


July 2014

# To Yoder or Not to Yoder? How the Spending Clause Holding in *National Federation of Independent Business v. Sebelius* Can Be Used to Challenge the No Child Left Behind Act

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### Recommended Citation

Christopher Roma, *To Yoder or Not to Yoder? How the Spending Clause Holding in National Federation of Independent Business v. Sebelius Can Be Used to Challenge the No Child Left Behind Act*, 34 Pace L. Rev. 1320 (2014)

Available at: <http://digitalcommons.pace.edu/plr/vol34/iss3/9>

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# **To Yoder or Not to Yoder? How the Spending Clause Holding in *National Federation of Independent Business v. Sebelius* Can Be Used to Challenge the No Child Left Behind Act**

**Christopher Roma\***

## I. Introduction

On June 28, 2012, the United States Supreme Court issued its ruling in *National Federation of Independent Business v. Sebelius*<sup>1</sup> (“*Sebelius*”) challenging the Patient Protection and Affordable Care Act (“ACA”). Pundits on both sides of the political spectrum anxiously awaited the decision as the most significant social welfare reform legislation in decades hung in the balance. As a result of the intense media coverage discussing that single issue,<sup>2</sup> most of the public, this author included, believed that the Supreme Court was only ruling on the individual mandate provision.<sup>3</sup> Nevertheless, the individual mandate alone could not accomplish near universal health care coverage, so Congress also included a provision in the ACA that required States to adjust their Medicaid eligibility requirements to cover a greater number of people.<sup>4</sup> States who rejected the Medicaid expansion would lose their entire Medicaid funding.

The Medicaid expansion was challenged by numerous states claiming that Congress had overstepped its power under the Spending

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\* For Erica, my love and my rock. To my mother, father and entire family, for all their love and support.

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

2. At the time the case was being decided—and to a great extent even today almost a year later—if one performs a Google search on terms such as “ACA,” “Obamacare,” etc., and attach it to the term “Supreme Court,” the results will focus almost exclusively on the Individual Mandate and Commerce Clause.

3. 26 U.S.C. § 5000A (2012).

4. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2012).

Clause.<sup>5</sup> In a decision which surprised even those people following the case closely, the Supreme Court, for the *first time ever*, found a condition attached to a spending program to be unconstitutionally coercive.<sup>6</sup> The idea that Congress could impermissibly coerce a state into accepting conditions attached to federal funds was not a new idea. Since *Charles C. Steward Mach. Co. v. Davis*,<sup>7</sup> the Court had suggested that a theory of coercion, in which the federal government used inducements and incentives to eviscerate all possibility of meaningful state choice, could be a legitimate limit on Congress' spending power. However, coercion in this context is notoriously hard to define, especially without any clear guidance from the Supreme Court. As a result, a review of the lower court cases dealing with the coercion issue highlights a distinct pattern of ruling against states, with some courts taking it a step further questioning whether they even had the ability to determine "the states are faced . . . with an offer they cannot refuse or merely a hard choice."<sup>8</sup>

The difficulty of defining and applying coercion leads to the question which this article seeks to explore:

Was *Sebelius* and the Medicaid expansion simply another *Wisconsin v. Yoder*<sup>9</sup> or did it set a precedent that could be used by future challenges to spending conditions to establish unconstitutional coercion?

It is true that the Medicaid expansion was unprecedented insofar as the amount of money at stake, and both the Chief Justice and the joint dissent focused heavily on this amount of money<sup>10</sup>. But there is reason to believe that a challenge to the No Child Left Behind Act brought by states who have been denied a waiver under the Obama Administration

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5. U.S. CONST. art. I § 8, cl. 1.

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

7. 301 U.S. 548 (1937).

8. Celestine Richards McConville, *Federal Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163, 180-82 & n.104 (2001) (quoting *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981)).

9. 406 U.S. 205 (1972). *Yoder* was a Supreme Court case which held that a Wisconsin law requiring compulsory school attendance to the age of sixteen violated members of the Old Order Amish Religion and Conservative Amish Mennonite Church's First Amendment free exercise rights. Since the decision, it has been virtually unavailing as precedent to others seeking similar challenges because the Amish way of life is so unique as it relates to secondary education. *Id.*

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

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could use the new precedent to crawl out from under the onerous and sometimes outlandish conditions attached to Title I money.

The No Child Left Behind Act (“NCLB”), the latest reauthorization of the Elementary and Secondary Education Act (“ESEA”) was enacted in 2002. NCLB was a complete overhaul of the Title I program, the largest grant system for federal education funds. States opting into the new program were forced to implement a wide array of federal regulatory policies.

States such as California, Texas, Montana, Nebraska and Pennsylvania all have either declined to apply for waivers out of the testing, accountability, and penalty schemes of No Child Left Behind; or, have had their applications rejected by the Department of Education.<sup>11</sup> This Article argues that these states would have a legitimate challenge to NCLB as unconstitutionally coercive based on the precedent of *Sebelius*. As discussed more in the sections that follow, not only is NCLB and Title I the largest federal funding program behind Medicaid, it also shares many of the characteristics that the opinions in *Sebelius* found to be coercive.

Part II of this Article discusses the history of the coercion theory as a theoretical limitation on Congress’s spending power. This Article will focus on the reluctance and difficulty past courts have expressed in formulating a workable limit based on an argument that states are unconstitutionally coerced into accepting federal spending legislation. Part III briefly examines the Affordable Care Act in order to contextualize the Court’s ruling in *Sebelius*. Part IV discusses the *Sebelius* decision, focusing on the opinions of Chief Justice Roberts and the joint dissent authored by Justice Scalia. Part V provides a brief introduction and background of the No Child Left Behind Act. Part VI makes the case that NCLB is unconstitutionally coercive based on the decision in *Sebelius*.

