SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 64 | Issue 2

2013

Coercion by the Numbers: Conditional Spending Doctrine and the Future of Federal Education Spending

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Abstract

In *NFIB v. Sebelius*, the Supreme Court for the first time deemed a federal spending program unconstitutionally coercive. This decision transformed the coercion principle from a mere rhetorical device into a legitimate restraint on federal conditional spending. Specifically, the coercion principle addresses the risk that Congress will use its spending power to subvert state regulation in areas in which states have a reserved right to regulate. As this principle has developed over recent decades, federal spending for elementary and secondary education has steadily increased.

This Note applies the Court's reasoning from *NFIB* to No Child Left Behind, which remains the primary piece of federal education legislation, and concludes that a strong case exists for finding federal education spending unconstitutionally coercive. Such a case resonates with the rationales underlying the coercion principle. Long-term trends in education spending are then considered to show that coercion will likely become a genuine issue in the near future, even as Congress enacts new education legislation. Finally, this Note discusses federal involvement in education and makes two legislative recommendations for absolving coercion issues.

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INTRODUCTION

In *National Federation of Independent Business v. Sebelius*[1] (*NFIB*), often dubbed the "health care decision," the Supreme Court took an unprecedented step in striking down an exercise of congressional conditional spending as unconstitutionally coercive.[2] However, the long-term ramifications of this holding remain unsettled. While pushing the conditional spending doctrine forward, the Court's three opinions leave many questions unanswered. How exactly does the Court judge coercion? At what point does "pressure turn[ ] into compulsion?"[3] Are other conditional spending programs vulnerable?

This Note addresses those questions. More specifically, it examines how conditional spending for education may likewise be

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

2. *Id.* at 2630 (Ginsburg, J., dissenting).

3. Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937).

deemed unconstitutionally coercive under the Supreme Court's new conditional spending jurisprudence. Part I reviews the relevant history of the conditional spending doctrine, finishing with the Medicaid portion of the recent health care decision. Part II outlines the evolution of the federal government's involvement in education and the spending schemes associated with that involvement. Part III briefly reviews the federal courts' application of the conditional spending doctrine to federal education spending. Part IV employs the analysis from the health care decision to conclude that modern congressional conditional spending for education violates the coercion principle. Part V concludes this Note by observing the problems associated with federal involvement in education and offers recommendations for reconciling federal education spending with the coercion principle.

I. CONDITIONAL SPENDING DOCTRINE

Congress regularly makes federal funds available to states and localities provided that the recipients comply with certain conditions. An instrument of cooperative federalism, conditional funding benefits state and federal officials alike. State representatives avoid the perception that their sovereignty has been undermined by national programs, while setting in motion initiatives that presumably benefit their citizens.[4] Congress benefits in terms of efficiency and increased popular acceptance of its policies by those opposed to a wide-reaching federal bureaucracy.[5] Over time, conditional funding grants have proven to be a popular policy tool. As Justices Scalia, Kennedy, Thomas, and Alito—the dissenting Justices—noted in *NFIB*, Congress increasingly grants money to states to accomplish its legislative objectives.[6]

But the increased legislative popularity of such conditional spending obscures its drawbacks, notably the undermining of political accountability and the circumventing of limits on federal power.[7] As

4. Reply Brief of State Petitioners on Medicaid at 5, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-400).

5. *Id.* (explaining that Congress benefits "by spending the federal money through States rather than new federal instrumentalities").

6. *See NFIB*, 132 S. Ct. at 2658 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (citing G. ROSS STEPHENS & NELSON WIKSTROM, AMERICAN INTERGOVERNMENTAL RELATIONS: A FRAGMENTED FEDERAL POLITY 83 (2007)) (acknowledging the large increase of federal aid in absolute terms and as a percentage of state and local expenditures: from 11.6% in 1950 to 37.5% in 2010).

7. Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 573–74, 584 (2000) (asserting that cooperative federalism arrangements, which include conditional spending schemes, erode political

American political institutions continue to embrace conditional funding, greater attention should be dedicated to the constitutional issues it raises. This Part tracks the Supreme Court's treatment of these issues and identifies where the Court's conditional spending jurisprudence stands today.

A. Development of Conditional Spending Jurisprudence

Congress's power to spend money for the general welfare traces back to the Spending Clause.[8] Nearly a century and a half after the Constitution's adoption, however, the basic meaning of the clause remained open to debate. In the midst of the New Deal, the Supreme Court weighed two divergent stances on whether the spending power stands alone as a separate power, distinct from the other enumerated legislative powers.

In *United States v. Butler*,[9] the Court decided this issue and adopted an expansive view of the spending power.[10] According to James Madison, the Constitution limits the power of Congress to spend only in support of its other Article I powers; in contrast, Alexander Hamilton viewed the Spending Clause as authorizing a separate power subject only to the broad limitation of furthering the general welfare.[11] By definitively adopting Hamilton's view, the Court greatly enhanced the federal government's ability to spend, especially in light of the Court's admitted reluctance to second-guess Congress.[12]

Taking advantage of *Butler*'s broad interpretation of its spending power, Congress began to steadily increase its use of conditional spending to prompt and influence state action.[13] But the Supreme

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accountability and sidestep the constitutional principle of dual federalism).

8. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

9. 297 U.S. 1 (1935).

10. *Id.* at 65. The Court held the taxing authority at issue under the Agricultural Adjustment Act, Pub. L. No. 73-10, 48 Stat. 31 (1933), to be unconstitutional because it regulated intrastate agricultural production in violation of the Tenth Amendment. However, the Court undermined *Butler*'s Tenth Amendment holding just two years later. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 589–90 (1937).

11. *Butler*, 297 U.S. at 65–66.

12. *Id.* (reasoning that adopting Madison's minimalist view would render the Spending Clause's "general welfare" language a "mere tautology").

13. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

Court shed little light on the topic for decades following the *Butler* decision.[14]

The conditional spending doctrine's development did not begin in earnest until 1981 in *Pennhurst State School & Hospital v. Halderman*.[15] In *Pennhurst*, residents of a state-operated facility for people with mental retardation asserted a claim under the Developmentally Disabled Assistance and Bill of Rights Act,[16] a federal grant program aimed at creating state programs to assist the developmentally disabled.[17] Specifically, residents alleged that the facility failed to provide the minimum living conditions detailed in the Act's "bill of rights" provision.[18]

The Supreme Court attacked the provision's language for failing to express that compliance with it served as a condition for the receipt of federal funds under the Act.[19] Articulating a rare restraint on conditional spending, the Court analogized congressional conditional spending to contract law. Drawing from the concept of mutual assent, the Court asserted that the spending power depends "on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"[20] Thus, Congress must unambiguously express any condition on federal grants to states, or the courts will decline to enforce it.[21]

Though *Pennhurst* limited Congress's ability to attach conditions to its spending, it represented the exception rather than the rule. *South Dakota v. Dole*[22] most completely articulates the modern conditional spending doctrine before *NFIB* and exemplifies the wide deference traditionally accorded to Congress in exercising its spending power. In an opinion by Chief Justice Rehnquist, the *Dole* Court

14. *But see, e.g.*, Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 135–36 (1947) (recognizing Congress's ability to fix the terms of funding granted to the states); King v. Smith, 392 U.S. 309, 316–17 (1968) (same).

15. 451 U.S. 1 (1981).

16. Pub. L. No. 94-103, 89 Stat. 486 (1975) (codified as amended in scattered sections of 42 U.S.C. (2006)).

17. *Pennhurst*, 451 U.S. at 5–6, 11.

18. *Id.* at 6, 12–13.

19. *Id.* at 12–13 (distinguishing the bill of rights provision, 42 U.S.C. § 6010, from §§ 6005, 6009, 6011, and 6012). The Court upheld other provisions of the Act that clearly conditioned federal assistance on taking certain actions to facilitate the employment of people with disabilities.

20. *Id.* at 17.

21. *Id.*

22. 483 U.S. 203 (1987).

upheld legislation that withheld a percentage of federal highway funds from states that set their minimum legal drinking ages below twenty-one years.[23]

Rehnquist outlined the basic framework for evaluating conditional spending, holding that conditions are valid as long as they satisfy four requirements.[24] First, the spending must advance the "general welfare." Second, as established in *Pennhurst*, the condition must be expressed unambiguously. Third, the condition must relate to federal interests in the spending program. Fourth, the spending cannot violate any other constitutional provision. In applying the framework, the *Dole* majority controversially found that the drinking age condition "directly related" to the funding's purpose of improving the safety of interstate travel.[25] By categorizing the seemingly tenuous relationship between minimum drinking ages and highway funding as direct, the *Dole* Court displayed significant deference to Congress in crafting funding conditions.[26]

More important, however, the Court trumpeted an independent concern for congressional coercion. The Court expanded on language from *Steward Machine Co. v. Davis*,[27] an earlier case in which the Court found that a condition did not cross "the point at which pressure turns into compulsion."[28] A half century after that decision,

23. *Id.* at 206. The legislation at issue was 23 U.S.C. § 158 (2006) (allowing the Secretary to withhold funds if the legal purchase, possession, or drinking age is below twenty-one years).

24. *Id.* at 207–08.

25. *Dole*, 483 U.S. at 208–09. *But see id.* at 212–15 (O'Connor, J., dissenting) (disagreeing with the majority's application of the relation requirement while approving the majority's framework).

