less than $2 million on the estate recovery program. *Id.*

123. California v. United States, 104 F.3d 1086, 1090–92 (9th Cir. 1997). The other claims were related to the adverse impact on state and federal immigration policy. *Id.* at 1090–91.

124. *Id.* at 1092.

125. *See supra* notes 90–97 and accompanying text.

126. *California*, 104 F.3d at 1092.

127. *See supra* note 73 and accompanying text.

128. *See supra* notes 73, 75, and accompanying text.

129. 132 S. Ct. 2566, 2577 (2012).

130. *Id.* at 2584; *see also infra* Part III.A.

131. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2584.

132. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2591, 2593; *see also infra* Part III.B.

quirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax and thus the individual mandate was within Congress's taxing powers.[133] Fourth, the Court held that the Medicaid expansion provision of the ACA that penalized non-participating states by taking away their existing funding exceeded Congress's power granted by the Spending Clause.[134] Lastly, the Court held that the Medicaid expansion penalty was severable from the ACA, and left the rest of the provisions intact.[135]

A. The Anti-Injunction Act

The Court examined whether the penalty for not complying with the ACA's individual mandate could be treated like a tax.[136] If so, the Anti-Injunction Act would bar the suit because the penalty had not been paid.[137] Focusing on the distinction between a "tax" and a "penalty," the Court reasoned that while Congress cannot change whether something is a tax or a penalty for constitutional purposes, the statutory text could establish whether something is a tax or penalty under the Anti-Injunction Act.[138] The Court held that because Congress chose to label the shared responsibility payment as a penalty, there was no reason to think that the Anti-Injunction Act, which is a statute applying to any "tax," would apply to a "penalty."[139] Thus the Anti-Injunction Act did not bar the Court from hearing the other challenges raised.[140]

133. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2600; *see also infra* Part III.C.

134. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2606; *see also infra* Part III.D.

135. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2608.

136. *Id.* at 2593.

137. *Id.* at 2582. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such a tax was assessed." I.R.C. § 7421(a) (West 2013).

138. *Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2583. The Court reasoned that, because the Anti-Injunction Act and the ACA are "creatures of Congress's own creation," the relation between the statutes is best demonstrated by Congress's statutory text, which refers to the payment as a penalty, not a tax. *Id.*

139. *Id.* The Court looked to congressional intent to determine whether the penalty could be considered a tax under the Anti-Injunction Act. *Id.* The Court held that by clearly making a distinction between "tax" and "penalty" in the ACA, it followed that Congress did not intend for the penalty to be a tax under the Anti-Injunction Act. *Id.*

140. *Id.* at 2584.

B. The Commerce Clause and the Necessary and Proper Clause

The Court examined past Commerce Clause decisions to determine whether Congress had the power to enact the individual mandate.[141] The Court noted that Congress's authority under the Commerce Clause is broad and extends beyond the direct regulation of interstate commerce to activities that have a substantial effect on interstate commerce, and activities that, when aggregated with similar activities of others, have a substantial effect on interstate commerce.[142] The Court reasoned, however, that the power to regulate commerce "presupposes the existence of commercial activity to be regulated."[143] The Court concluded that the individual mandate did not regulate existing commercial activity.[144] Rather, it compelled individuals to become active in commerce, which fell outside of the scope of Congress's powers under the Commerce Clause.[145] The Court also noted that, although Congress can anticipate the effects of an already occurring economic activity on commerce, this did not mean that Congress has the power to justify regulations by anticipating the creation of the activity itself.[146] Thus, the Court held that the individual mandate was unconstitutional under the Commerce Clause.[147]

The dissenting Justices also reached the conclusion that the individual mandate was unconstitutional under the Commerce Clause.[148] They distinguished between regulating the consumption of health care and the participation in the health insurance market.[149] The dis-

141. *Id.* at 2585–86.

142. *Id.* at 2585–87 (citing United States v. Darby, 312 U.S. 100, 118–19 (1941); Wickard v. Filburn, 317 U.S. 111, 127–28 (1942)).

143. *Id.* at 2586 ("If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous . . . . [T]he language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated.").

144. *Id.* at 2587.

145. *Id.* The Court was concerned that if the individual mandate was a valid exercise of Congress's power under the Commerce Clause, the clause would be expanded in a way that would allow Congress to justify federal regulation by pointing to the effects of inaction on commerce. *Id.* The Court noted that, in *Wickard*, the farmer "was at least actively engaged in the production of wheat." *Id.* at 2588.

146. *Id.* at 2590.

147. *Id.* at 2591.

148. *Id.* at 2646–47 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). Although the dissenting Justices agreed with the majority that the individual mandate is not sustainable under the Commerce Clause, they dissented from the tax portion of the majority's analysis and asserted that the entire ACA should be held unconstitutional. *Id.* at 2642.

149. *Id.* at 2648. The dissent noted that everyone may be said to consume health care if the term is taken as broadly as purchasing a bottle of aspirin, but that the health care

senting Justices noted that defining a market by participants who will, at some point in their life, probably purchase goods or services covered by mandated insurance is unprecedented and would leave no limits on Congress's power under the Commerce Clause.[150] Also, they asserted that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not carte blanche for Congress to regulate commerce by doing whatever will help achieve its ends.[151] The dissent concluded that the individual mandate was unconstitutional under the Commerce Clause.[152]

In her opinion concurring in part and dissenting in part, Justice Ginsburg disagreed with the Court's holding that the individual mandate was unconstitutional under the Commerce Clause, stating that the majority construed the Clause too rigidly.[153] Justice Ginsburg applied a two-part test to determine whether the statute was constitutional.[154] She reasoned that the uninsured, as a class, substantially affect interstate commerce because everyone will inevitably participate in the market for health care at some point, and those people without insurance affect the price of health care and health insurance regardless of their current health status.[155] Justice Ginsburg found that the individual mandate was reasonably connected to Congress's goal of protecting the health care market from disruption by individuals who fail to purchase insurance.[156] Thus, Justice Ginsburg asserted that the

"market" that is the object of the individual mandate consists primarily of goods and services that young people generally do not purchase. *Id.*

150. *Id.* The dissenting Justices echoed the reasoning of the majority opinion regarding the distinction between activity and inactivity, noting that "[i]f this provision 'regulates' anything, it is the *failure* to maintain minimum essential coverage." *Id.* at 2644.