## II. The Spending Clause and Constitutional Precedent Leading up to *Sebelius*

Congress’s spending power derives from Article I, Section 8,

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11. See Map of States Approved or Awaiting Approval of ESEA Flexibility Waivers, DEP’T OF EDUC., <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (last visited July 13, 2014).

Clause I of the Constitution, which states that “The Congress shall have Power To lay and collect taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.”<sup>12</sup> At the time of *Sebelius*, there were several existing Supreme Court decisions the Court could have used to help resolve the issue of whether “Congress exceeds its enumerated powers and violate[s] basic principles of federalism when it coerces States into accepting onerous conditions . . . by threatening to withhold all federal funding under [Medicaid] . . . .”<sup>13</sup>

Principal among them were *Charles C. Steward Mach. Co. v. Davis*<sup>14</sup> and *South Dakota v. Dole*.<sup>15</sup> In *Steward*, the Court recognized the possibility that financial inducements could assert a power “akin to undue influence,” but established a presumption against coercion to avoid plunging the law “into endless difficulties.”<sup>16</sup> Based in part on this presumption the Court noted there was no reason to suppose, “that the State in that case acted other than through ‘her unfettered will.’”<sup>17</sup>

In *South Dakota v. Dole*, the Supreme Court reaffirmed Congress’ broad power to spend for the general welfare.<sup>18</sup> The Court also articulated limits on that power and reaffirmed that coercion, although not present in *Dole*, could be a successful argument given the right circumstances.<sup>19</sup> *Dole* involved a state law challenge to a federal law<sup>20</sup>

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12. U.S. CONST. art. I, § 8, cl. 1.

13. *Florida v. U. S. Dep’t. of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *petition for cert. filed*, 2011 WL 4500702, at \*i (U.S. Sept. 27, 2011) (No. 11-400), *cert granted*, 80 U.S.L.W. 3297 (U.S. Nov. 14, 2011) (No. 11-398), *aff’d in part, rev’d in part sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

14. 301 U.S. 548 (1937) (upholding an unemployment insurance program provided in the Social Security Act, which imposed a federal tax on employers, but gave a ninety percent credit to employers who adopted their own unemployment plans meeting federal standards).

15. 483 U.S. 203 (1987)

16. *Id.* at 590.

17. *Sebelius*, 132 S. Ct. at 2603 (quoting *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

18. *Dole*, 483 U.S. at 207 (1987).

19. *Id.* at 207-09. Besides coercion, the court placed three internal limits on spending which requires it to: (1) promote the general welfare; (2) unambiguously inform states what is demanded of them; and (3) be germane “to the federal interest in particular national projects or programs.” It also placed one external limit: the “independent constitutional bar,” which prevents Congress from inducing states into actions that the Constitution otherwise restricts. *Id.* at 209-210.

20. *National Minimum Drinking Age*, 23 U.S.C. § 158 (2012).

that directed the Secretary of Transportation to withhold five percent of a State's federal highway funds if they would not raise the minimum drinking age to twenty-one.<sup>21</sup> The "condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel."<sup>22</sup> However, the "condition was not a restriction on how the highway funds – set aside for specific highway improvement and maintenance efforts – were to be used."<sup>23</sup> South Dakota argued that Congress exceeded its power under the Spending Clause. The Court rejected the argument because "all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of her highway funds."<sup>24</sup> Therefore, the Court concluded, this was mere inducement and South Dakota retained a meaningful choice whether to accept or reject the offer.<sup>25</sup> *Dole* and *Steward* left coercion as a theoretical limit on Congress' spending power. Both cases were argued heavily between each of the opinions.

The Court in *Dole* also placed three internal restrictions on Congress' spending power, the most important of which is the "clear-statement" rule.<sup>26</sup> In the spending power context the clear-statement rule is rooted in *Pennhurst State School & Hospital v. Halderman*,<sup>27</sup> in which the Supreme Court held that states must have notice of a condition at the outset.<sup>28</sup> Legislation passed under the spending power, the Court continued, is "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."<sup>29</sup> This quasi-contractual relationship results in spending legislation that is only legitimate if the state "voluntarily and knowingly accepts the terms of the 'contract.'"<sup>30</sup> This principle of Spending Clause legislation was highly contested by the Justices in *Sebelius*, with the Chief Justice supporting his conclusion in large part on the argument that states did not have notice of such a drastic change to Medicaid they would be forced to

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21. *Dole*, 483 U.S. at 211.

22. *Id.* at 208.

23. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012).

24. *Id.*

25. *Id.*

26. See Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067, 1067-72 (2010).

27. 451 U.S. 1 (1981).

28. *Id.* at 17.

29. *Id.*

30. *Id.*

accept.<sup>31</sup>

In *New York v. United States*,<sup>32</sup> the Court reviewed the Low-Level Radioactive Waste Act requiring states to either regulate the radioactive waste in their border, or to assume the liabilities for damages caused through legislation.<sup>33</sup> The court held that the Federal Government may not, consistently with the Constitution, commandeer a state's legislative process by forcing them to enact and enforce a federal regulatory program.<sup>34</sup> Allowing Congress to do so, the court feared, would diminish the political accountability of both state and federal governments.<sup>35</sup> The Court also stated that "outright coercion" of state governments is incongruous with the inducement rationale from *Steward* and *Dole*.<sup>36</sup> However, as in those two cases, the Court failed to provide guidance as to what coercion entails or how this type of coercion would relate to the financial coercion framework set forth in *Dole*.<sup>37</sup> Although *New York v. United States* dealt with legislation outside of the Spending Clause, Chief Justice Roberts relies on this anti-commandeering principle and the accountability rationale in *Sebelius*. Congress may not require a state to regulate, according to the Chief Justice in *Sebelius*, "whether . . . directly command[ing] a State to regulate or indirectly coerce a State to adopt a federal regulatory system as its own."<sup>38</sup>

### III. The Affordable Care Act

In 2010, Congress passed the Patient Protection and Affordable

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

32. 505 U.S. 144 (1992).