26. *See* Michele Landis Dauber, *Judicial Review and the Power of the Purse*, 23 LAW & HIST. REV. 451, 452–53 (2005) (positing that the Supreme Court has exercised vast deference towards congressional spending since before the beginning of the twentieth century). Commentators have criticized not only *Dole*'s "directly related" reasoning but also later applications of that reasoning to conditions that bear a looser relation to the federal interest in the spending. *See, e.g.*, Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 447–50 (2005) (attacking court decisions upholding the Clean Air Act's conditions on federal highway funds as sufficiently related to the federal interest of environmental protection).

27. 301 U.S. 548 (1937).

28. *Id.* at 590. However, the Court doubted whether courts could determine with any precision the point at which a condition becomes coercive. For a conceptual explanation of coercive conditional spending and a related analytical framework, see Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001).

Dole asserted that in certain circumstances federal conditional spending may turn from permissible encouragement into unconstitutional coercion.[29] In evaluating coercion, the Supreme Court emphasized that South Dakota would lose only five percent of the funds otherwise available under the highway program, a very small percentage of the state's total expenditures for all purposes. Therefore, the Court described the condition as "relatively mild encouragement."[30]

Four years later, the Supreme Court delved deeper into the rationales underlying coercion. In *New York v. United States*,[31] the constitutionality of three sets of incentives under the Low-Level Radioactive Waste Policy Amendments Act of 1985[32] was at stake. The first set of incentives, the "monetary incentives," awarded states for achieving a series of waste-disposal milestones from a fund financed by a portion of surcharges paid by states exporting nuclear waste. The Supreme Court reaffirmed the *Dole* framework by using it to find that this portion of the Act was a valid exercise of conditional spending.[33] After the Court rejected the argument that the form of accounting for these expenditures violated the spending power, it upheld an otherwise straightforward exercise of conditional spending.[34]

Nonetheless, the Court struck down another piece of the statute that imposed a negative incentive on states that did not regulate according to Congress's instructions.[35] The "take title" provision gave states the option of either regulating in line with Congress's instructions or, alternatively, taking title and possession of the waste and bearing the liability for all damages suffered by waste generators. This provision, the Court found, unconstitutionally crossed the line from encouragement to coercion.[36]

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

30. *Id.*

31. 505 U.S. 144 (1992).

32. 42 U.S.C. §§ 2021b–2021j (2006).

33. *New York*, 505 U.S. at 171–73.

34. *See id.* at 172 (responding to petitioner's argument that keeping the funds in an account separate from the general treasury violates Congress's spending power, Justice O'Connor stated, "[t]he Constitution's grant to Congress of the authority to 'pay the Debts and provide for the . . . general Welfare' has never . . . been thought to mandate a particular form of accounting").

35. *Id.* at 174–75.

36. *Id.* at 175.

Concern for state rights climbed to the forefront in the Court's reasoning.[37] As Justice O'Connor noted, "[T]he Constitution simply does not give Congress the authority to require the States to regulate."[38] Further, the Court addressed problems created by the take-title provision that apply equally to instances of conditional spending.

First, the Court recognized the risk of disconnecting political accountability when Congress compels states to regulate.[39] If states freely choose to take action, then state officials rightly remain accountable to their own citizens. But when Congress coerces states to act, as found in *New York*, citizens may wrongly hold state officials politically accountable for Congress's political agenda.[40] In other words, when state officials cease to act under their volition and instead carry out the orders of Congress, voters may nonetheless blame or credit state officials.

Second, because coercion misdirects political accountability, the concern arises that coercion may promote political abuse. Federal officials possess an incentive to compel states to act because they can shift responsibility and its inherent burdens to the states. Without the coercion principle, members of Congress might overly rely on coercive federal spending programs and take refuge in a political safe harbor. Meanwhile, state legislators could plausibly deflect blame to Congress, further blurring the lines of political accountability. The *New York* Court anticipated the potential degradation into political tennis, especially in the context of radioactive waste disposal.[41] It responded by asserting that state officials cannot consent to a congressional overreach.[42] Though the Court did not strike down an exercise of conditional spending, it fortified the coercion principle recognized in *Dole*. These developments provided the foundation for the Supreme Court's more rigorous approach to conditional spending in *NFIB*.

37. *See, e.g.*, *id.* at 188 ("States are not mere political subdivisions of the United States. . . . The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart.").

38. *Id.* at 178.

39. *Id.* at 168 ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.").

40. *Id.* at 168–69.

41. *Id.* at 182 ("[T]he facts of these cases raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. Most citizens recognize the need for radioactive waste disposal sites, but few want sites near their homes. . . . [I]t is likely to be in the political interests of each individual official to avoid being held accountable to the voters. . . .").

42. *Id.* at 182.

B. Crossing the Line: NFIB v. Sebelius

NFIB garnered immense attention for its political ramifications. After the passing of the Patient Protection and Affordable Care Act[43] (ACA), many states challenged the validity of the individual mandate and the Medicaid expansion. Before the ACA, the Medicaid program offered conditional funding to the states to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care.[44] Under the ACA, states receiving funding were required to extend coverage to any person under the age of sixty-five with an income below 133% of the federal poverty line at the beginning of 2014.[45] As noted by Chief Justice Roberts, the provision would substantially increase the number of adults whom states must cover because states previously, on average, covered only unemployed parents who made less than thirty-seven percent of the poverty line and employed parents who made less than sixty-three percent.[46]

The Supreme Court produced three different opinions on the Medicaid expansion issue. Two opinions, representing seven Justices, concluded that the expansion was unconstitutionally coercive. Justices Ginsburg and Sotomayor concluded otherwise. Taken together, these opinions revitalize the coercion principle.[47] The opinions provide some guidance as to how the coercion principle will be applied going forward, but that guidance is limited by the tailoring of the opinions to the ACA. Thus, to facilitate a discussion about the future of the coercion principle, the following subsections detail the reasoning of all three opinions.

1. Chief Justice Roberts's Opinion

Chief Justice Roberts's opinion, joined by Justices Breyer and Kagan, found that Congress unconstitutionally exercised its spending power through the Medicaid expansion's conditional funding scheme.[48] The opinion advanced two bases for finding the provisions

43. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

44. 42 U.S.C. § 1396d(a) (2006).

45. § 2001, 124 Stat. at 271 (amending 42 U.S.C. § 1396a beginning in 2014).

46. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601 (2012) (citing MARTHA HEBERLEIN ET AL., KAISER COMM'N ON MEDICAID AND THE UNINSURED: PERFORMING UNDER PRESSURE 11 (2012)).

47. *See* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 372–73 (2008) (predicting the Roberts Court will shy away from the coercion principle's problematic line-drawing analysis).

48. *NFIB*, 132 S. Ct. at 2606 (explaining that although Congress has broad spending power, it cannot surprise states with certain conditions).

unconstitutional. One focused on the coercive amount of funding; the other emphasized the condition's retroactive effect.

Chief Justice Roberts first confronted the issue of coercion. He contrasted the amount of federal Medicaid funding at stake under the ACA with the highway funding subject to the drinking age condition in *Dole*.[49] More specifically, he contrasted the funding in proportion to overall state expenditures. In *Dole*, less than one percent of total South Dakotan expenditures was conditioned, whereas the ACA conditioned over ten percent of an average state's budget.[50] Because the ACA placed its conditions on a greater proportion of overall state expenditures, Chief Justice Roberts concluded that the condition was "economic dragooning that leaves the States with no real option but to acquiesce."[51]

Chief Justice Roberts's second basis builds on the premise that the Medicaid expansion would achieve a "shift in kind, not merely degree."[52] In other words, the ACA changes Medicaid in a manner that turns it into a program distinct from its prior form.[53] Branching from that premise, Chief Justice Roberts concluded that the ACA unconstitutionally placed a retroactive condition on funding.[54] In his view, the ACA added an unexpected condition onto the Medicaid funding that states had already accepted. The ACA's conditions were not a mere amendment to Medicaid that States could have anticipated when they joined the program. The Court derived the rule against retroactive conditions from *Pennhurst* as a corollary of the requirement that Congress "unambiguously express" funding conditions.[55] By enacting a shift in kind, Congress imposed new

49. *Id.* at 2604–05.

50. *Id.* (citing NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: EXAMINING FISCAL 2010–2012 STATE SPENDING 11 tbl.5 (2012); 42 U.S.C. § 1396d(b) (2006)).

51. *Id.* at 2605.

52. *Id.*

53. Chief Justice Roberts reached this conclusion primarily by emphasizing the change in design away from covering the four discrete categories of people originally covered: the disabled, the blind, the elderly, and needy families with dependent children. *Id.* at 2606 ("Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage."); *see* 42 U.S.C. § 1396a(a)(10) (2006).

54. *NFIB*, 132 S. Ct. at 2606.

55. *Id.* (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 25 (1981)).

conditions that states could not have anticipated when they opted into the program.