151. *Id.* at 2646.

152. *Id.* at 2644.

153. *Id.* at 2609 (Ginsburg, J., concurring in part and dissenting in part). Justice Ginsburg argued that precedent has recognized Congress's broad authority to set the nation's course in the economic and social welfare realms, and regulations of commerce that do not infringe some constitutional prohibition are within that power. *Id.* Justice Ginsburg found that the majority's reading of the Commerce Clause "harks back to the era in which the Court routinely thwarted Congress's efforts to regulate the national economy in the interest of those who labor to sustain it." *Id.*

154. *Id.* at 2616. Justice Ginsburg asserted that the questions asked when appraising legislation are: (1) whether Congress had a "rational basis" for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a reasonable connection between the regulatory means selected and the asserted ends. *Id.* Justice Ginsburg also considered that Congress has the power to regulate economic activity that substantially affects interstate commerce, as well as local activities that, when viewed in the aggregate, have a substantial impact on interstate commerce. *Id.*

155. *Id.* at 2617.

156. *Id.* at 2617–18.

individual mandate was a valid exercise of Congress's power under the Commerce Clause.[157]

The Court also considered whether Congress had the power to enact the individual mandate under the Necessary and Proper Clause.[158] According to the Court, although Congress's determination that a regulation is necessary is generally entitled to some deference, the Court must declare unconstitutional any laws that undermine the structure of government established by the Constitution.[159] The Court noted that all previous cases upholding laws under the Necessary and Proper Clause involved exercises of authority derivative of, and in service to, a granted power, which the Court found to be lacking in this case.[160] Thus, even if the individual mandate was "necessary" to the ACA, the Court held that it was not a "proper" means of effectuation.[161]

Justice Ginsburg dissented with this part of the opinion as well, asserting that the individual mandate could be upheld under the Necessary and Proper Clause.[162] Justice Ginsburg noted that, combined with several other provisions, the individual mandate was a necessary component of the ACA.[163] Additionally, she asserted that the individual mandate was proper legislation because it addressed the "very sort of interstate problem that made the commerce power

157. *Id.* Justice Ginsburg also dissented from the majority's finding that the individual mandate attempts to regulate "inactivity" and asserted that the decision to self-insure is an economic act in itself, which is subject to regulation under the Commerce Clause. *Id. at* 2624. She also disagreed that the individual mandate compels purchase of an unwanted product, arguing that Congress is merely defining the terms on which individuals pay for an interstate good, which is a "quintessential economic regulation well within Congress's domain." *Id.* at 2620.

158. *Id.* at 2591 (majority opinion). The Necessary and Proper Clause states that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

159. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2591–92.

160. *Id.* (citing United States v. Comstock, 130 S. Ct. 1949, 1965 (2010); Sabri v. United States, 541 U.S. 600, 602, 605 (2004); Jinks v. Richland Cnty., 538 U.S. 456 (2003)). Because the Court found that the individual mandate could not be sustained under the Commerce Clause, it reasoned that it would be a broad expansion of federal authority, and would allow Congress to reach beyond the limit of its authority, to authorize the individual mandate under the Necessary and Proper Clause. *Id.* at 2592.

161. *Id.*

162. *Id.* at 2615 (Ginsburg, J., concurring in part and dissenting in part).

163. *Id.* at 2626. Justice Ginsburg argued the individual mandate is a key component tied to the guaranteed-issue and community-rating provisions. *Id.* Without the individual mandate, Congress learned, the community rating and guaranteed-issue requirements would trigger an adverse selection death spiral in the health-insurance market. *Id.* Thus, she asserted that the individual mandate was a necessary part of the legislation. *Id.*

essential in our federal system."[164] Justice Ginsburg concluded that, when viewed as a component of the entire ACA, the individual mandate was constitutional under the Necessary and Proper Clause.[165]

C. Congress's Taxing Power

While holding that the individual mandate could not be sustained under the Commerce Clause or Necessary and Proper Clause,[166] the Court considered whether the individual mandate could be read as imposing a tax on individuals who do not purchase insurance.[167] The Court reasoned that, while labeling the shared responsibility payment as a "penalty" was fatal to the application of the Anti-Injunction Act, that label did not determine whether the payment may be viewed as an exercise of Congress's taxing power.[168] Rather than focusing on the precise language, the Court looked to the substance and application of whether the payment fell under Congress's taxing power.[169]

The Court applied a functional approach similar to the one used in *Bailey v. Drexel Furniture Co.*,[170] which focused on three practical characteristics of a tax: (1) the degree of burden it imposes, (2) whether it is punitive, and (3) whether it is enforced by an agency responsible for punishing violations or collecting revenue.[171] The Court found that the shared responsibility payment could be considered a tax because it would be far less than the price of insurance, there was not a punitive element of the statute, and the payment was collected by the IRS through the normal means of taxation to raise revenue.[172] The Court reasoned that, although the payment may be intended to

164. *Id.* at 2628. Justice Ginsburg disagreed with Chief Justice Roberts's assertion that the individual mandate undermines the structure of government established by the Constitution, instead noting that acting directly upon individuals, without employing the states as intermediaries, is entirely consistent with the Constitution's design. *Id.* at 2627.

165. *Id.* at 2625.

166. *See supra* Part III.B.

167. *Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2593 (majority opinion). The Court recognized that if a statute has two possible meanings, one of which violates the Constitution, then courts should adopt the meaning that does not violate it. *Id.* The government argued the individual mandate could be read as imposing a tax if it was not permissible under the Commerce Clause. *Id.*

168. *Id.* at 2594.

169. *Id.* at 2596.

170. 259 U.S. 20, 38 (1922). This case examined the constitutional validity of the Child Labor Tax Law. *Id.* at 34. The Court noted the difficulty of differentiating between a tax and a penalty, and devised a test that focused on three characteristics of a tax: the degree of burden, its punitive nature, and the enforcement agency. *Id.* at 36–38.

171. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2595–96.