33. *Id.*

34. *Id.* at 145.

35. *Id.* at 168.

36. *Id.* at 166.

37. See Charlton C. Copeland, *Beyond Separation in Federalism Enforcement: Medicaid Expansion, Coercion, and the Norm of Engagement*, 15 U. PA. J. CONST. L. 91, 161 (2012).

38. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012); accord Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 903 (2006) [hereinafter *Political Safeguards*] (noting that in 2006, prior to *Sebelius*, "[w]hile the Court has not extended [the anti-commandeering political accountability] reasoning to federal spending programs, such a move would be logical, given that cooperative federalism and commandeering both engender the authority-tangling that gives rise to accountability concerns.").

Care Act (“ACA” or “Act”),<sup>39</sup> also known as “Obamacare,” in order to increase the number of Americans who have health insurance and to begin reigning in the uncontrollable growth in medical costs. Organizations and lawmakers threatened to challenge the constitutionality of the sweeping reform before the bill reached President Obama’s desk.<sup>40</sup> As expected, they followed through on those threats. Twenty-six states, several individuals, and the National Federation of Independent Businesses filed suit, challenging the constitutionality of the ACA in the United States District Court for the District of Northern Florida.<sup>41</sup> The challenges focused on two key provisions of the ACA, only one of which is relevant to this article: (1) the Individual Mandate, which requires most Americans to maintain a “minimum essential” health insurance coverage;<sup>42</sup> and (2) the Medicaid expansion, which enlarged the scope of the Medicaid program and increased the number of individuals the States must cover.<sup>43</sup> This note is concerned with the challenge to the Medicaid expansion as an unconstitutionally coercive exercise of Congress’s Spending Power.<sup>44</sup>

#### A. *Medicaid Expansion*

As discussed in more detail below, it was essential to Chief Justice Roberts’ holding that he believed the Medicaid expansion under the ACA was in reality an “independent grant,” rather than a mere modification of the existing program.<sup>45</sup> A brief recap of the “old” Medicaid system and the changes made ACA is warranted. “Old” Medicaid required States to provide coverage to a limited number of needy individuals, e.g., pregnant women, children, needy families, the

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

40. *Health Care Bill Could Face String of Legal Challenges*, FOX NEWS (Dec. 22, 2009), <http://www.foxnews.com/politics/2009/12/22/health-care-face-string-legal-challenges/>.

41. Complaint, Florida v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91).

42. 26 U.S.C. § 5000A (2012).

43. *Id.* at 2581.

44. U.S. CONST. art. I, § 8, cl. 1.

45. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012).



blind, the elderly, and the disabled.<sup>46</sup> There is no mandatory coverage and States rarely offered coverage for most childless adults. States also “enjoy considerable flexibility with respect to the coverage levels for parents of needy families.”<sup>47</sup> On average, according to the Chief Justice, States were only covering unemployed parents with incomes below 37% of the federal poverty line and for employed parents, only those making less than 63% of the poverty level.<sup>48</sup>

The Affordable Care Act, “New Medicaid,” made considerable changes. By 2014, States opting in to “New Medicaid” must expand their Medicaid programs to cover all individuals under the age of sixty-five with incomes below 133% of the federal poverty line.<sup>49</sup> “New Medicaid,” to comply with the minimum levels of the individual mandate, required states to establish an “[e]ssential health benefits” package.<sup>50</sup> Finally, and gratuitously, the federal government will pay 100% of the additional costs of covering the newly eligible individuals until 2016, and then gradually decreasing to a minimum of 90%.<sup>51</sup> Recognizing these changes will be important for future challenges under *Sebelius*, especially if one concludes, as this author does, that the Chief Justice’s opinion will be followed in lower courts and requires withholding of funds from an independent program.

#### IV. *National Federation of Independent Businesses v. Sebelius*<sup>52</sup>

The district court held that Congress did not exceed its power under the Spending Clause in enacting the Medicaid expansion,<sup>53</sup> but did invalidate the entire Act because the individual mandate was unconstitutional and was not severable.<sup>54</sup> The United States Court of Appeals for the Eleventh Circuit affirmed the district courts holding that the Act’s expansion of the Medicaid program, enacted pursuant to the Spending Clause, was not so unduly coercive as to violate the Tenth

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46. 42 U.S.C. § 1396a(a)(10); *Sebelius*, 132 S. Ct. at 2601.

47. 42 U.S.C. § 1396a(a)(10)(A)(ii); *Sebelius*, 132 S. Ct. at 2601.

48. *Sebelius*, 132 S. Ct. at 2601.

49. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

50. *Sebelius*, 132 S. Ct. at 2601.

51. 42 U.S.C. § 1396d(y)(1); *see Sebelius*, 132 S. Ct. at 2601.

52. 132 S. Ct. 2566 (2012).

53. *Florida ex rel. Bondi v. U.S. Dep’t of Health*, 780 F. Supp. 2d 1256, 1269 (N.D. Fla. 2011).

54. *Id.* at 1299-305.