Despite some ambiguity regarding the relationship between the two bases in Chief Justice Roberts's opinion, both operate as a sufficient, independent basis for finding conditional spending unconstitutional. The *Dole* framework requires satisfaction of all four of its prongs.[56] The *Pennhurst* "unambiguously express" requirement composes one prong within the framework.[57] Thus, failure to meet that requirement alone would have rendered the provision unconstitutional. But Chief Justice Roberts declined to narrowly rest the holding solely on the *Pennhurst* requirement. Instead he reinvigorated the coercion principle, which *Dole* treated as a separate spending constraint. This move strongly suggests that the Court will more thoroughly scrutinize congressional conditional spending in the future. However, Chief Justice Roberts expressly declined to elaborate where the line that separates encouragement and unconstitutional coercion lies.[58]

2. The Adjoined Opinion of Justices Scalia, Kennedy, Thomas, and Alito

The opinion of Justices Scalia, Kennedy, Thomas, and Alito[59] echoed much of Chief Justice Roberts's coercion analysis. It emphasized the amount of funding at stake, though the dissenting Justices relied more broadly on budget figures. They argued that, as a practical matter, the "sheer size of this federal spending program in relation to state expenditures" makes it very difficult for states to replace lost federal funds through tax increases or other budget cuts.[60] Both the dissenting Justices and Chief Justice Roberts used figures

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

57. *Id.* Despite Chief Justice Roberts's citation to *Pennhurst* in explaining the "shift in kind" theory, some commentators mistakenly attribute the theory to coercion analysis. *See, e.g.*, Megan Ix, Note, National Federation of Independent Business v. Sebelius: *The Misguided Application and Perpetuation of an Amorphous Coercion Theory*, 72 MD. L. REV. 1415, 1441–43 (2013) (treating the retroactivity of a "shift in kind" as a new criterion of coercion).

58. *NFIB*, 132 S. Ct. at 2606 ("We have no need to fix a line either. It is enough today that wherever that line may be, this state is surely beyond that.").

59. *Id.* at 2657 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). This Note refers to this opinion as the "adjoining opinion" in recognition of the fact that seven of the Justices found the Medicaid expansion unconstitutional. In addition, this Note refers to Justices Scalia, Kennedy, Thomas, and Alito as the "dissenting Justices."

60. *Id.* at 2663.

from the same report to show how important federal Medicaid funding is to states' total spending.[61]

To highlight state reliance on Medicaid funding, the adjoining opinion mentioned that federal funding for elementary and secondary education equals only 6.6% of total state spending versus almost twenty-two percent for Medicaid.[62] Importantly for this Note, while federal Medicaid funding to states certainly exceeds education funding, the opinion did not suggest how the Court would rule on coercion in respect to federal education spending. Education funding simply served as the ideal contrast because it is the next biggest federal funding item to states.

The adjoining opinion included an argument relating to the difficulty of replacing federal funding. When the federal government supports a grant program by levying a heavy tax, states lose the ability and the willingness to tax their constituents further.[63] Under such a program, a new tax in a nonparticipating state must tack on to federal taxes paid by residents, who then subsidize the federal program in other states.[64] State legislators would incur a higher political cost by deciding to tax an already heavily tapped tax base. Thus, especially in situations of widespread national acceptance, states face immense pressure to acquiesce even if they deem a program inefficient and ineffective.[65] Altogether, the adjoining opinion stresses the states' reliance on federal funding and the impracticality of replacing the federal funds to accomplish the same objective.

The dissenting Justices additionally argued that the stated goal and structure of the ACA's Medicaid expansion evidenced intent to

61. *See, e.g.*, *id.* at 2662–63 (citing STATE EXPENDITURE REPORT: EXAMINING FISCAL 2010–2012 STATE SPENDING 7 (2012)) (noting that in 2010 the federal government granted $223 billion to the states for preexpansion Medicaid, which equaled nearly twenty-two percent of all state expenditures).

62. *Id.* at 2663 (citing STATE EXPENDITURE REPORT: EXAMINING FISCAL 2010–2012 STATE SPENDING 7, 16 (2012)).

63. *Id.* at 2661–62; *see also* Reply Brief of State Petitioners on Medicaid at 19, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-400) ("Coercion is measured by a State's ability to withstand the loss of the inducement at stake.").

64. The fact that all states participate in Medicaid does not defeat this point. A state's residents pay federal taxes regardless of its participation in Medicaid. Thus, the state must use the federal dollars collected from its residents or lose those funds. A state desiring to opt out of Medicaid may be compelled to stay in the program to avoid losing out on money collected from its own tax base. In other words, the rationale underlying the coercion principle applies both when a state first decides to accept federal conditional funds and when a state later decides whether to continue accepting those funds.

65. *NFIB*, 132 S. Ct. at 2661–62.

coerce.[66] To the dissenting Justices, the ACA's expressed goal and the lack of backup scheme demonstrated Congress's knowledge that it had designed an offer the states could not refuse.[67] Overall, though, they relied primarily on budgetary arguments about the amount of Medicaid funding at stake and the concerns underlying coercion.

3. Justice Ginsburg's Dissent

Justice Ginsburg, joined by Justice Sotomayor, wrote the lone opinion upholding the Medicaid expansion.[68] Because the Court divided seven to two on this issue, this opinion bears little weight. Moreover, Justice Ginsburg focused her criticism on the majority's shift-in-kind premise, not the coercion principle.[69] She found Medicaid, including the ACA's expansion, to be a single program.

Justice Ginsburg mentioned that Congress has amended the Medicaid program more than fifty times, sometimes significantly.[70] Because the federal government provides much of the funding for the ACA expansion, the financial burdens born by the states change minimally; thus, the Act's Medicaid expansion does not significantly

66. *Id.* at 2664–66. First, the expansion's goal was to provide near-universal health care coverage, which Congress can accomplish only with full state acceptance. *Id.* at 2664. If states refused to expand their Medicaid programs to include all adults below 133% of the federal poverty line, then the ACA's goal would be impeded. *Id.* at 2665. Second, Congress omitted any type of backup scheme for when states declined the funding for the expansion. The adjoining opinion noted that Congress would have created a backup if it thought states could refuse to accept funding to implement a health benefit exchange. *Id.*

67. *Id.* at 2666. The federal government argued that Congress's anticipation of full participation was based on the notion that the expansion offered exceedingly favorable terms to the states. However, Justice Scalia rejected the argument because of the phased-in costs that participating states would bear. But Justice Scalia's reasoning that congressional intent helps to prove coercion is dubious. Congressional intent to design a conditional funding program to coerce states to act should not affect the analysis of whether the scheme actually accomplished that effect. The Supreme Court defines constitutional boundaries, not Congress.

68. *Id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Because Justice Ginsburg would have upheld the Medicaid expansion as a constitutional exercise of Congress's spending power, this Note refers to her opinion as the dissent for purposes of this issue.

69. *Id.* at 2630 ("Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation.").

70. *Id.* at 2631–32 (placing particular emphasis on coverage expansions for pregnant women and the large increase in annual federal Medical expenditures over the long run).

differ from past expansions.[71] In addition, Congress expressly reserved "[t]he right to alter, amend, or repeal any provision" of the Medicaid program.[72] And states acknowledged that right by agreeing to change their respective plans in accordance with changes in federal law.[73] To Justice Ginsburg, Congress exercised its spending power within the parameters of *Pennhurst* by merely amending an existing program.

Besides the separate-program premise, Justice Ginsburg took issue with Chief Justice Roberts's contention that the terms of the conditions were not unambiguously expressed. Based on state acknowledgment of Congress's express authority and the history of Medicaid expansions, she argued that states could hardly be surprised by the ACA's terms. Moreover, she asserted that the analysis should focus on the ACA's expression of conditions, not the conditions expressed in the original Medicaid legislation.[74]

Lastly, she flatly declined to engage in the sort of statistical federalism analysis that defined the other opinions. In response to Justices Chief Justice Roberts's and Justice Scalia's coercion analyses, Justice Ginsburg contended that the political question doctrine precludes the Court from engaging in the analysis due to the lack of judicial competence.[75]

II. FEDERAL INVOLVEMENT IN ELEMENTARY AND SECONDARY EDUCATION

Federal involvement in elementary and secondary education is hardly an overnight development. Paralleling Congress's steady expansion into health care, Congress has increasingly claimed education as a prerogative it shares with the states. Initially, the federal government did little more than voice encouragement for education. Today, Congress serves as a key player rather than a booster. This evolution invokes the primary purpose of the conditional spending principle: to prevent Congress from overstepping the bounds of federalism. Defining where those boundaries lie demands consideration of how the federal role in education has evolved. Thus, to inform an application of the coercion principle to education spending, this Part summarizes the key steps in Congress's expansion into education.

71. *Id.* (mentioning that federal funds will cover all of the costs for newly eligible recipients in 2014 and will phase down to ninety percent by 2020).

72. 42 U.S.C § 1304 (2006).

73. *See* 42 C.F.R. § 430.12(c)(i) (2013).

74. *NFIB*, 132 S. Ct. at 2638.

75. *Id.* at 2640–41 ("The coercion inquiry . . . appears to involve political judgments that defy judicial calculation.").

A. Tradition of State Control

The Tenth Amendment declares that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[76] For much of America's history, states led the development of public education, in part because the Constitution does not enumerate education as a federal power.[77] Based on an understanding that Congress lacked power to regulate education, states generally detailed the structure of their educational systems in their own constitutions.[78] In fact, each state's constitution at the very least mentions education.[79]

In America's early years, Congress occasionally influenced public education through indirect initiatives.[80] Shortly before the adoption of the Constitution, the federal government passed a series of ordinances to organize the development of the Northwest Territory.[81] For example, a 1785 ordinance[82] required each newly created township to

76. U.S. CONST. amend. X.

77. STEPHEN B. THOMAS ET AL., PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 2 (Stephen D. Dragin ed., 6th ed. 2009).