172. *Id.*

affect individual conduct, it does not preclude it from being a valid exercise of the taxing power.[173] Thus, the Court held that the individual mandate was a valid action under Congress's taxing power.[174]

In the joint dissent, the Justices argued that the analysis should have stopped after the individual mandate was found unconstitutional under the Commerce Clause.[175] The dissenting Justices argued that there is no reason to look to the taxing power, because the individual mandate involved a penalty, and a penalty cannot also be a tax for constitutional purposes.[176] The dissent argued further that to say the individual mandate imposed a tax was not interpreting the statute; it was rewriting it.[177] Thus, the dissent concluded that the individual mandate is unconstitutional.[178]

D. Medicaid Expansion Provisions

The Court also examined the Eleventh Circuit's holding that the Medicaid expansion was a valid exercise of Congress's authority under the Spending Clause.[179] The Court disagreed with the Eleventh Circuit's conclusion and held that the Medicaid expansion provision violated the Constitution.[180] The Court asserted that states did not have a genuine choice whether to accept the grants and the accompanying conditions offered by Congress.[181] Recognizing that Spending Clause legislation cannot use financial inducements to exert power so that "pressure turns into compulsion,"[182] the Court found that Congress

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173. *Id.* In distinguishing penalties from taxes, the Court explained, "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *See id.* ("Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS." (citing United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996)).

174. *Id.* at 2600.

175. *Id.* at 2650 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

176. *Id.* at 2651. The dissent argued that in all other cases penalties and taxes are mutually exclusive. *Id.* Furthermore, the dissenting Justices noted that in evaluating the individual mandate, the Court should have looked at whether Congress framed the individual mandate as a tax, not whether it *could* have done so. *Id.*

177. *Id.* at 2655.

178. *Id.* at 2642.

179. *Id.* at 2601 (majority opinion). The Spending Clause vests Congress with the power "[t]o lay and collect Taxes . . . to pay the Debts and provide for the . . . general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

180. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2608.

181. *Id.* The Court noted that it has repeatedly characterized Spending Clause legislation as similar in nature to a contract and stated that the legitimacy of Congress's exercise of the spending power rests on whether a state voluntarily and knowingly accepts the terms of the grant conditions. *Id.* at 2602.

182. *Id.* at 2602 (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

had crossed the line to coercion by threatening to take away existing Medicaid funding if states refused to accept the new expansion conditions.[183] In finding the Medicaid expansion penalty unconstitutional, the Court declined to fix the line where persuasion becomes coercion, stating that it is "enough for today that wherever that line may be, this statute is surely beyond it."[184]

The Court also examined whether the Medicaid expansion was permitted under the right to alter, amend, or repeal provisions, reserved by Congress in the original statute.[185] The Court found that the Medicaid expansion was more than a modification of the current program and thus fell beyond the rights reserved in the statute.[186] The Court characterized the Medicaid expansion as a "shift in kind, not merely degree."[187] It further asserted that the Medicaid expansion resembled the creation of a separate Medicaid program.[188] The Court held that states could hardly anticipate that the right to alter or amend the Medicaid program might include such a drastic transformation.[189] Thus, the Court found that the Medicaid expansion was not constitutional under the Spending Clause powers granted to Congress.[190]

The dissenting opinion also found that the Medicaid expansion was unconstitutional.[191] The dissent opined that Congress had plainly crossed the line distinguishing encouragement from coercion because, although a state could turn down the expansion as a matter of law, it would be incredibly costly to the state and its residents to do so.[192] The Justices asserted that Congress knew that no state could re-

183. *Id.* at 2603. A state that opts out of the ACA's expansion would lose all of its Medicaid funding, which accounts for over twenty percent of the average state's total budget. *Id.* at 2604. States have developed intricate regimes to run their Medicaid programs, and the states argued that threatened loss of all funding for that program essentially leaves the states with no choice but to participate in Medicaid expansion. *Id.* at 2604–05.

184. *Id.* at 2606.

185. *Id.* at 2605; *see also* 42 U.S.C. § 1304 (2006) ("The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress.").

186. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2605–06.

187. *Id.* The Court noted that the Medicaid expansion surprised states with post-acceptance conditions, which is not permissible under the Spending Clause. *Id.* at 2606.

188. *Id.* The Court asserted it was a separate program and shift in kind because the provisions expanded the initial categories of the needy who were covered under Medicaid to include all non-elderly with an income below 133 percent of the federal poverty level. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 2666–67 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

192. *Id.* at 2662. The dissent noted that, even if states refuse the expansion, their residents would still have to pay federal taxes to support the new program and would have to

fuse the Medicaid expansion, and thus the provision was unduly coercive and exceeded Congress's spending power.[193]

In the dissenting portion of her opinion, Justice Ginsburg agreed with the Eleventh Circuit's holding that the Medicaid expansion provisions were within Congress's spending power.[194] Justice Ginsburg noted that Congress could have recalled the existing Medicaid legislation and attempted to replace it, but it instead chose to exercise its right to "alter, amend, or repeal" any provision of the Medicaid Act.[195] Justice Ginsburg asserted that (1) Medicaid has always been a single program with a constant aim; (2) states have always had to comply with Congress's conditions to receive the funding; and (3) past expansion of the program demonstrated adequate notice that Congress is entitled to amend the requirements of participation.[196] She disagreed that the Medicaid expansion was a "shift in kind," arguing that it was within the constitutional power granted to Congress to amend the program.[197]

Justice Ginsburg also disagreed that the Medicaid expansion penalty was coercive.[198] The Justice noted that while Congress might be prohibited from offering a financial inducement where "pressure turns into compulsion," the Court has never before ruled that terms of a grant crossed that line.[199] Furthermore, Justice Ginsburg expressed concern over the majority's lack of guidance on fixing a line where "persuasion gives way to coercion."[200] Justice Ginsburg claimed that the majority's "coercion inquiry . . . involve[d] political judgments that defy judicial calculation" and were too amorphous to be judicially administrable.[201] Justice Ginsburg would have held the Med-

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pay the equivalent in state taxes. *Id.* The dissent also noted that states rely upon Medicaid funding and that many states would be "hard pressed" to compensate for the loss of federal funds if they chose not to participate in the expansion. *Id.* at 2663.

193. *Id.* at 2666.

194. *Id.* at 2642 (Ginsburg, J., concurring in part and dissenting in part).

195. *Id.* at 2629–30. Justice Ginsburg added that, since the enactment of the Medicaid Act in 1965, states have regularly conformed to the alterations made to it by Congress. *Id.* at 2630.