Amendment's restriction on the use of the spending power to encourage state legislation.<sup>55</sup> The United States Supreme Court granted certiorari,<sup>56</sup> and in the portion of the case that had drawn less public attention, compared to the fight over the individual mandate, concluded that the ACA's Medicaid expansion provisions exceeded Congress's power under the Spending Clause.<sup>57</sup> By conditioning receipt of existing Medicaid funds on states' participation in the new Medicaid requirements<sup>58</sup> in the ACA, seven justices in two different opinions concluded that Congress unconstitutionally coerced states into participating in the new expansion.<sup>59</sup> As Justice Ginsburg points out in her opinion, this marked the first time ever that the "[Court has found] an exercise of Congress' spending power unconstitutionally coercive."<sup>60</sup>

A. *Chief Justice Roberts Opinion*<sup>61</sup>

Chief Justice Robert's agreed with the Plaintiffs' argument in this case that "[c]ongress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State[s] accept[] the new expanded funding and complies with the conditions that come with it."<sup>62</sup> The States argued that this contravened the Court's holding in *New York v. United States*, because the "Federal

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55. Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1262-69 (11th Cir. 2011), cert. granted, 132 S. Ct. 603-04 (2011). The circuit court affirmed the district court's ruling that the individual mandate was unconstitutional but found that the mandate was severable from the rest of the act and therefore reversed that part of the districts court's ruling. *Id.* at 1328.

56. *See id.*

57. U.S. CONST. art. I, § 8, cl. 1; *Sebelius*, 132 S. Ct. at 2588.

58. The two significant new requirements placed on the states under the ACA were: (1) requiring States to expand their Medicaid program to cover all individuals under sixty-five years old with incomes below 133% of the federal poverty line, 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII); and (2) establishment of a new essential health benefit package, which States must provide to all new Medicaid recipients, §§ 1396a(k)(1), 1396u-7(b)(5), 18022(b).

59. *Sebelius*, 132 S. Ct. 2566.

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

61. Part IV.A analyzes the Chief Justice's opinion and the joint dissent, hoping to establish some of the clear takeaways from *Sebelius*. The Chief Justice was joined in Part IV by Justice Breyer and Justice Kagan.

62. *Sebelius*, 132 S. Ct. at 2601; accord Brief for State Petitioners on Medicaid at 20-24, Florida v. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011) (No. 11-400), 2012 WL 105551.

Government may not compel the States to enact or administer a federal regulatory program.”<sup>63</sup> In agreeing with the plaintiffs, the Chief Justice’s opinion made three important analytical moves,<sup>64</sup> each of which will be considered in turn.

Chief Justice Roberts, it seemed, was careful to make a clear distinction between the two types of conditions that Congress can impose on spending grants, which represents Chief Justice Robert’s first important analytical distinction. Congress, the Chief Justice suggested, could place conditions on states receiving federal funds that regulated the use of that money.<sup>65</sup> Here, Justice Roberts is making it clear that it is well within the constitution for Congress to regulate the use of funds granted to the states because “[this] is the means by which Congress ensures that the funds are spent according to its view of the ‘general [w]elfare.’”<sup>66</sup> According to Chief Justice Roberts, these types of conditions are not vulnerable to a coercion challenge because as the donor, the federal government can impose these type of restrictions, and Congress has the power to spend for and define the “general welfare.”<sup>67</sup>

In *Sebelius*, however, the Court was presented with conditions that took on an entirely different form. In this case Congress threatened to withhold “new Medicaid” funds for failure to accept conditions; however they *also* threatened to withhold the States’ existing Medicaid funds for failure to adopt the conditions attached to the “new Medicaid” funds.<sup>68</sup> Because Congress placed conditions that took the form of a threat to terminate other significant *independent grants*, the Chief Justice stated, “the conditions are properly viewed as a means of pressuring the States to accept policy changes.”<sup>69</sup>

This type of condition triggers the next important analytical step in the Chief Justice’s framework. Relying on and reaffirming the Court’s holding in *Dole*, these conditions required the Court to answer whether “the financial inducement offered by Congress was so coercive as to pass

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63. *Sebelius*, 132 S. Ct. at 2601 (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

64. See generally Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861 (2013).

65. *Sebelius*, 132 S. Ct. at 2603-04.

66. *Id.* at 2604.

67. See *id.*

68. *Id.* at 2604.

69. *Id.*

the point at which pressure turns into compulsion.”<sup>70</sup> Chief Justice Roberts then easily distinguished *Dole* from the Medicaid challenge based on vast difference in the amount of money at stake, and also noted the “intricate statutory and administrative regimes [states have developed] . . . to implement their objectives under existing Medicaid.”<sup>71</sup> Chief Justice Roberts then offered some colorful descriptions to contrast the “relatively mild encouragement”<sup>72</sup> in *Dole*—“it is a gun to the head” and “threatened loss of over 10 percent of a State’s overall budget . . . is economic dragooning . . . .”<sup>73</sup> The threatened loss of funds in this case eliminated the States ability to voluntarily accept or reject the offer “not merely in theory but in fact.”<sup>74</sup>

There is an important, yet not immediately apparent, point to be made here about Chief Justice Roberts’ discussion of the coercive effect of the financial inducement in this case. In his discussion of *Dole*, the Chief Justice said the Court found that threatened loss of 5% of the States highway funds as a mere “inducement.”<sup>75</sup> This is how far the court went in *Dole*, yet the Chief Justice continued—“In fact, the federal funds at stake constituted less than half of one percent of South Dakota’s budget at the time.”<sup>76</sup> The Chief Justice “shift[ed] from the 5% at risk to a determination of *what the 5% meant for a particular state’s budget* . . . suggest[ing] that the Court is paying attention to the financial and budgetary context in which the ‘inducement’ is made.”<sup>77</sup> The Chief Justice applied this contextual analysis of coercion to Medicaid, finding the States were threatened with the loss of 100% of Medicaid funds, which accounted for “over 20% of the average state’s budget.”<sup>78</sup> Finally,

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70. *Id.* (internal quotation marks omitted) (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).

71. *Id.* at 2605.

72. *Dole*, 483 U.S. at 211.

73. *Sebelius*, 132 S. Ct. at 2605.

74. *Dole*, 483 U.S. at 211.

75. *Sebelius*, 132 S. Ct. at 2604.