78. JAMES D. KOERNER, WHO CONTROLS AMERICAN EDUCATION? A GUIDE FOR LAYMEN 79 (1968); *see also* William E. Thro, *An Essay: The School Finance Paradox: How the Constitutional Values of Decentralization and Judicial Restraint Inhibit the Achievement of Quality Education*, 197 WEST'S EDUC. L. REP. 477, 482 (2005) (reviewing the types of education provisions included in state constitutions from single clauses promising free education to detailed descriptions of the state's education system).

79. Michael D. Barolsky, Note, *High Schools Are Not Highways: How* Dole *Frees States From the Unconstitutional Coercion of No Child Left Behind*, 76 GEO. WASH. L. REV. 725, 742 (2008); *see also* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 105 (1995) (remarking that each state, except arguably Mississippi, includes an "education clause" in its constitution). The current version of Mississippi's constitution reads "[t]he legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitation as the Legislature may prescribe." MISS. CONST. art. VIII, § 201.

80. *See* KOERNER, *supra* note 78, at 4–5 (listing federal laws implicating education up through the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27).

81. *See, e.g.*, Continental Congress Ordinance of May 20, 1785 (ascertaining the mode of disposing of Lands in the Western Territory), *reprinted in* 28 JOURNALS OF THE CONTINENTAL CONGRESS 375 (John Fitzpatrick ed., 1933).

82. *Id.*

reserve a section of land for a public school.[83] More than eighty years and the Civil War passed before Congress created the Department of Education in 1867.[84] Initially not a cabinet-level department, the agency lacked the policy-making authority commonly held by its European counterparts.[85] Instead, the department's mission centered on collecting statistics and distributing information.[86] A later example of indirect influence comes from the Servicemen's Readjustment Act of 1944.[87] The Act, known as the G.I. Bill, and its successors[88] financed college and vocational educations for numerous military veterans without actually regulating the educations themselves.[89]

The federal government held little more than a fringe role in education until the 1960s.[90] During the nineteenth century and early twentieth century, public schooling spread dramatically across the states without much direction or assistance from the federal government.[91] From 1890 to 1920, the number of students attending

83. *Id.* Two years later, the federal government provided that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance of 1787, art. III, *reprinted in* 1 U.S.C. LVII, LIX (2012).

84. Act of Mar. 2, 1867, ch. 158, § 1, 14 Stat. 434, 434.

85. WILLIAM J. REESE, AMERICA'S PUBLIC SCHOOLS: FROM THE COMMON SCHOOLS TO "NO CHILD LEFT BEHIND" 45–46 (Stanley I. Kutler ed., updated ed. 2011); *see also* KOERNER, *supra* note 78, at 9–12 (explaining the limited informational purposes of the agency and detailing its troubled beginnings).

86. § 1, 14 Stat. at 434 ("[T]here shall be established . . . a department of education, for the purpose of collecting such statistics and facts as shall show the condition and progress of education in the several States and Territories, and of diffusing such information respecting the organization and management of school and school systems, and methods of teaching . . . .").

87. Pub. L. No. 78-346, 58 Stat. 284 (codified as amended in scattered sections of 38 U.S.C.) (commonly known as the G.I. Bill).

88. *See generally* CASSANDRIA DORTCH, CONG. RESEARCH SERV., GI BILLS ENACTED PRIOR TO 2008 AND RELATED VETRANS' EDUCATIONAL ASSISTANCE PROGRAMS: A PRIMER 4 tbl.1 (2012) (summarizing the educational assistance programs, beginning with the G.I. Bill).

89. *See, e.g.*, § 400, 58 Stat. at 287–90 (establishing the mechanics of the G.I. Bill's education program, including the states' ability to designate qualified educational and training institutions).

90. THOMAS ET AL., *supra* note 77, at 12 (describing funding laws that were passed to provide financial assistance to schools).

91. REESE, *supra* note 85, at 45–46, 63–64. The ideal of the common school, particularly the free high school, motivated the expansion. Notable advocates for the common school, namely Horace Mann, William Harris,

American high schools increased from two hundred thousand to nearly two million.[92] In the early twentieth century, America led western nations in postsecondary enrollment rates.[93] The decentralized structure of America's education system accelerated its rapid expansion.[94] Still today, upwards of fourteen thousand school districts, ninety-six thousand schools, and 3 million teachers continue to make key decisions that most directly impact the classroom.[95]

B. "War on Poverty" Era: Expansion of the Federal Role in Education

By the 1960s, the tradition of state dominance in education started to erode. The Elementary and Secondary Education Act of 1965[96] (ESEA) represents the beginning of increased federal involvement in education. The original ESEA doubled the amount of federal aid to education and steadily increased the proportion of total education spending supplied by the federal government.[97] The law aimed to supplement state efforts to educate economically disadvantaged students.[98] To this end, under the original ESEA,

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and John Dewey, argued that common schools would promote social equality, reduce crime, and reinforce good morals.

92. EDWARD A. KRUG, THE SHAPING OF THE AMERICAN HIGH SCHOOL 11, 439 (1964).

93. Claudia Goldin, *The Human-Capital Century and American Leadership: Virtues of the Past*, 61 J. ECON. HIST. 263, 265 (2001).

94. *Id.* at 284. Goldin explains that even if a significant minority supported postsecondary education expansion, this desired expansion would not occur in a centralized system until support grew to a national majority. In a decentralized system, however, the significant minority could expand postsecondary education in localities where it constituted a majority. *Id.* In the decentralized system, it follows that because localities expanding postsecondary education would gain a comparative advantage over neighboring area, a "race to the top" situation would ensue.

95. Susan H. Fuhrman et al., *Educational Governance in the United States: Where Are We? How Did We Get Here? Why Should We Care?*, *in* THE STATE OF EDUCATION POLICY RESEARCH 41, 41 (Susan H. Fuhrman et al. eds., 2007).

96. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

97. THOMAS ET AL., *supra* note 77, at 12.

98. *See* sec. 2, § 201, 79 Stat. at 27 (designating as Title I the Act of September 30, 1950, Pub. L. No. 81-874, 64 Stat. 1100, creating a separate Title II, and declaring in the new Title II that United States policy is "to provide financial assistance (as set forth in this title) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs"); INDEP. REVIEW PANEL, IMPROVING THE ODDS: A REPORT ON TITLE I FROM THE INDEPENDENT REVIEW PANEL 2 (2001).

extended federal funds to school districts servicing high proportions of children from low-income families.[99]

ESEA established relatively modest conditions for receipt of federal funding. Schools receiving funding were obligated to use the money to extend remedial reading and math instruction services.[100] States retained the option to decline federal funds for specific programs as opposed to risking all federal education funding for a refusal to participate in a single program.[101]

In the decades following the passage of the original ESEA, Congress slowly broadened the federal government's role in education.[102] The Education for All Handicapped Children Act of 1975[103] required states receiving federal funds to effectuate policies to provide students with disabilities a "free appropriate public education."[104] In 1979, Congress reconstituted the U.S. Office of Education, which had been demoted to an executive office one year after its creation,[105] into the cabinet-level Department of Education.[106]

The National Commission on Excellence in Education's landmark report, *A Nation at Risk*,[107] incited nationwide concern for education and effectively launched a movement focusing on developing higher

99. Sec. 2, §§ 203–204, 79 Stat. at 28–30.

100. *See* sec. 2, § 205(a), 79 Stat. at 30–31 (limiting the ways local educational agencies can use ESEA grants and setting basic reporting requirements).

101. Sec. 2, § 210, 79 Stat. at 33–34.

102. See John F. Jennings, *Title I: Its Legislative History and Its Promise*, *in* TITLE I: COMPENSATORY EDUCATION AT THE CROSSROADS 1, 14–15 (Geoffrey D. Borman et al. eds., 2001) (discussing the history of ESEA and its reauthorizations).

103. Pub. L. No. 94-142, 89 Stat. 773 (amending the Education and Handicapped Act, Pub. L. No. 91-230, § 601, 84 Stat. 121, 175 (1970)) (current version at 20 U.S.C. §§ 1400–1482 (2012)).

104. Sec. 5, § 612, 89 Stat. at 780 (current version at 20 U.S.C. § 1412(a)(1) (2012)).

105. U.S. DEP'T OF EDUC., OVERVIEW OF THE U.S. DEPARTMENT OF EDUCATION 3 (2010).

106. Department of Education Organization Act, Pub. L. No. 96-88, § 201, 93 Stat. 668, 671 (1979). Although the Act committed additional federal resources to education, it did so with the understanding that none of the Department's programs would allow federal officers to exercise any control over curriculum, program of instruction, and other matters of local school administration such as personnel or textbooks. § 103, 93 Stat. at 670–71.

107. NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983) [hereinafter A NATION AT RISK].

standards.[108] In 1994, Congress pushed along the standards movement with two laws. First, the Goals 2000: Educate America Act[109] extended federal money to states for drafting their own academic standards.[110] Second, the Improving America's Schools Act of 1994[111] reauthorized and amended ESEA in line with the standards-based reform principles outlined in Goals 2000.[112]

C. Modern Scheme: No Child Left Behind

Riding the coattails of the standards movement,[113] Congress enacted the currently controlling version of ESEA, the No Child Left Behind Act of 2001[114] (NCLB). The law passed easily through Congress with bipartisan support and markedly increased federal

108. *See* DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 24–30 (2010) (voicing mostly support of *A Nation at Risk* and crediting the report with launching the standards movement in education). Setting the tone for the report, the first paragraph straightly stated that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people." A NATION AT RISK, *supra* note 107, at 9.