196. *Id.*

197. *Id.* Justice Ginsburg noted that, since 1965, Congress has amended the Medicaid program on more than fifty occasions, including expanding the beneficiaries. *Id.* at 2631. She further asserted that "[e]nlargement of the population and services covered by Medicaid, in short, has been the trend." *Id.*

198. *Id.* at 2642.

199. *Id.* at 2634.

200. *Id.* at 2640.

201. *Id.* at 2641.

icaid expansion penalty to be a valid exercise of Congress's power under the Spending Clause.[202]

E. Severability of the Medicaid Penalty

After determining that the ACA's expansion of Medicare exceeded Congress's power under the Spending Clause,[203] the Court examined whether the unconstitutional portion of the Medicaid provisions affected other parts of the ACA.[204] The Court held that removing the provision that allows all further Medicaid payments to a state to be withheld would remedy the constitutional violation, and the severability clause included in the ACA permitted the rest of the Medicaid provisions to stand.[205] Determining that Congress would have wanted to preserve the rest of the ACA, the Court allowed the remainder of the ACA to stand.[206]

IV. ANALYSIS

In *National Federation*, the Supreme Court held that the Medicaid expansion was unconstitutional under the Spending Clause powers granted to Congress.[207] The Supreme Court concluded that Congress crossed the line to coercion by taking away existing Medicaid funding

202. *Id.* at 2642.

203. *See supra* Part III.D. The Court, however, also reasoned that, while Congress cannot penalize states that choose not to participate in the Medicaid expansion by taking away existing funding, Congress still has the power to offer new funds under the ACA to expand Medicaid and to require separate compliance with conditions for their use. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2607 (majority opinion).

204. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2607. In examining whether other provisions were affected, the Court relied on legislative intent, noting that unless it is "evident" that Congress would not have wanted the rest of the ACA to stand, it must be left intact. *Id.* (citing Champlin Refining Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234 (1932)).

205. *Id.* at 2607. The Court found that the severability clause demonstrated Congress's explicit instructions to leave unaffected the remainder of the chapter if any particular provision was found invalid. *Id.*

206. *Id.* at 2608. The dissent asserted that no part of the ACA is severable and thus the statute should be invalidated in its entirety; the dissenting Justices reasoned that making the Medicaid expansion voluntary introduced a new dynamic that should only be created by congressional choice, not the Court. *Id.* at 2667 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). The dissent stated that without the individual mandate and Medicaid expansion, the other provisions might impose enormous risks or unexpected burdens on the health-care community and federal budget, which would be in conflict with the ACA's design of "shared responsibility." *Id.* at 2671. The dissenting Justices concluded that the other provisions of the ACA could not remain if the individual mandate and Medicaid expansion are unconstitutional, because the other provisions cannot operate as Congress intended without those two major components. *Id.*

207. *See supra* note 134 and accompanying text.

if states refused to accept the new expansion conditions.[208] The Supreme Court erred in ruling that the Medicaid expansion penalty was not a valid exercise of Congress's power under the Spending Clause.[209] By applying an amorphous standard to determine that the Medicaid expansion provisions amounted to coercion, the Court left little guidance for evaluating future exercises of Spending Clause power to administer federal grant programs.[210] The Court should have found that the states had a real choice to participate in the Medicaid expansion, and where states have a real choice there can be no coercion.[211]

A. The Application of the Supreme Court's Amorphous Coercion Theory Identified What Is Not Coercion but Left No Indication of What Circumstances Amount to Coercion.

The Spending Clause powers and the standards used to evaluate the use of those powers are well developed in the Court's jurisprudence.[212] Traditionally, great deference was given to Congress's implementation of federal grant programs through the spending power.[213] While suits have been brought against federal grant programs invoking the coercion theory, and there have been changes to those programs, the application of the coercion theory by courts has been rather limited, with no established guidelines or standards for its implementation.[214]

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208. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2603 (majority opinion).

209. *See infra* Part IV.C.2.

210. *See infra* Part IV.B.2.

211. *See infra* Part V.

212. *See supra* note 36 and accompanying text; Part II.A.2.

213. Gregory D. Hanley, Note, *Constitutional Limitations on Congressional Use of Conditional Funding Grants in Light of* South Dakota v. Dole, 34 WAYNE L. REV. 1643, 1649 (1988) ("[T]he Court has shown great deference to congressional acts, choosing to let Congress spend as it pleases. . . . Further, although the Court has acknowledged that at some point the coercion employed by a conditional grant can rob the states of free choice, the Court has not yet defined that point.").

214. *See* Coulter M. Bump, Comment, *Reviving the Coercion Test: A Proposal to Prevent Federal Conditional Spending that Leaves Children Behind*, 76 U. COLO. L. REV. 521, 536 (2005) ("[C]ourts commonly refused to engage in a coercion analysis given the elusiveness of the test and the failure of the plaintiff to give a 'principled definition' of the coercion concept."); Erwin Chemerinsky, *Protecting the Spending Power,* 4 CHAP. L. REV. 89, 102–103 (2001) ("To begin with, it is impossible to draw a line between inducement and compulsion. . . . Defining a distinction between inducement and coercion is even more difficult. What type of evidence would be relevant?"); Hanley, *supra* note 213, at 1649 ("This lack of legitimate, well-defined restrictions on the spending power was a formidable obstacle to South Dakota's challenge of the National Minimum Drinking Age Amendment in *Dole*.").

The application of the coercion theory has led to several different approaches, none of which led to the invalidation of a federal spending program.[215] Thus, precedent does more to establish what *does not* amount to coercion than what *does* amount to coercion. The guiding notions that emerged from the Supreme Court prior to *National Federation* are that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties,"[216] and that withholding five percent of federal highway funding does not amount to coercion.[217] In both instances, the Supreme Court declined to provide a fixed line at which inducement becomes coercion.[218] This lack of guidance led to further limited application of the coercion theory in the lower courts, and a continued deference to Congress.

Federal appellate courts have acknowledged the coercion theory but continued to uphold federal spending programs in instances where large amounts of funding were at stake.[219] The Eighth Circuit rejected the coercion theory even where the entire amount of federal education funding was at risk.[220] Similarly, the Fourth Circuit rejected the coercion theory when a state's entire Medicaid funding was potentially at risk.[221] In *Skinner*, the Ninth Circuit upheld a federal spending program where almost all of Nevada's federal highway funding would be withheld if the state refused to participate in the program.[222] Thus, these cases demonstrate that even where large amounts of funding are at stake, courts continued to defer to Congress's use of the spending power to enact federal spending programs in light of the doctrine's lack of any clear boundaries. Federal spending programs that threatened a state's entire education budget or, similar to *National Federation*, threatened a state's entire Medicaid budget have never been considered coercive.[223] The historical application of the coercion theory left little guidance regarding the factors

215. *See supra* Part II.B.