76. *Id.*

77. Copeland, *supra* note 37, at 164 (emphasis added).

78. *Id.* (quoting *Sebelius*, 132 S. Ct. at 2604); see also Shannon K. McGovern, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1536 (2011) (supporting taking contextual financial realities into the consideration of coercion – “[t]he states’ ability to make meaningful decisions about whether to accept conditional grants depends not only on the amount in question and the relative burdens of the strings attached, but also on the vagaries of the financial climate”).

the Chief Justice recognized that States had developed “intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid.”<sup>79</sup> By considering financial coercion through the lenses of contextual realities the Chief Justice opened the door for future challengers to argue that a spending condition, practically speaking, left states with no choice but to accept.

Finally, in the Chief Justice’s third notable analytical development to the coercion doctrine, he held that the “new Medicaid” was in fact a new independent program and that the states could not have anticipated such a change when they signed on to participate in the “old Medicaid.”<sup>80</sup> Leaving aside the lack of explanation for this novel conclusion, it is significant for many reasons. For one, it places the emphasis of the coercion analysis on threatening to withhold funds from a pre-existing and independent program, in which states’ participation is entrenched.<sup>81</sup> This conclusion also calls into question the significance the Chief Justice analysis of the coercive impact based on the contextual realities between state and the federal government.<sup>82</sup> Roberts, by placing the emphasis on the States’ lack of notice shifted the inquiry to the time the state originally began participation in the program.<sup>83</sup> This will have an effect on future applications if lower courts read this opinion as lacking emphasis on the administrative and fiscal realities that impact a State’s ability to accept or reject federal spending conditions.<sup>84</sup> Moreover, it is possible that this limitation will leave the coercion doctrine isolated to this case, with a result of forfeiting increased political accountability that was an important policy justification for Robert’s opinion.<sup>85</sup>

#### B. *The Joint Dissent*<sup>86</sup>

The joint dissent agreed with the Chief Justice’s conclusion that the Medicaid expansion was unconstitutionally coercive<sup>87</sup> and discussed

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79. Copeland, *supra* note 37, at 164.

80. *Sebelius*, 132 S. Ct. at 2606.

81. *See* Bagenstos, *supra* note 64.

82. *See* Copeland, *supra* note 37, at 161.

83. *Id.*

84. *Id.*

85. *See* Bagenstos, *supra* note 64.

86. The joint dissent was authored by Justice Scalia with Justices Kennedy, Thomas and Alito joining him.

87. The joint dissent wrote separately to express their disagreement over the

similar points made by the Chief Justice relating to the limits on Congress' spending power.<sup>88</sup> After the general discussion the joint dissent boils the case down to two questions: "(1) what is the meaning of coercion in this context?; (2) is the ACA's expanded Medicaid coverage coercive?"<sup>89</sup>

The first question, according to the joint dissent, was straightforward in the present context – "legitimacy of attaching conditions to federal grants depends on the voluntariness of States' choice to accept or decline the offered package. . . . [I]f States really have no choice . . . the offer is coercive."<sup>90</sup> Moreover, theoretical voluntariness is not enough, the decision to accept or reject must remain with the states, "not merely in theory but in fact."<sup>91</sup> The joint dissent then turned to answering the second question, whether the ACA's expanded Medicaid coverage left the states with a voluntary choice to accept or reject the offer.

Answering this question, the joint dissent looked principally to the size of the Medicaid expansion at issue declaring, "in this case . . . there can be no doubt."<sup>92</sup> Like the Chief Justice, the joint dissent assessed the massive impact withholding all Medicaid funds would have on the states' overall budgets.<sup>93</sup> However, the dissent expanded on the Chief Justice's reasoning on this point, couching the financial burden in terms of a double loss.<sup>94</sup> Medicaid is funded by heavy federal taxes on individuals, including citizens residing in an "opt out state." Therefore, a State that opts out of "new Medicaid" loses the federal Medicaid funding (which their citizens are still paying for) and is left with a diminished tax base to raise revenue to support the state's own Medicaid type program.<sup>95</sup>

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severability of the penalty provision of the Medicaid expansion.

88. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2659-61 (Scalia, J., dissenting) (discussing the anti-commandeering principle from *New York v. United States*, 505 U.S. 144 (1992); the requirement that states voluntarily and knowingly accept the terms of the contract, and the importance of political accountability).

89. *Id.* at 2661.

90. *Id.*

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

92. *Id.* at 2662.

93. *Id.* (discussing that Medicaid has long been the largest grant program to the states, that states devote more of its budget to Medicaid than any other program, and that federal funds account for fifty percent to eighty-three percent of each states' total Medicaid expenditures).

94. *Id.* at 2661; *see* Copeland, *supra* note 37, at 166.

95. *Sebelius*, 132 S. Ct. at 2661-62 (Scalia, J., dissenting).

Simply stated, the dissent found the “mechanism of coercion in the risk that federal taxes will crowd out the ability of states to raise their own revenue.”<sup>96</sup> Justice Scalia gave a hypothetical scenario to illustrate this point:<sup>97</sup>

Suppose, for example, that Congress enacted legislation offering each State a grant equal to the State’s entire annual expenditures for primary and secondary education. Suppose also that this funding came with conditions governing such things as school curriculum, the hiring and tenure of teachers, the drawing of school districts, the length and hours of the school day, the school calendar, a dress code for students, and rules for student discipline. *As a matter of law*, a State could turn down that offer, but if it did so, its residents would not only be required to pay the federal taxes needed to support this expensive new program, but they would also be forced to pay an equivalent amount in state taxes. And if the State gave in to the federal law, the State and its subdivisions would surrender their traditional authority in the field of education.<sup>98</sup>

This example was a cause for concern for the joint dissenters.<sup>99</sup> It

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96. Bagenstos, *supra* note 64, at 10; *see* Copeland, *supra* note 37, at 166 n.303 (noting that Professor Lynn Baker, a prominent authority on the Spending Clause and cited by Justice Ginsburg, has made this double loss argument to support her contention that funding withdrawals that go beyond use regulations for those specific funds are *per se* coercive).