109. Pub. L. No. 103-227, 108 Stat. 125 (1994) (amending ESEA) (codified as amended in scattered sections of 20 U.S.C.).

110. § 306(a), (c), 108 Stat. at 160, 162–64. *But see* RAVITCH, *supra* note 108, at 17–19 (arguing that most states drafted vague, unsubstantial standards following a successful attack on history standards drafted by University of California, Los Angeles historians). An opinion piece in the *Wall Street Journal*, written by the former chairperson of the National Endowment for the Humanities, triggered a national media firestorm that led the Clinton administration to abandon the national standards. *See generally* Lynne V. Cheney, Op-Ed., *The End of History*, WALL ST. J., Oct. 20, 1994, at A22 (strongly criticizing the national standards for political bias); *see also* RAVITCH, *supra* note 108, at 17 (discussing Cheney's argument the effects). On the other hand, Ravitch, who viewed the state standards as flawed but fixable, argues that the national-standards battle discouraged states from writing substantive standards that would polarize constituents. *Id.* at 19.

111. Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended in scattered sections of 20 U.S.C.).

112. *See* sec. 101, § 1111, 108 Stat. at 3523 (allowing the standards created by states under Goals 2000 to satisfy the requirement that states adopt "challenging content standards and challenging student performance standards").

113. *See* RAVITCH, *supra* note 108, at 29–30 (contending that assessment-based reforms replaced the standards movement in the mid-1990's upon the states' unwillingness to develop demanding, concrete standards).

114. Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

control over education.[115] NCLB touches essentially every program created under the prior ESEA and goes further.[116]

Similar to prior versions of ESEA, NCLB's funding scheme demands that states satisfy statutory provisions to receive federal funds.[117] While stakeholders and interest groups have taken issue with a number of the provisions added by NCLB, no provisions have generated more animosity and controversy than those pertaining to academic assessment.[118] To receive NCLB funds, each state must develop "challenging academic content standards and challenging student academic achievement standards" for "mathematics, reading or language arts, and . . . science."[119] From those standards, states must design and administer annual standardized assessments to all students in grades three through eight.[120] The assessment results then serve as a primary indicator of yearly performance within a single, statewide accountability system that meets an array of federal requirements.[121] Under the accountability system requirements, schools must achieve "adequate yearly progress" (AYP), a state-defined threshold,[122] or incur sanctions. Potential sanctions include

115. Lizette Alvarez, *House Votes for New Testing to Hold Schools Accountable*, N.Y. TIMES, May 24, 2001, at A1, A20. The bill passed the House of Representatives 384 to 45.

116. U.S. DEP'T OF EDUC., NO CHILD LEFT BEHIND: A DESKTOP REFERENCE 9 (2002).

117. *See, e.g.*, 20 U.S.C. § 6316(a)(1) (2006). For previous ESEA conditions, see *supra* Part II.B.

118. *See, e.g.*, H.R. REP. NO. 107-063, pt. 1, at 1240 (2001) ("[W]e remain concerned that the bill goes too far in its reliance on standardized testing."); Michael Winerip, *On Education: Teachers, and a Law That Distrusts Them*, N.Y. TIMES, July 12, 2006, at B8 (expressing the concern that time-intensive standardized testing detracts from students' opportunity to pursue subjects tailored to their interests). *See generally* RAVITCH, *supra* note 108 (questioning the accuracy of standardized testing results and the perverse incentives high-pressure testing creates for teachers and administrators).

119. 20 U.S.C. § 6311(b)(1)(A),(C) (2012).

120. *Id.* § 6311(b)(3)(C)(vii).

121. *Id.* § 6311(b)(2). After disaggregating and categorizing the score data to facilitate tracking of specific populations, states must publicly release the assessment results. *See id.* § 6311(b)(3)(C)(xiii), (h)(1)(C)(i)–(ii) (listing the information states must include on their annual report cards).

122. *Id.* § 6311(b)(2)(A)–(C). Under § 6311(b)(2), states possess the incentive to set AYP standards low so their constituent districts can maximize their federal funding, which places less pressure on the state to provide supplemental funding. As a result, the standards developed pursuant to NCLB have been varied and often disappointingly low. *See* G. GAGE KINGSBURY ET AL., NW. EVALUATION ASS'N, THE STATE OF STATE STANDARDS: RESEARCH INVESTIGATING PROFICIENCY LEVELS

forcing schools to offer in-district public school transfers,[123] requiring the provision of "supplemental educational services,"[124] and restructuring.[125]

Critical to any discussion of coercion, NCLB's conditions function differently from prior ESEA conditions in two important respects. First, some of NCLB's requirements apply to all schools in a state, including those not receiving federal money.[126] For schools that do not receive federal funding as bargained-for consideration, those requirements seemingly transform from conditions into regulations.[127] Second, at least in practice, NCLB conditions funding on the satisfaction of a bundle of its provisions.[128] Unlike the original ESEA, states lack the option to select which specific federal programs they would independently adopt.[129] This bundling raises the potential that a state would rationally accept what it views to be an unwanted

IN FOURTEEN STATES 11, 19 tbl.7 (2004) (noting that the states' proficiency levels for standards and assessments vary greatly).

123. 20 U.S.C. § 6316(b)(1)(E) (2012).

124. *Id.* § 6316(b)(5)(B).

125. *Id.* § 6316(b)(8)(B). After a school fails to meet AYP for three consecutive years, a school district must either (1) reopen the school as a public charter school, (2) replace all or most of the staff who are relevant to the failure to make AYP, (3) contract with an entity such as a private management company, (4) turn over the school's operations to the state, or (5) implement "[a]ny other major restructuring of the school's governance arrangement that makes fundamental reforms." *Id.*

126. Ronald D. Wenkart, *The No Child Left Behind Act and Congress' Power to Regulate Under the Spending Clause*, 174 WEST'S EDUC. L. REP. 589, 590 (2003). Wenkart explains that NCLB required states receiving Title I funds to develop academic standards that must apply to all public schools in the state whether or not they receive those funds. *Id.* ESEA did demand a state plan for funds received under Title II, but those plans needed to set forth only how the state will administer and protect the funds for textbooks and other education material. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, sec. 5, § 203(a), 79 Stat. 27, 37–38. Thus, the ESEA state plans did not apply to and regulate localities through the proxy of the state.

127. *See id.*

128. *See* Barolsky, *supra* note 79, at 737–40, 745 (explaining that while NCLB's text merely calls for the Secretary of Education to withhold payment without defining what payment to withhold, Department of Education practice has forced states to comply with all NCLB provisions to receive federal funding); Gina Austin, Note, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights*, 27 T. JEFFERSON L. REV. 337, 367 (2005) (asserting that noncompliance with NCLB could result in the loss of a state's Title I funding and twice that amount in other categorical funds).

129. *See* sec. 2, § 210, 79 Stat. at 33–34 (allowing for withholding of Title I funds for failing to meet certain Title I requirements).

regulation because it amounts to a cost associated with a beneficial program.

Several states have challenged NCLB's provisions. In 2005, Connecticut sued the Secretary of Education after she refused to allow the state to deviate from NCLB's assessment regime.[130] The Connecticut Mastery Test scheme at issue differed from the NCLB scheme in several respects, including the grade-levels of the test takers.[131] Though the court dismissed the action for lack of jurisdiction, the case exemplifies states' distaste for losing control over their education systems. Shortly after the Connecticut suit, the Fairfax County School Board decided not to give four thousand recent immigrant students the same NCLB-mandated test given to English-speaking students.[132] Despite initial support from Virginia's Superintendent of Public Instruction, the district administered the test after the federal Deputy Secretary of Education threatened to withhold all of the county's federal educational assistance.[133] Though Virginia and Connecticut's struggles epitomize states' frustration with NCLB, other states have resisted as well.[134]

As NCLB remains in effect, the federal government has sought other means to influence education. Interestingly, the financial crisis of the late 2000s created an opportunity for the Obama administration to place its stamp on education. The American Recovery and Reinvestment Act of 2009,[135] which aimed at stabilizing

130. Connecticut v. Spellings, 453 F. Supp. 2d 459 (D. Conn. 2006), *aff'd as modified sub nom.* Connecticut v. Duncan, 612 F.3d 107 (2d Cir. 2010).

131. Nicole Liguori, *Leaving No Child Behind (Except in States That Don't Do As We Say): Connecticut's Challenge to the Federal Government's Power to Control State Education Policy Through the Spending Clause*, 47 B.C. L. REV. 1033, 1054 (2006) (noting that Connecticut requires public school students in fourth, sixth, and eighth grades to take the Connecticut Mastery Test, while NCLB requires that students be tested every year from third through eighth grade and at least once in tenth through twelfth grade).

132. Maria Glod, *Fairfax Resists "No Child" Provision: Immigrants' Tests in English at Issue*, WASH. POST, Jan. 26, 2007, at B1. School board members felt that administering the test to immigrant students would set them up for failure. One member stated, "It is wrong for our students to take a test they are predisposed to fail." *Id.*

133. Maria Glod, *Fairfax Schools Concede on Testing: Comprise Made on Limited English*, WASH. POST, Apr. 19, 2007, at B1.

134. *See, e.g.*, Jeff Archer, *Connecticut Files Court Challenge to NCLB*, EDUC. WK., Aug. 31, 2005, at 23, 27 (mentioning that Utah passed a measure giving its state education law precedence over federal law and that Colorado law offers financial protection to districts opting out of NCLB's requirements).