216. *See supra* text accompanying note 57.

217. *See supra* text accompanying note 69.

218. *See supra* note 73 and accompanying text.

219. *See supra* Part II.B.3.

220. Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000); *see also supra* text accompanying notes 108–113.

221. West Virginia v. U.S. Dep't of Health & Human Servs., 289 F.3d 281, 297 (4th Cir. 2002); *see also supra* text accompanying notes 115–122.

222. Nevada v. Skinner, 884 F.2d 445, 454 (9th Cir. 1989); *see also supra* text accompanying notes 90–97.

223. HENRY J. KAISER FAM. FOUND., A GUIDE TO THE SUPREME COURT'S DECISION ON THE ACA'S MEDICAID EXPANSION (2012), *available at* http://www.kff.org/healthreform/upload/8347.pdf. "In *NFIB v. Sebelius*, the Court for the first time found that a federal condition on a grant to states was unconstitutionally coercive." *Id.*

that might cause a federal spending program to be coercive, particularly given that no line was drawn regarding percentage of funding at risk, and even programs that threatened 100% of funding have been upheld.[224]

B. In National Federation*, the Supreme Court Applied a New Criterion to Evaluate Coercion and for the First Time Found that the Amount of Funding at Stake Made a Program Coercive, While Still Failing to Set Guidelines for Similar Analyses in the Future*

The Supreme Court, in *National Federation*, focused its coercion analysis on several factors,[225] including the amount of funding at stake. The Court also examined a new factor never previously considered.[226] The Court found that the expansion of Medicaid crossed the line to coercion because the expansion was so broad that it actually created a different program, and that such a change was unforeseeable when the states originally signed up to participate in Medicaid.[227] Although the amount of funding at stake and the changes being made to the Medicaid program played a role in the Court's decision, the Court failed to identify the specific factors it considered fundamental in evaluating the coercion theory, and the opinion did not explain what factors needed to be met.

1. "A Shift in Kind, Not Merely Degree": Why the Creation of a Separate Program That Threatens Funding of a Previous Program Is an Unworkable Factor in Future Coercion Theory Analyses

In *National Federation*, the Supreme Court found that the ACA did not simply expand the Medicaid program but instead created a new program altogether.[228] Thus, a possible new criterion for coercion emerged: A federal spending program may be coercive if it threatens to withhold funding from a separate program for refusal to partici-

224. *See supra* text accompanying notes 73–75.

225. *See supra* Part III.D.

226. *See* Memorandum from the Congressional Research Service, Kathleen S. Swendiman and Evelyne P. Baumrucker, Selected Issues Related to the Effect of *NFIB v. Sebelius* on the Medicaid Expansion Requirements in Section 2001 of the Affordable Care Act (July 16, 2012), *available at* http://www.ncsl.org/documents/health/aca_medicaid_expansion_memo_1.pdf (stating that "[t]he fractured nature of this decision, with its three opinions, adds to the complexity of determining its effect on future grant conditions, and on implementation of the ACA Medicaid Expansion").

227. *See supra* text accompanying notes 187–189.

228. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2605–06 (2012).

pate in the new program.[229] The majority reasoned that the Medicaid expansion was in actuality a new program because it transformed the old program to meet the health care needs of a different portion of the population.[230] In practice, this provides no guidance for drawing the line between old and new programs, and was not a strongly supported interpretation of the Medicaid expansion.[231] Medicaid was developed with the intent of enabling poor persons to receive basic health care when they need it.[232] It is difficult to argue how expanding the poor population served by Medicaid constitutes transforming the program. Medicaid has gone through many expansions since its enactment, none of which have been questioned as being outside of the bounds of Congress's right to repeal, amend, or alter the program.[233] Prior to this decision, the creation of a separate program had

229. *See* KENNETH R. THOMAS, CONG. RESEARCH SERV., R42367, THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER *NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS* 14–15 (2012), *available at* http://theincidentaleconomist.com/wordpress/wp-content/uploads/2012/07/CRS-Federal-Grants-R42367-clean.pdf (discussing the creation of criteria where, if a grant condition is attached to a new and independent program, the condition may be unconstitutionally coercive if it threatens funding of an existing program).

230. *Nat'l Fed'n of Indep. Bus.*, 132 at 2605–06. The Supreme Court stated that past amendments to the Medicaid program have simply altered and expanded boundaries of previously established categories. *Id.* at 2606. Justice Ginsburg pointed out, however, that when Medicaid was enacted, there were four categories of beneficiaries, and three more were added in late 1980s. *Id.* at 2635 (Ginsburg, J., concurring in part and dissenting in part). The Medicaid expansion simply adds another category. Additionally, Medicaid is a program enacted to provide medical assistance to "needy persons," so the additional category of individuals under 133 percent of the federal poverty level should still qualify as meeting the purpose of the original Medicaid program. *Id.*

231. *See* Charlton C. Copeland, *Beyond Separation in Federalism Enforcement: Medicaid Expansion, Coercion, and the Norm of Engagement,* 15 U. PA. J. CONST. L. 91, 165 (2012) (noting "the Chief Justice's failure to provide a framework for analyzing when an amendment to a statute constitutes an entirely new statute"). Only Justice Breyer and Justice Kagan agreed with the Chief Justice's old program-new program analysis. Swendiman & Baumrucker, *supra* note 226, at 2; *see also* John K. DiMugno, *Navigating Health Care Reform: The Supreme Court's Ruling and the Choppy Waters Ahead*, 24 CAL. INS. L. & REG. REP. 1, 9 (2012) ("The coercion argument, however, succeeded in the Supreme Court based on the legal fiction that Medicaid is two federal programs.").

232. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2630 (Ginsburg, J., concurring in part and dissenting in part).