97. States, education law scholars, and Local Education Agencies (LEA’s), who at the time of this opinion continue to be stuck under the onerous federal conditions attached to No Child Left Behind Act took quick notice of Justice Scalia’s example. *See* Mark Walsh, *Ed. Law Challenges Loom After Health-Care Ruling*, EDUC. WEEK, July 18, 2012, at 20 (discussing the ruling, noting both Justice Ginsburg and Justice Scalia discussed education in their opinions and quoting leading education law scholars as to the significance for ESEA, NCLB and education anti-discrimination statutes such as Title IX).

98. *Sebelius*, 132 S. Ct. at 2662 (Scalia, J., Dissenting) (emphasis in original).

99. Often, the Court’s conservative block raises federalism concerns in the context of an increasing federal role in education. *See* Walsh, *supra* note 97. The joint dissent used this hypothetical to illustrate just how intrusive and powerful an unchecked spending power could be. This author believes that education was a strategic selection

also highlights what is most likely the key analytical difference between the two opinions that together made up the seven votes to strike down the Expansion as coercive. The joint dissent's hypothetical does not involve Congress leveraging continued funds on an entrenched program to coerce or force a state to participate in a separate "independent program."<sup>100</sup> For the joint dissent, "the combination of 'large grants' supported by 'a heavy federal tax' makes a condition one that states 'as a practical matter, [may] be unable to refuse[,]'"<sup>101</sup> once this is determined it essentially ends the inquiry into coercion under the joint dissent's framework.

#### V. No Child Left Behind Act

The Federal Government became a meaningful player in elementary and secondary education in 1965 when Congress passed the Elementary and Secondary Education Act of 1965.<sup>102</sup> The Act's flagship funding program is Title I, which allocates a majority of all federal education funds to states on the condition that they adopt federal directives and policies.<sup>103</sup> The central purpose of Title I when it was originally passed, and subsequently reauthorized over the years, was to provide federal funding to schools and school districts with a high percentage of students from low-income households.<sup>104</sup> To achieve this purpose, the federal grants under Title I were conditioned on conformance with directives and regulations on how they could be spent, such as providing mathematics

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for the hypothetical because of the current state of federal education policy. Moreover, because education has been recognized as the most important function of state and local governments and given the historic nature of this ruling, this hypothetical was not so much a simple illustration as it was a foreshadowing of future challenges (notably, No Child Left Behind).

100. *Compare Sebelius*, 132 S. Ct. at 2662 (Scalia, J., Dissenting) (illustrating, by example, double loss in education context as coercive without threatening loss of funds from independent grant), *with id.* at 2605 (Opinion of Roberts, C.J.) (holding the threatened loss of funds from existing Medicaid as the unconstitutional coercive action in this case).

101. Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 166 (2012) (quoting *Sebelius*, 132 S. Ct. at 2661).

102. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 2701-2854 (1982)).

103. McGovern, *supra* note 78, at 1526.

104. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. § 6301 (1994 & Supp. V 2000)).



instruction to disadvantaged students.<sup>105</sup>

In 2002, George Bush signed into law the No Child Left Behind Act (NCLB),<sup>106</sup> which was a complete revisal and reauthorization of the Title I program of the Elementary and Secondary Education Act of 1965 (ESEA).<sup>107</sup> NCLB imposed new substantive provisions<sup>108</sup> focused on testing,<sup>109</sup> teaching,<sup>110</sup> and accountability.<sup>111</sup> These new regulations were forced on states that wished to continue receiving Title I funds. In the sections that follow, this article argues that the No Child Left Behind Act is analogous to the Medicaid expansion, making for a strong argument that under the precedent set in *Sebelius*, States could successfully challenge the law as unconstitutionally coercive.

## VI. Why NCLB and the Medicaid Expansion are Sufficiently Similar to Find NCLB Unconstitutionally Coercive.

### A. *Size of the Funding Program – How Much Money is at Stake*

The most important feature of Title I funds under NCLB and the Medicaid program at issue in *Sebelius* is the sheer size of the program. Federal funding under NCLB's Title I, Part A for fiscal year 2011 was \$14,463,416,198.00.<sup>112</sup> In 2010, federal education expenditure for all K-12 funding programs was \$70.7 billion, which is just over twenty-one

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105. Judith A. Winston, *Rural Schools in America: Will No Child Be Left Behind? The Elusive Quest for Equal Educational Opportunities*, 82 NEB. L. REV. 190, 202 (2003).

106. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

107. McGovern, *supra* note 78, at 1526.

108. For an in-depth discussion on all of the new requirements placed on states receiving Title I funds, see Copeland, *supra* note 37, at 145-51.

109. See 20 U.S.C. § 6311 (2012) (requiring states to adopt comprehensive plans defining adequate yearly progress).

110. See *id.* § 6319(a)(2). A "highly qualified" teacher new to the profession must have state certification and demonstrate competency in the relevant subject matter by having majored in that subject in college or by passing a state test. *Id.* § 7801(23).

111. See *id.* § 6311(b)(1) (requiring states to submit to the Secretary of Education an accountability plan developing challenging academic standards in math, reading, and science).

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

percent of state K-12 expenditures.<sup>113</sup> Moreover, to understand the amount of money states receive for primary and secondary education alone, under Title I and IDEA the average state receives over a half a billion dollars each year.<sup>114</sup> The joint dissent recognized that federal outlays for elementary and secondary education were the second largest, after Medicaid.<sup>115</sup> Although falling well short of the amount of money attached to the Medicaid expansion, federal education funding under NCLB nevertheless represents a significant amount of federal funding. A dollar amount that is at the very least marginally comparable to the amount of money attached to the Medicaid expansion.