135. Pub. L. No. 111-5, 123 Stat. 115 (codified in scattered sections of the U.S.C.).

the American economy, created the Race to the Top program.[136] Similar to NCLB, the program influenced states to adopt a federally endorsed set of education reforms, but it employed a different mechanism to exact its influence. The Secretary of Education awarded Race to the Top funds—$4.35 billion[137]—based on state applications in a competitive process. Forty states applied in the program's first round, and only two were awarded funding.[138] The second round resulted in ten winners from a pool of thirty-five applicants.[139] A much smaller third round concluded in December 2011.[140]

The full implications of the Race to the Top program extend beyond the scope of this Note. While the program prompted states to adopt certain reforms, the program does not trigger the same coercion issues as NCLB. Many states opted to not participate. And of the states that applied, less than a third received funding.[141] Relevant to a coercion assessment of NCLB, Congress separately authorized and funded Race to the Top. Thus, the program has not diverted federal money away from NCLB's conditional funding scheme.

In September 2011, a decade after Congress passed NCLB, the Obama administration announced a NCLB waiver plan that would waive states' failure to meet the requirement that all students achieve proficiency in math and language arts by 2014.[142] To obtain a waiver under the plan, states had to agree to separate conditions related to academic standards and intervention in troubled schools. The waivers go into effect for the 2013–14 school year, with a one-year extension

136. § 14006, 123 Stat. at 283–84. The Act also included a much larger educational appropriation that was distributed based on preexisting statutory formulas. § 14002(a)(2)(A)(i), 123 Stat. at 279–80.

137. U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (2009).

138. Alyson Klein, *Obama Uses Funding, Executive Muscle to Make Often-Divisive Agenda a Reality*, EDUC. WK., June 13, 2012, at 1.

139. *Id.*

140. Press Release, U.S. Dep't of Educ., Department of Education Awards $200 Million to Seven States to Advance K–12 Reform (Dec. 23, 2011); *see also* Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1832, 125 Stat. 38, 163–64 (appropriating funding for the third round).

141. An argument could be made that Congress coerces the states with this type of competitive grant arrangement. The prospect of funding itself has a value. Similar to tort damages for loss of opportunity, the value of potential funding could be discounted by the probability that the state will receive limited or no funding. However, under the Supreme Court's current jurisprudence, much more money would need to be at stake before coercion would become an issue.

142. Michele McNeil & Alyson Klein, *Obama Outlines NCLB Flexibility*, EDUC. WK., Sept. 28, 2011, at 1.

option.[143] States receiving a waiver must still comply with other NCLB conditions. While the U.S. Department of Education denied some state's waiver requests, at least forty-one states have obtained these waivers.[144] Ironically, the waiver's purported added flexibility has transformed into another avenue of federal muscle, as the Department seeks to impose higher requirements for states to obtain future NCLB relief.[145]

D. Pending Reauthorization of the ESEA-NCLB Regime

As of April 2013, Congress has neglected to meaningfully advance reauthorization legislation.[146] NCLB attracted bipartisan support in the unique political environment that followed September 11, 2001, with members of Congress supporting it as an act of partisan unity.[147] Congress enacted NCLB for an initial term of five years that expired in 2007, but the law remains in effect until Congress modifies or eliminates it.[148]

Given Congress's recent aversion to long-term compromises, the reauthorization process promises to be contentious and drawn-out.[149]

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143. *Id.*

144. Michele McNeil, *Arne Duncan Attaches More Strings to NCLB Waiver Renewal*, EDUC. WK.: BLOGS (Aug. 29, 2013, 1:00 PM), http://blogs.edweek.org/edweek/campaign-k-12/2013/08/barring_reauthorization_this_m.html.

145. *Id.* (reporting that Secretary of Education Arne Duncan will impose tougher requirements for states to obtain future NCLB waivers).

146. *See* Alyson Klein, *Top K–12 Leader in Congress Sets Departure Date*, EDUC. WK., Feb. 6, 2013, at 20 (describing ESEA renewal as "long-stalled" and mentioning that Senator Harkin, a leader on education issues and serving his final term, may focus more attention on reauthorizing the Individuals with Disabilities Act, Pub. L. No. 108-446, 118 Stat. 2647 (codified at 20 U.S.C. §§ 1400–1482 (2012))).

147. ELIZABETH H. DEBRAY, POLITICS, IDEOLOGY, & EDUCATION: FEDERAL POLICY DURING THE CLINTON AND BUSH ADMINISTRATIONS 117 (2006).

148. Regina R. Umpstead & Elizabeth Kirby, *Reauthorization Revisited: Framing the Recommendations for the Elementary and Secondary Education Act's Reauthorization in Light of No Child Left Behind's Implementation Challenges*, 276 WEST'S EDUC. L. REP. 1, 3 (2012).

149. For an in-depth analysis of the political and institutional considerations impeding ESEA reauthorization, see Elizabeth DeBray & Eric A. Houck, *A Narrow Path Through the Broad Middle: Mapping Institutional Consideration for ESEA Reauthorization*, 86 PEABODY J. EDUC. 319, 334–35 (2011). DeBray and Houck correctly predicted that the 112th Congress would not pass an ESEA reauthorization bill after analyzing factors like congressional polarization, degree of party control, new leadership and committee composition, and the rising influence of education think tanks. *Id.* Many of these impediments apply equally to

Congressional lassitude will add to the already conflicting views about what is best for American education.[150] In March 2010, the Obama administration released *A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act*[151] in an attempt to guide congressional deliberations. The *Blueprint*'s approach maintains many of NCLB's core policies while incorporating some of the reforms endorsed in the Race to the Top program.[152] The *Blueprint* also calls for a continuation of the Race to the Top program.[153]

If Congress incorporates Race to the Top in the renewed ESEA, then less money may be distributed via the traditional conditional spending model. A decrease in conditional funding under ESEA will weaken the argument that it is unconstitutionally coercive. However, the *Blueprint* has sparked little progress,[154] and recent budgetary trends suggest that federal conditional spending for education will not decrease.[155]

This Note's coercion analysis incorporates NCLB spending figures. Unless ESEA reauthorization dramatically cuts federal conditional spending for education, the same case for unconstitutional coercion will persist. Conversely, increased federal conditional spending under ESEA will only strengthen the case for coercion.

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the current 113th Congress, suggesting that ESEA will continue to dwell in a state of congressional purgatory.

150. *Compare* Benjamin Michael Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 MO. L. REV. 81, 131–32 (2011) (advocating for principle-based guidelines over a set of rigidly defined best practices), *with* Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1719–20 (2007) (contending that the federal government should build on the set of best practices that it currently provides).

151. U.S. DEP'T OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010).

152. *Id.* at 3–6 (noting that the *Blueprint* builds on the following key priorities: "(1) College- and Career-Ready Students; (2) Great Teachers and Leaders in Every School; (3) Equity and Opportunity for All Students; (4) Raise the Bar and Reward Excellence; [and] (5) Promote Innovation and Continuous Improvement").

153. *Id.* at 36 (stating that the *Blueprint* is modeled after the Race to the Top program).

154. In 2011, Senators Tom Harkin and Michael Enzi sponsored a reauthorization bill that adopted many of the *Blueprint*'s suggested changes, but the bill was soundly defeated. *See* Klein, *supra* note 138, at 20.

155. *See* discussion *infra* Part IV.C; *see also* Umpstead & Kirby, *supra* note 148, at 24–25 (contending that the reauthorization debate has been framed as building on the NCLB's foundational principles).

III. FEDERAL COURTS AND CONDITIONAL FUNDING FOR EDUCATION

In recent years, federal courts have sought to reign in federal overreaching in education by invoking the conditional spending doctrine. The following three cases suggest that federal courts will be willing to apply *NFIB*'s analysis to a case involving conditional spending for education.

The Supreme Court rigorously applied the conditional spending doctrine in *Arlington Central School District Board of Education v. Murphy*.[156] In *Murphy*, parents who prevailed on a claim filed under the Individuals with Disabilities Education Act[157] (IDEA) sought to recover fees for an education consultant's services used in the action.[158] The relevant section of IDEA provided that the district court "may award reasonable attorneys' fees as part of the costs" to parents prevailing in a claim under the statute.[159] At issue was whether the statute provided for fee shifting of payments to experts.

The Court strictly enforced *Pennhurst*'s requirement that Congress impose funding conditions unambiguously.[160] Justice Alito averred that when evaluating whether a condition was stated "unambiguously," the relevant reference point is the state officer who decides whether to accept conditional federal funds.[161] In other words, courts cannot incorporate congressional legislative history into its analysis of spending conditions.

In 2009, the Sixth Circuit addressed a NCLB conditional spending issue in *School District of Pontiac v. Secretary of the United States Department of Education*.[162] The plaintiff school districts and education associations claimed that the so-called unfunded mandates provision[163] does not require them to comply with NCLB requirements when federal funds do not cover the costs of doing so.[164] The Sixth

156. 548 U.S. 291 (2006).

157. 20 U.S.C. §§ 1400–1482 (2012).

158. 548 U.S. at 294.

159. 20 U.S.C. § 1415(i)(3)(B)(i) (2012).

160. 548 U.S. at 304.

161. *Id.* at 296.

162. 584 F.3d 253 (6th Cir. 2009) (en banc).

163. 20 U.S.C. § 7907(a) (2012) ("Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.").

164. 584 F.3d at 256.

Circuit found that the provision failed the *Pennhurst* requirement because "the only thing clear about § 7907(a) is that it is unclear."[165] This decision and *Murphy* foreshadowed part of the Court's ruling in *NFIB* by strengthening the "unambiguously stated" requirement of federal conditional spending.