233. *See* 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, 610–11 (2012) (discussing how Medicaid has been characterized by ongoing and regular changes in structure and benefits and noting that "[n]ot only have Medicaid benefits been markedly expanded over time, but noticeable changes in the nature and structure of care have occurred, and continue to occur"); Copeland, *supra* note 231, at 137 (arguing that the ACA requirement that states expand Medicaid is only the latest in a line of expansions of the program since its enactment); DiMugno, *supra* note 231, at 3 ("Over the years, Congress has amended the Medicaid program on more than 50 occasions, adding millions to the Medicaid eligible

never been a factor in coercion analyses, and the Court failed to provide specific guidelines for how to determine if an old program is being changed into a new program. If expanding a program to reach a larger population constitutes the creation of a new program, future federal spending programs are likely to be constrained in making any changes to the way programs operate. Without guiding principles, the old program-new program distinction creates another unclear criteria for coercion theory application in future cases.[234]

The vague old program-new program analysis could have unintended consequences for the future of federal spending programs and Congress's spending powers.[235] It is unclear if the driving factor in creating a new program is the amount of money at stake[236] or the changes made to the structure of the program.[237] In *National Federation*, the Court did not establish a specific level of funding or particular program parameters that would amount to coercion.[238] If expand-

population."); Sara Rosenbaum, *The States' Medicaid 'Coercion' Claim: More Rhetoric Than Fact,* HEALTH AFF. BLOG (Dec. 14, 2011), http://healthaffairs.org/blog/2011/12/14/the-states-medicaid-coercion-claim-more-rhetoric-than-fact/ [hereinafter *States' Medicaid 'Coercion' Claim*] (discussing how Medicaid has been transformed overtime, from four million covered in 1966 to nearly seventy million covered in 2010 as the result of mandates that states had to comply with to continue to receive federal funding). The most significant expansions required states to extend eligibility to pregnant women and their children, if they qualified for welfare payments, and expand eligibility to elderly and the disabled who were not eligible for Supplemental Security Income. Copeland, *supra* note 231, at 137. Other expansions involved increasing the income limits for eligible pregnant women and children. *Id.*

234. Swendiman & Baumrucker, *supra* note 226, at 4–5; *see also id.* at 3 ("While Justice Roberts' opinion is technically the majority opinion only with regard to the Court's remedy, his views are likely to guide the lower courts in the future for new spending power challenges to federal grant conditions.").

235. *See, e.g.*, Copeland, *supra* note 231, at 91 (noting that the Medicaid decision has the potential to impact federal-state cooperative arrangements such as No Child Left Behind and others far beyond the health care context); DiMugno, *supra* note 231, at 10 (arguing that holding the Medicaid expansion invalid could have profound implications for the validity of many federal programs because the Court provided little guidance on how to determine whether federal spending conditions are coercive); Nicole Huberfeld, *Post-Reform Medicaid Before the Court: Discordant Advocacy Reflects Conflicting Attitudes,* 21 ANNALS HEALTH L. 513, 538 (2002) (discussing how a decision that expands the coercion theory would be far reaching because so many major public programs rely on conditional spending laws).

236. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2604 ("In this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head.").

237. *See id.* at 2605 (noting that the Medicaid expansion was a "shift in kind, not merely degree" and created a new program, rather than expanding the old one).

238. *See* Timothy Stolzfus Jost, *Is Medicaid Constitutional?*, N. ENGL. J. MED., May 3, 2012, at e27(2), *available at* http://www.nejm.org/doi/full/10.1056/NEJMp1204347 ("Most cooperative federal programs—addressing not only health care but also transportation, education, welfare, community development, and environmental problems—involve condi-

ing the population that a federal spending program reaches, or adjusting the amount of funding attached to a program or required of a state qualifies it as new program, future federal grant programs may have a difficult time exercising their right to amend the program without exposing themselves to a coercion challenge.[239] Thus the old program-new program criterion introduced by the Court in *National Federation* is unlikely to act as a workable standard in evaluating coercion, and may cause great uncertainty for federal spending programs in the future.[240]

2. *Why It is Never Clear When Financial Inducement Crosses the Line Between "Mild Encouragement" and a "Gun to the Head"*

In *National Federation*, the Supreme Court emphasized the amount of funding at stake for the states.[241] As a result, for the first time ever, the Court found that an exercise of Congress's spending power was unconstitutionally coercive.[242] Chief Justice Roberts noted that, in this case, "the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head."[243] At the same time, the Supreme Court still declined to specify the point at which the financial inducement became coercion.[244] Emphasizing the impact of funding on the coercion analysis but not fixing a specific line or providing some guidance as to where the line

tional federal grants to the states. All these programs are subject to litigation if the states win this case.").

239. *See id.* at e27(2)–(3) ("The Court's establishing the coercion theory as an active legal doctrine would threaten the ability of the federal government to work with the states to address national problems. Holding the expansion unconstitutional could eliminate federal–state cooperative programs. The ramifications of such a ruling could far exceed those that might follow from the invalidation of the minimum-coverage requirement.").

240. *See* Lyle Denniston, *Argument Recap: Will Medicaid be Sacrificed?*, SCOTUS BLOG (Mar. 28, 2012), http://www.scotusblog.com/2012/03/argument-recap-will-medicaid-be-sacrificed/ (noting a comment from Justice Sotomayor at oral arguments that "[w]e're going to tie the hands of the federal government in choosing how to structure a cooperative relationship with the states. We're going to say to the federal government, the bigger the problem, the less your powers are.").

241. Medicaid spending accounts for over twenty percent of the average state's total budget, with federal funds covering fifty to eighty-three percent of those costs. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2604. The Court noted that "the threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." *Id.* at 2605.

242. *Id.* at 2630 (Ginsburg, J., concurring in part and dissenting in part).

243. *Id.* at 2604 (majority opinion).