Moreover, the Chief Justice's forays into a contextual analysis of coercion would allow a challenging state to argue NCLB is unconstitutionally coercive. Many states' current financial realities coupled with administrative investments and structural or other physical investments are analogous to the financial realities and investments discussed in *Sebelius*. For example, prior to the enactment of NCLB, all states had statewide testing and accountability systems set up and accounted for in their budgets. The testing and accountability conditions attached to NCLB required increased administrative resources, most of which exceeded the capabilities of state and local departments of education. Consequently, they required additional funding.<sup>116</sup> The Chief Justice opened the door for lower courts to consider such contextual financial realities which all support a finding that NCLB was unconstitutionally coercive.

B. *Loss of Other, Unrelated, Independent Federal Funds as a Result of States "Opting-out" of New Conditions*

A corollary to the actual dollar amount of federal expenditures to

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113. See Nat'l Ass'n of State Budget Officers, 2010 State Expenditure Report: Examining Fiscal 2009-2011 State Spending 14 & 16 (2011), available at [http://www.nasbo.org/sites/default/files/2010%20State%20Expenditure%20Report\\_0.pdf](http://www.nasbo.org/sites/default/files/2010%20State%20Expenditure%20Report_0.pdf) [hereinafter "NASBO Report"].

114. *Id.*

115. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2663-64 (2012) (Scalia, J., dissenting) ("After Medicaid, the next biggest federal funding item is aid to support elementary and secondary education, which amount to 12.8% of total federal outlays to the States . . . ." (citing NASBO Report)).

116. Gina Austin, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights*, 27 T. JEFFERSON L. REV. 337 (2005).

states under Title I, as amended by No Child Left Behind, is the threat of losing *other, unrelated, Independent federal funds* for States failure to opt into the reauthorization in 2002.<sup>117</sup> Principal to the Chief Justice's holding<sup>118</sup> was the provision of the ACA that provided "if a State's Medicaid plan does not comply with the Act's Requirements, the Secretary of Health and Human Services may declare that 'further payments will not be made to the State.'"<sup>119</sup> This provision, according to the Chief Justice, was "a gun to the head."<sup>120</sup> Yet, Medicaid expansion did not take effect until 2014, meaning the Chief Justice was speculating that it would leave States with no choice. That is not to say he was incorrect, rather it is to drive home the next point—there is real evidence that States confronted with losing all education funds for opting out of NCLB, had no choice and were coerced into opting in. This is a benefit of challenging a law after it has actually coerced States into accepting. Here is the evidence.

To highlight the general opposition to opting in to NCLB, at the time it was passed at least thirty-eight states considered legislative resolutions condemning NCLB.<sup>121</sup> Focusing on Utah and Virginia will highlight how NCLB threatened independent grant funds and was, just like the Medicaid expansion, a "gun to the head." In 2004, the Virginia House of Delegates passed a resolution condemning NCLB and introduced a bill to reject certain parts of the Act.<sup>122</sup> Virginia was poised to render NCLB unnecessary as they believed their statewide SELP test was adequate.<sup>123</sup> The Department of Education, eager to get all states on board with NCLB, informed them of the consequences—"[the DOE] would seek to cut *all* education funds that had *any* relation to NCLB if the state pulled out or refused to comply with NCLB requirements. For

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117. See *infra* notes 119-29 and accompanying text.

118. See Bagenstos, *supra* note 64, at 5, 7-9 (arguing that under the Chief Justice's opinion, there is a threat to withhold funds from independent grant programs, which states have participated in for years as a dispositive element to prove coercion).

119. *Sebelius*, 132 S. Ct. at 2604 (quoting 42 U.S.C. § 1396c).

120. *Id.*

121. See William J. Mathis, *The Cost of Implementing the Federal No Child Left Behind Act: Different Assumptions, Different Answers*, 80 PEABODY J. EDUC. 90, 91-92 (2005) (detailing state responses to the passage of NCLB).

122. Michael D. Barolsky, *High Schools are not Highways: How Dole Frees States from the Unconstitutional Coercion of No Child Left Behind*, 76 GEO. WASH. L. REV. 725, 740 (2008).

123. *Political Safeguards*, *supra* note 38, at 897.

Virginia, this would mean a loss of \$330 million per year.”<sup>124</sup> Virginia did not opt-out.

Utah took a similar path to Virginia. The Utah House of Representatives passed a bill refusing NCLB funds, at which time they also received a notice from the Department of Education.<sup>125</sup> The Department of Education informed the Utah Superintendent of Instruction that rejecting NCLB would lead to a loss of \$43 million in Title I funds, even more important to legal and practical coercion, Utah would forfeit nearly twice that much in other formula and categorical funds.<sup>126</sup> Despite both houses giving the bill to reject NCLB a favorable recommendation a month before, HB 43 ultimately failed to gain the necessary votes and was defeated.<sup>127</sup>

Despite lacking any notice in the statute itself,<sup>128</sup> both Virginia and Utah were threatened with loss of education funds that were not within the NCLB/Title I reauthorization bill. Therefore, similar to the issue in *Sebelius*, states were coerced into accepting an independent spending program with threats of losing extraordinary amounts of other federal dollars that were entirely separate from NCLB and Title I. Given that no state, significantly including Virginia and Utah, ultimately opted out of NCLB, it leads to no other conclusion than the states were coerced into NCLB. In short, they opted in “with a gun to their head.”