More on point for this Note, one recent federal court decision specifically contemplated the coercion argument with regard to federal education spending. The Fourth Circuit, in *Virginia Department of Education v. Riley*,[166] focused on an IDEA provision that demands that states provide a "free appropriate public education" to all children with disabilities, including those suspended or expelled from school.[167] Virginia, an IDEA-funds recipient, had in effect a policy of withholding free educational services from disabled students who had been expelled for behavior unrelated to their disabilities.[168] The U.S. Department of Education threatened to withhold all of Virginia's IDEA funding for two years—a total of $60 million—if it did not change the policy. Virginia refused.[169]

Ultimately, the court decided narrowly that the provision's language did not create a condition.[170] But the court continued to comment that if the provision was a condition, then the withholding of Virginia's entire $60 million annual IDEA grant would surpass the "relatively mild encouragement" permitted in *Dole*.[171] Similarly to Chief Justice Roberts's and the dissenting Justices' *NFIB* opinions, the *Riley* court noted the large amount of funding at stake; however, it rejected a percentage-based argument that the IDEA funding amounted to only five percent of Virginia's spending to educate children with disabilities.[172] Instead, the court contrasted the absolute amount of funding at stake with the small number of students affected by the provision.[173]

165. *Id.* at 277.

166. 106 F.3d 559 (4th Cir. 1997) (en banc) (per curiam).

167. *Id.* at 561 (discussing 20 U.S.C. § 1412(a)(1)(A) (2012))

168. 106 F.3d at 560.

169. *Id.*

170. *Id.* at 568.

171. *Id.* at 569.

172. *Id.* at 569–70.

173. *Id.* at 569 ("Here, in stark contrast [to *Dole*], the Federal Government has withheld from the Commonwealth 100% of an annual special education grant of $60 million because of the Commonwealth's failure to provide private educational services to less than one-tenth of one percent (126) of the 128,000 handicapped students for whom the special education funds were earmarked.").

The federal courts' recent treatment of conditional education spending indicates that *NFIB*'s coercion reasoning is more than an aberration applicable to only the Medicaid program. Instead, *NFIB* conforms to federal courts' increased skepticism of federal conditional spending in education cases. As shown by these cases and *NFIB*, the Supreme Court appears primed to strike down federal conditional spending for education as unconstitutionally coercive.

IV. APPLICATION OF POST-*NFIB* CONDITIONAL SPENDING DOCTRINE TO FEDERAL EDUCATION FUNDING SCHEME

Chief Justice Roberts's *NFIB* opinion relied on two separate theories from *Dole* to find the Medicaid expansion unconstitutional: (1) the expansion imposes an unexpected condition on prior funding[174] and (2) the expansion involves so much money that states could not refuse the offer.[175] Using the Supreme Court's *NFIB* reasoning, this Part explains how the stage has been set for the Court to find that federal conditional spending for education violates the latter of these two theories: coercion.

A. Coercion by the Numbers

The *NFIB* Court displayed a willingness to find an exercise of conditional spending in violation of the coercion principle, but where exactly the coercion line is drawn lingers as an open question. The Court established that Congress crosses the line when a conditional funding grant exceeds a certain threshold. As noted by the dissenting Justices, federal aid for elementary and secondary education is the next largest federal funding item to states after Medicaid.[176] Under *NFIB*, if any other conditional spending item crosses from encouragement into unconstitutional coercion, it is education spending. But *NFIB* introduces a few wrinkles into *Dole*'s coercion analysis. Chief Justice Roberts and the dissenting Justices' analyses significantly overlap but diverge in a few relevant respects as well.

Chief Justice Roberts focused on (1) how large of an item Medicaid is in the average state's budget and (2) the proportion of Medicaid covered by federal funds.[177] Combining those two items, Chief Justice Roberts derived the statistic that drove his analysis: the

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

175. *Id.* at 2605.

176. *Id.* at 2663 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

177. *Id.* at 2604 (majority opinion) ("Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs.").

percentage of funding at risk compared to a state's total spending for all purposes.[178]

The dissenting Justices' adjoining opinion adds several quantitative considerations.[179] It emphasized the absolute amount of Medicaid funding directed to the states by Congress.[180] The opinion then mentioned how much of the nation's Medicaid expenditures derive from federal funding.[181] Lastly, it joins Chief Justice Roberts's opinion in highlighting federal Medicaid grants as a percentage of a states' total spending, cherry-picking figures from a few select states—Arizona and South Dakota—to support its coercion finding.[182] The state-specific focus contrasts with Chief Justice Roberts's use of budget figures averaged across all fifty states.

Nuances aside, both opinions primarily considered the funding at stake in proportion to states' total expenditures.[183] Chief Justice Roberts declared that "[t]he threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning."[184] Both opinions cited an annual report by the National Association of State Budget Officers (NASBO).[185] Using data from other NASBO reports, the application of *NFIB*'s analysis to NCLB conditional funding generates

178. *Id.* at 2604–05.

179. Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Business v. Sebelius, 93 B.U. L. REV. 1, 62 (2013) ("These factors in their totality supported the plurality's determination that states are effectively 'locked in' to Medicaid. But the conflation of financial and other considerations muddles the coercion analysis; the Court failed to indicate which of these factors is decisive for a law's constitutional status.") (citation omitted).

180. *NFIB*, 132 S. Ct. at 2662–63 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) ("In 2010, the Federal Government directed more than $552 billion in federal funds to the States . . . Of this, more than $233 billion went to pre-expansion Medicaid.") (citation omitted).

181. *Id.* at 2663. In addressing states' reliance on federal conditional spending for certain categorical purposes, the dissenting Justices treat elementary and secondary education as a distinct category of funding from higher education. *See, e.g.*, *id.* (referring to elementary and secondary education as a single funding item). The Court rests this distinction on the fact that funding for these respective categories derives from different legislative schemes.

182. *Id.* at 2663–64.

183. *Id.* at 2663 ("But the sheer size of this federal spending program in relation to state expenditures means that a State would be very hard pressed to compensate for the loss of federal funds by cutting other spending or raising additional revenue."); *id.* at 2604–06 (majority opinion).

184. *Id.* at 2605.

185. NAT'L ASS'N OF STATE BUDGET OFFICERS, 2010 STATE EXPENDITURE REPORT: EXAMINING FISCAL 2009–2011 STATE SPENDING (2011).

a figure below Chief Justice Roberts's ten percent coercion mark. From 2002 to 2010, NCLB conditional funding to the states as a percentage of total state expenditures peaked in 2003 at 2.11%.[186]

This percentage still greatly exceeds—by a multiple of eleven—the 0.19% of state expenditures at stake in *Dole*.[187] After 2003, the percentage of total state expenditures from NCLB conditional funding has gradually dipped, even though NCLB funding has increased. By 2010, the $25.1 billion in NCLB funding to states equated to only 1.55% of states' total expenditures.[188] These percentages do not rise to the levels at issue in *NFIB*, but the *NFIB* Court did not set a minimum threshold for coercion.[189] NCLB's conditional funding in relation to overall state expenditures places its coerciveness between *Dole*'s 0.19% and *NFIB*'s 10.0%. Thus, by applying *NFIB*'s budgetary analysis to NCLB's federal conditional spending for education, an argument emerges: conditional spending for education as it exists under NCLB today is unconstitutionally coercive.

Budgetary arguments beyond the Court's focus in *NFIB* support this argument as well. While Chief Justice Roberts and the dissenting Justices measure reliance using total state expenditures as a base value, state gross domestic product (GDP) provides a better measure. Reliance hinges on a state's ability to fund a program, not its willingness to fund it. If the state can fund a program to a certain level but declines to do so, it nonetheless maintains its ability to

186. NAT'L EDUC. ASS'N, NCLB FUNDING 4 (2010) (2003 NCLB funding of $23.8 billion); NAT'L ASSOC. OF STATE BUDGET OFFICERS, 2004 STATE EXPENDITURE REPORT 6 tbl.1 (2005) (2003 total state expenditures of $1.13 trillion). 2003 NCLB funding comprised almost one-tenth of what states spent for elementary and secondary education, which totaled $245.6 billion. *Id.* at 16 tbl.7.

187. *NFIB*, 132 S. Ct. at 2664.

188. NAT'L EDUC. ASS'N, *supra* note 186, at 3; NAT'L ASSOC. OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: EXAMINING FISCAL 2010–2012 STATE SPENDING 7 tbl.1 (2012), *available at* http://www.nasbo.org/sites/default/files/State%20Expenditure%20Report_1.pdf (2010 total state expenditures of $1.62 trillion).

189. *But see* Eloise Pasachoff, *Conditional Spending After* NFIB v. Sebelius*: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 622–25 (2013) (arguing that the NCLB funding figures are insufficient to show coercion because they are closer to the figures in *Dole* rather than *NFIB*). Professor Pasachoff likewise discusses the post-*NFIB* treatment of NCLB. On the issue discussed in this Note—labeled the "economic dragooning" theory by Pasachoff—she relied on the 1.5% figure's relative proximity to *Dole*'s 0.19% as the crucial indicator that mollifies coercion concerns. *Id.* This argument shortchanges the sizeable difference between those two figures. And because the Court did not specify when funding becomes coercive, any figure above 0.19% yields a plausible argument for coercion.

decline federal funding.[190] States with lower total expenditures per capita may have the ability to tax and spend more on education, but they *choose* not to. As opposed to total spending, state GDP—a measure of a state's total output—better indicates the size of a state's tax base, and thus its ability to pay, because it does not incorporate a state's overall inclination to tax and spend for all purposes.