244. *Id.* at 2606. The Court noted that *Steward Machine Co.* did not attempt to fix an outermost line where persuasion gives way to coercion, and this Court also had no need to fix a line: "It is enough for today that wherever that line may be, this statute is surely beyond it." *Id.*

could be found, perpetuates the use of an amorphous funding consideration in future cases dealing with coercion.[245] The lack of a fixed line leaves the funding factor open to interpretation. In Justice Ginsburg's opinion concurring in part and dissenting in part, she notes:

> 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"? 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[?][246]

Justice Ginsburg's opinion has merit. Thus far, when it comes to programs that withhold federal funds, the Supreme Court has spoken to what constitutes coercion at opposite ends of the spectrum, but it has not clearly addressed what would happened in between. In *Dole*, for example, the Court held that withholding five percent of federal highway funds was not coercive.[247] In *National Federation*, however, the Court ruled that withholding 100 percent of Medicaid funds was coercive.[248] But what happens when a federal spending program attempts to withhold some amount of funding between five percent and 100 percent? The variety of ways funding could be taken into account create more questions than answers for the future application of the coercion theory.[249]

Another factor complicating the use of funding to evaluate coercion is that the impact of funding inducements may vary across different states.[250] Because different states have different needs, some

245. *See, e.g.*, Denniston, *supra* note 240 (noting Justice Sotomayor's comment during oral arguments that a court would have no way to know where to draw a line beyond which coercion would be found).

246. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2640 (Ginsburg, J., concurring in part and dissenting in part) (internal citation omitted); *see also* Gillian Metzger, *Defense of the Constitutionality of Health Care Reform*, 62 MERCER L. REV. 633, 637 (2011) ("[I]t is very difficult to come up with a judicially-manageable standard for when changes to a spending program go too far and become coercive. . . . Should we measure coercion by percentage of funding under a program that is put at risk, or the absolute amount of federal funds at issue? Or should we measure by the percentage of a state's budget that the funding represents?").

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

248. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2604–06.

249. *See* Metzger, *supra* note 246, at 637 (noting that alternative metrics can lead to different determinations about whether coercion exists).

250. Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the* Dole *Loopholes,* 4 CHAP. L. REV. 163, 188–89 (2001) ("Financial coercion must be deter-

might feel coerced, while others might not. At oral argument in *National Federation*, Justice Ginsburg observed that, while twenty-six states claimed that the Medicaid expansion was coercive, there were other states that liked the expansion, and did not feel coerced.[251] Several states opted to begin expanding Medicaid after the ACA was signed into law, without regard for the potential lawsuits.[252] Gillian Metzger, a professor at Columbia Law School, noted that "for some states that have already expanded their Medicaid programs . . . this expansion with the funding that came along with it was hardly coercive at all. It was actually quite supportive of their choices."[253] Whether a funding program is seen as inducement or coercion may also depend on the political choices of a state and its budget.[254] The individualized nature of state decisions makes it difficult to assess from the federal perspective whether conditional funds are coercive across the board, further complicating the use of funding at stake to assess coercion.

The individualized nature of determining coercion and the lack of specified limits emphasize the fact that a funding-focused analysis is not a workable standard for evaluating coercion.[255] Precedent has shown that given the lack of a fixed line where the amount of funding becomes coercive, courts have interpreted the importance of funding at stake differently.[256] Using funding to evaluate coercion attempts to distinguish situations where withholding funding coerces rather than induces.[257] The difference between the two is difficult to establish, and courts have discarded the dichotomy in other areas of constitutional adjudication because there is no way to distinguish between the

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mined on a case-by-case basis. What is financially coercive to one state might not be financially coercive to another state." (footnote omitted)).

251. Transcript of Oral Argument at 20–21, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566 (No. 11-400).

252. Jennifer Lubell, *Only 7 states, D.C. Expand Medicaid Ahead of 2014*, AM. MED. NEWS (June 11, 2012), http://www.ama-assn.org/amednews/2012/06/11/gvsb0611.htm. In addition to the District of Columbia, California, Colorado, Connecticut, Minnesota, Missouri, New Jersey, and Washington committed to expanding Medicaid early. The article also noted that most states had made progress on at least one of the five options to improve their Medicaid programs authorized by the health reform law. *Id.*

253. Metzger, *supra* note 246, at 637.

254. *Id.* at 637–38.

255. McConville, *supra* note 250, at 179–83; *see also id.* at 166 ("The coercion loophole left open in *Dole* should not be used as a means of enforcing federalism based limits. . . . [It] improperly emphasizes financial inducement . . . . While the financial impact of a funding condition may well inform the decision to participate in a federal program, it does not disable the state from choosing . . . .").

256. *See supra* Part II.

257. Donald J. Mizerk, Note, *The Coercion Test and Conditional Federal Grants to the States*, 40 VAND. L. REV. 1159, 1180 (1987).

two in a practical way.[258] It is unclear how future courts will interpret the decision in *National Federation* and how it may impact the future of federal spending programs. Thus, the amount of funding involved in a federal spending program should not be a factor used to evaluate the presence of coercion.

C. Using the Presence of a Choice to Evaluate Coercion Claims: Why a Bright-Line Test Is Unworkable

No clear framework has been presented for evaluating the presence of coercion in future cases.[259] In actuality, it would be very difficult to come up with a judicially manageable standard to apply to coercion claims.[260] A bright-line test may place excessive limits on the ability of Congress to create and develop federal programs with conditional funding, and is likely to suffer the inadequacies inherent to bright-line rules—either arbitrarily categorizing cases on the basis of some proposed mathematical limit or providing a vague verbal classification of cases that provides little more guidance than a broad term such as coercion.[261] The inadequacy of a bright-line test requires that the Court re-examine the meaning of the coercion theory and the criteria used to evaluate it.[262]

1. The Role of State Autonomy and Why There Is Still a Choice Regardless of the Amount of Funding at Stake

In *Steward Machine Co.*, the Court recognized that Congress should not be able to destroy or impair the autonomy of the states.[263] Thus, the coercion theory was initially developed as a safeguard to ensure that states have the ability to make a choice in accepting or rejecting federal funding.[264] Although the fiscal impact of conditional funding may affect a state's decision to participate in a federal program, it does not prevent a state from choosing.[265] States possess the power to raise money by taxation or other methods; thus a federal program does not become coercive by offering needed funds.[266] Low-

258. *Id.*

259. *See supra* Part IV.B.

260. Metzger, *supra* note 239, at 637.

261. Reeve T. Bull, Note, *The Virtue of Vagueness: A Defense of* South Dakota v. Dole, 56 DUKE L.J. 279, 299, 302 (2007); *see infra* Part IV.C.1.

262. *See infra* Part IV.C.2.

263. Steward Mach. Co. v. Davis, 301 U.S. 548, 586 (1937).

264. McConville, *supra* note 250, at 175.

265. *Id.* at 166.