C. *No Child Left Behind Revised Title I From a Program Aimed at Targeting the Education Gap of Low-Income Students to a Program Implementing Nationwide Federal Education Policy.*

As discussed above, the Chief Justice anchored his holding on the States’ lack of notice that Congress would condition continued participation on a later agreement to also participate in what he pegged as a new,<sup>129</sup> independent Medicaid program.<sup>130</sup> Yet, the Chief Justice failed

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124. *Id.* at 897 (quoting e-mail from Rod Clemmons, Legislative Assistant, Office of Del. James H. Dillard II, to the Harvard L. Rev. (Feb. 27, 2005, 11:17:14 EST) (on file with the Harvard Law School Library).

125. Austin, *supra* note 116, at 365-66.

126. William T. Pound, Nat’l Conference of State Legislatures, Task Force on No Child Left Behind: Final Report 45 (2005).

127. Austin, *supra* note 116, at 366.

128. *See infra* Part C for discussion on lack of notice.

129. States have made a lack of notice argument of the penalties for failing to opt in to NCLB and the new Title I program. Notably, Virginia at the time was considering

to articulate a framework for analyzing when an amendment to a statute constitutes an entirely new statute.<sup>131</sup> Even without a clear framework to answer this question NCLB has many of the same qualities of the Medicaid expansion, lending itself to a similar conclusion.

First, the Chief Justice notes the original program “was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children.”<sup>132</sup> The Chief Justice continued, “Under the [ACA], Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population . . . .”<sup>133</sup> NCLB effected a similar change on the Title I program. In order to continue the receipt of federal funds under the existing Title I program,<sup>134</sup> states were required to adopt new federal policies completely unrelated to Title I. For example, states who received Title I funding under NCLB had to have a plan to ensure that all teachers in “core academic subjects within the State are highly qualified . . . .”<sup>135</sup> Moreover, each state was required to implement a “single statewide accountability system” as a condition to continued receipt of Title I funds.<sup>136</sup> These examples demonstrate that NCLB effected a “shift in kind, not merely degree”<sup>137</sup> when it attached requirements for schools receiving Title I funds but also mandated requirements of schools that received none.

The Chief Justice also made a point of noting that the States could not have been on notice that such changes were permitted under the clause allowing Congress to alter or amend the statute.<sup>138</sup> He addressed Justice Ginsburg argument, which highlighted some of the more drastic amendments made by previous Congress’s, and distinguished them as lacking in the same sort of transformation the current Medicaid

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opting out but was informed of the loss of all education funding – something the statute itself left unclear and lacking notice to states. *See supra* Part II.

130. *See* Bagenstos, *supra* note 64, at 9.

131. Copeland, *supra* note 37, at 165.

132. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605-06 (2012).

133. *Id.* at 2606.

134. Additionally, to continue receipt of other grant funds not directly connected to Title I but which rely on the Title I formula, *see infra* Part II.

135. 20 U.S.C. § 6319(a)(2) (2012).

136. *Id.* § 6311(a)(2)(A).

137. *Sebelius*, 132 S. Ct. at 2605.

138. *Id.*

expansion worked.<sup>139</sup> Similarly, Title I had been reauthorized and amended throughout its history; however none of these previous amendments had the same degree of revision as NCLB.<sup>140</sup> Notably, as discussed above Title I now placed regulations on schools that received none of the funding. As a result, States who participated in the Title I program in its first iteration in the ESEA in 1965 could hardly anticipate the drastic changes effected by NCLB.<sup>141</sup> For these reasons, NCLB presents a situation sufficiently analogous to the Medicaid expansion and constitutes unconstitutional coercion under the framework laid out in Chief Justice Roberts' opinion.

## VII. Conclusion

The coercion theory, that in some instances the Federal Government leaves states with no choice other than to enter into conditional spending program in violation of the constitution, has eluded Academics and Jurists alike since *Butler v. United States*.<sup>142</sup> It is not surprising then that the *Sebelius* opinions finding the Medicaid expansion coercive could not settle on a single coercion analysis and that the Chief Justice's opinion and the joint dissent inspired such a spirited dissenting opinion from Justice Ginsburg.<sup>143</sup> The question thus becomes exactly when do federal spending conditions become unconstitutionally coercive under *Sebelius*'s precedent.

It is likely impossible for outsiders to discern precisely what constitutes financial inducement that is so overbearing that it becomes unconstitutional coercion. It is also likely that future challenges to federal spending conditions will produce inconsistent results and application of the uncertain precedent set in *Sebelius*.

The No Child Left Behind Act, however, is sufficiently analogous

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139. *Id.* at 2606.

140. Even the Department of Education noted that NCLB differed from the eight previous reauthorizations. The DOE stated the changes as: (1) increased accountability for states, school districts, and schools; (2) additional teachers or paraprofessionals; and (3) after school and summer programs that extend the regular school curriculum. Coulter M. Bump, *Reviving the Coercion Test: A Proposal to Prevent Federal Conditional Spending that Leaves Children Behind*, 76 U. COLO. L. REV. 521, 523-24 (2005).

141. *See Sebelius*, 132 S. Ct. at 2604-07.

142. 271 U.S. 1 (1936).

143. *Sebelius*, 132 S. Ct. at 2629-41 (Ginsburg, J., concurring in part, dissenting in part).

to the Medicaid Expansion that it is reasonable to foresee a court striking it down as unconstitutionally coercive. Federal education funding under NCLB represents the largest federal expenditure after Medicaid and there is no real argument that states were left with no meaningful choice to accept or reject the new conditions. While this article suggests that NCLB would and should be struck down as unconstitutionally coercive under the *Sebelius* precedent, any challenge, whether successful or not, would answer what is arguably the most important lingering question: whether coercion will be a legitimate check on Congress' expansive power under the Spending Clause or if *Sebelius* will be read into oblivion as a case that presented unique facts so extraordinary as to prevent future use as meaningful precedent. In short, to *Yoder* or not to *Yoder*.