266. *Id.* at 178–79.

er federal courts have largely recognized that the coercion theory relates to the autonomy of states, not financial temptation, and accordingly never used the coercion theory to limit the spending power.[267] Several courts have properly rejected coercion arguments because they doubted that states could be coerced into participating in federal spending programs.[268] Rather, courts have consistently recognized the difference between coercion and difficult choices.[269] While financial inducement has been considered in cases evaluating a coercion claim, until *National Federation*, it had never been a determining factor, because the focus rightfully rested on the presence of a choice—not the level of funding involved.

A choice-focused inquiry provides the proper analytical framework. The factors for evaluating whether there is a choice were established by the Court in *Dole*.[270] Under the *Dole* analysis, a state choice requires notice and clear understanding of the conditions by the state.[271] Conditional grants by their nature present states with the choice to comply with the conditions, and thus a conditional grant cannot force a state's choice under the coercion theory.[272] As long as the state possesses the ultimate authority to accept or reject federal funds along with their associated conditions, there is no interference with the ability of a state to make that choice.[273] Drawing a fixed line between encouragement and inducement has proven impossible, and using a coercion theory to attempt to do that obscures the difference between choice and compulsion.[274] While states "may have to make a hard decision in foregoing federal funds and ultimately may not want to do so . . . that is different from compulsion where truly no choice remains."[275] Thus, even in the face of a difficult choice, states retain the ability to exercise their autonomy in making a choice, and where a real choice is present there cannot be coercion.

267. *Id.* at 179.
268. *Id.* at 179–80.
269. *See supra* text accompanying notes 86 and 112.
270. *See supra* text accompanying notes 63–66.
271. *See supra* text accompanying note 65.
272. Mizerk, *supra* note 257, at 1169–70.
273. Bull, *supra* note 261, at 294.
274. Chemerinsky, *supra* note 214, at 102.
275. *Id.* at 103.

2. States Can Choose Whether or Not to Participate in Medicaid, and Where There Is a Choice, There Cannot Be Coercion

States have always had a choice of whether to participate in Medicaid. Medicaid is a voluntary program and, while "Congress historically has reserved the right to alter and amend the program as needed. . . . [S]tates historically have reserved the right either not to participate at all, and to exit the program whenever they so desire."[276] Prior to the decision in *National Federation*, lower federal courts were in agreement that participation in Medicaid is entirely voluntary and therefore could not qualify as coercion.[277] In facing the choice of whether to participate in the Medicaid expansion, the States were given notice and a clear understanding of the conditions.[278] From its enactment, the Medicaid statute has contained a provision that reads "The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress."[279] When states initially agreed to participate in Medicaid, they accepted those terms and, since then, have accepted the numerous changes made to the program.[280] The states retain the choice of whether to participate in Medicaid and accept that Congress has the right to make changes to the program:

> A state still can walk away from Medicaid . . . . Were this to happen, both the state and Congress would face the very hard choice about what to do for millions of residents whose incomes are too low to qualify for a premium tax credit. But this hard choice does not amount to legal compulsion.[281]

In addition to understanding the terms of the Medicaid program, states were given four years from when the ACA was passed to decide whether or not to participate in the Medicaid expansion.[282] The nature of Medicaid as a voluntary program that was familiar to

276. Sara Rosenbaum, *Trying to Make Sense of the States' Medicaid Coercion Arguments*, HEALTH AFF. BLOG (Mar. 28, 2012), http://healthaffairs.org/blog/2012/03/28/sara-rosenbaum-trying-to-make-sense-of-the-states-medicaid-coercion-arguments/ [hereinafter *Trying to Make Sense*].

277. Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Healthcare Programs*, 86 N.C. L. REV. 441, 461 (2008). The Second, Third, Fifth, Ninth, and Eleventh Circuits agreed that participation in Medicaid is entirely voluntary. *Id.*

278. Nat'l Fed'n of Indep. Bus.v. Sebelius, 132 S. Ct. 2566–2637 (2012) (Ginsburg, J., concurring in part and dissenting in part). Justice Ginsburg noted that the Medicaid expansion "does not take effect until 2014. The ACA makes perfectly clear what will be required of States that accept Medicaid funding after that date." *Id.*

279. 42 U.S.C. § 1304 (2006).

280. Swendiman & Baumrucker, *supra* note 226, at 3.

281. *States' Medicaid 'Coercion' Claim*, *supra* note 233.

282. *Id.*

the states, coupled with the four-year period the states had to make their decisions about participation, demonstrates that the necessary elements to make a choice were present, and thus the Court should not have found coercion.

The financial inducement for the Medicaid expansion may be significant, but it did not eliminate the ability of any state to make a choice about its participation in the program. When introduced by *Steward Machine Co.*, the coercion theory was premised on the ability of states to retain their autonomy.[283] While courts have acknowledged that the amount of funding at stake could play a role in limiting Congress's spending powers, no court prior to *National Federation* ever found that the amount of funding at stake amounted to coercion. Funding may influence a state's decision, but the choice to accept or decline conditions and the attached federal funding still belongs to the state. Without the elimination of a state's ability to make a choice, there can be no coercion. Under the ACA, the states retained the choice to forgo participation in Medicaid, and thus would not have been coerced into participating.[284]

V. CONCLUSION

The Supreme Court held in *National Federation* that the Medicaid expansion penalty provision was unconstitutional, further complicating the application of an amorphous coercion theory.[285] As a result, the future of federal funding programs may be called into question[286] because the Court failed to articulate parameters for evaluating the presence of coercion, leaving courts without clear guidelines for examining future coercion claims.[287] The Court should not have considered the amount of federal funding at stake or the extent of the changes made to the program; instead, the Court should have focused on whether the states had a choice to participate in the Medicaid program.[288] The Court should have found that the states had a real choice of whether to participate in the Medicaid expansion, and where states have a real choice there cannot be coercion.[289]

283. Mizerk, *supra* note 257, at 1169, 1179–80.

284. *See Trying to Make Sense*, *supra* note 276 ("The reality of Medicaid is anything but a case of unconstitutional coercion. Medicaid certainly is not a case of Congress forcing states to do what it cannot do.").

285. *See supra* Part IV.

286. *See supra* Part IV.B.1.

287. *See supra* Part IV.B.2.

288. *See supra* Part IV.C.

289. *See supra* Part IV.