Using state GDP as a base value reveals states' growing reliance on federal education funding, which in turn indicates states' limited ability to choose whether to accept federal funding. Federal education funding as a percentage of state GDP has doubled since the time of *Dole* with the most dramatic increases occurring after NCLB implementation. From 1987 to 2011, the percentage rose from 0.22% to 0.47%.[191] In 2001, the year of NCLB's enactment, the percentage sat at just 0.26%.[192] While these percentages may appear low, it is important to consider that the base value is the states' total economic output in a year, not just government spending.

As of 2001, only thirty-three states had seen an increase in federal education funding as a percentage of state GDP since 1987. But all states—with the exception of Maine—experienced an increase from

190. The Fourth Circuit has raised the concern that comparing federal conditional funding to state budgets would create a perverse inventive for states to spend less in areas where they receive federal monies in an attempt to establish coercion. Va. Dep't. of Educ. v. Riley, 106 F.3d 559, 570 (4th Cir. 1997) (en banc) (per curiam).

191. KAREN A. FARRELL, NAT'L ASSOC. OF STATE BUDGET OFFICERS, 1989 STATE EXPENDITURE REPORT 28 (1989) (1987 federal education funds to states of $10.3 billion); *Interactive Data*, Bureau of Economic Analysis (last visited Mar. 12, 2013), http://www.bea.gov/iTable/index_regional.cfm (select "Begin using the data . . ." button; then "Gross domestic product by state"; then "Gross domestic product"; then "SIC"; then "All industry total"; then select United States as the area; then select 1987 as the year) (1987 combined state GDP of $4.6 trillion); NAT'L ASSOC. OF STATE BUDGET OFFICERS, 2002 STATE EXPENDITURE REPORT 16 tbl.7 (2011 federal education funds to states of $70.5 billion); *Interactive Data*, Bureau of Economic Analysis (last visited Mar. 12, 2013), http://www.bea.gov/iTable/index_regional.cfm (select "Begin using the data…" button; then "Gross domestic product by state"; then "Gross domestic product"; then "NAICS"; then "All industry total"; then select United States as the area; then select 2011 as the year) (2011 combined state GDP of $14.9 trillion).

192. NAT'L ASSOC. OF STATE BUDGET OFFICERS, 2002 STATE EXPENDITURE REPORT 16 tbl.7 (2003) (2001 federal education funds to states of $26.8 billion); *Interactive Data*, Bureau of Economic Analysis (last visited Mar. 12, 2013), http://www.bea.gov/iTable/index_regional.cfm (select "Begin using the data…" button; then follow "Gross domestic product" hyperlink in the first dropdown list; then choose "NAICS"; then select "All industry total"; then select each state individually; then select 2001 as the year) (2001 combined state GDP of $10.22 trillion).

1987 to 2011.[193] Perhaps the most impressive transformation happened in Montana, which received only 0.06% of its GDP in federal education funds in 1987 but brought in 0.66% in 2011.[194] More than half the states during 1987–2011 doubled their federal education funds in relation to state GDP.

While the *NFIB* court did not rely on GDP comparisons, it incorporated reliance into its coercion analysis. By accounting for states' ability, as opposed to willingness, to tax and spend, these GDP comparisons more accurately show how states rely more on federal education spending after the implementation of NCLB's conditional funding scheme. The greater reliance boosts the argument that current levels of conditional education spending deprive states of a real choice in accepting the federal funds.

Moreover, district and circuit courts may opt to use GDP for the comparative analysis instead of state expenditures. For example, the Fourth Circuit, in *Riley*, raised the concern that comparing federal conditional funding to state budgets would create a perverse incentive for states to spend less in areas where they receive federal funds in an attempt to establish coercion.[195] Using state GDP as the reference point for coercion mitigates this concern. But while the GDP comparison seems to reveal more about the expansion of federal conditional spending in education, the argumentative force behind this budgetary analysis is essentially the same regardless of the financial reference point. Ultimately, the numbers land between *Dole* and *NFIB*.

B. Application of the Coercion Principle's Rationales

The budget figures alone make a compelling case for coercion. Even so, a reconsideration of *Dole*'s rationales with respect to conditional spending for education reinforces the budgetary arguments made in the prior section, thus placing added pressure on federal courts to find the spending unconstitutionally coercive.

First, the confluence of increased federal control through conditional spending and the tradition of local and state control[196] complicates the electorate's task of determining whom to hold responsible. Voters intuitively connect education policy to local and state decision makers. Even voters that acknowledge the federal government's increased role in education must undertake the exhausting task of tracing federal funding to know who is responsible

193. *See supra* note 191.

194. *See supra* note 191.

195. *Riley*, 106 F.3d at 570. Using state GDP as the reference point for coercion analysis absolves this concern.

196. *See* discussion *supra* Part II.A–C.

for what. As a result, few voters have a firm grasp of the division of policy authority between federal, state, and local authorities.

Adding to the confusion, substantial federal involvement in education policy adds not a second but a third layer into the equation. To properly assess whom to hold accountable in education and to what degree, a voter must understand the fluid involvement of school administrators, local school board members, state school board members, state legislators, governors, members of Congress, the U.S. Department of Education, and the President.[197] The involvement of more decision makers additionally enables all of them to maintain plausible deniability. In other words, federal involvement creates more outlets for deflecting blame. Accordingly, both policy makers and policy implementers gain political insulation.[198] And as the electorate's ability to administer accountability diminishes, meaningful democratic participation in education dwindles.

Second, the modern coercion principle aims to protect state choice. Behind *Dole*'s language distinguishing "encouragement" from "coercion" lies the fear of state reliance on federal money.[199] When states build a reliance on federal money, they begrudgingly conform to federal policies. When that happens, funding deprives the states of any practical choice in turning down funds, which in turn enables the federal government to enlist the states in implementing its own policies. *NFIB* repeated these concerns.[200] In discussing the requirement that states voluntarily accept the terms of federal spending, Chief Justice Roberts stated that "[r]especting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."[201] In addition, the dissenting Justices underscored the reliance concern when comparing federal Medicaid funding to total state expenditures.[202]

197. Assuming a person votes for two state legislators, five local board of education members, and a single state board of education member, the voter must decipher the actions of ten policy makers and their political opponents. In addition, the voter must consider the influence of the state's governor and the President. If voters regularly fail to shoulder this burden, then the people controlling education gain insulation from whom they serve.

198. *See* Greve, *supra* note 7, at 593–94 (arguing that this lack of political accountability explains the general ineffectiveness of cooperative policies, which, despite their limitations, are increasing in use).

199. *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987) (stating its decision recognizes the potential danger of depriving states of realistic choice when accepting conditional funds).

200. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602–03 (2012).

201. *Id.* at 2602.

202. *Id.* at 2663–64 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

Fueling the concern for state reliance, conditional spending diminishes the alternatives available to a state. Citizens are subject to taxation from federal, state, and local governments. Given that a state's tax base is limited, any tax imposed and collected by the federal government diminishes a state's ability to collect taxes from that base.[203] State legislators incur steeper political costs for taxing that base as well. Because heavy federal taxation diminishes a state's ability to demand more money from its citizens, Congress deprives that state of its ability to choose whether to accept federal funding when it offers an overly large amount of money.[204] This concern heightens in tight fiscal times. In metaphorical terms, by offering an especially large carrot, Congress effectively pulls everything else off the menu. Choice does not exist when there are no alternatives.

The state-choice rationale for the coercion principle applies anytime states receive a large amount of conditional spending. As mentioned in Part IV.A, federal education spending granted to the states has grown as a share of state GDP since the time of *Dole*.

A potential waiver of funding conditions, like those granted by the Obama administration for NCLB, does not mitigate these concerns.[205] When accepting conditional funding, states do not know

203. Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1935–39 (1995) (pointing out that since the adoption of the Sixteenth Amendment states can effectively tax its citizens' income and property only after the federal government has taken its cut). Because of the federal government's superior position, it gains the ability to offer states conditional funding that states could have otherwise obtained by directly taxing their citizens. So when Congress uses conditional spending, it effectively offers states a return of their own citizens' money with the requirement that they follow certain conditions. *Id.*

204. The dissenting Justices raised this point in *NFIB*. 132 S. Ct. at 2661–62 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

205. *See* Charlton C. Copeland, *Beyond Separation in Federalism Enforcement: Medicaid Expansion, Coercion, and the Norm of Engagement*, 15 U. PA. J. CONST. L. 91, 161–65 (2012). Copeland acknowledges that the *NFIB* Court based its coercion analysis on the statutory framework at the time of enactment. However, he argues that doing so ignored the modern realities of bureaucratic cooperative governance. He asserts that the Court should have instead engaged in a more contextualized coercion analysis. While the Court has analogized much of its conditional spending jurisprudence to classical contract law, a consideration of relational contract principles to the relationship between the federal and state governments would have begged for the same type of contextualized analysis desired by Copeland. *See* James W. Fox Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1, 32 (2003) ("The relational emphasis of democratic citizenship makes it a natural counterpart to relational contract theory. In one sense, the political community is itself seen as a form of ongoing long-term contract.").

whether a waiver will eventually be offered, when it will be offered, or to which conditions the waiver will apply. Because states do not know this information, they must operate on the premise that the federal government will enforce all the conditions of its spending. And while a waiver sounds like a clean escape from a condition, states may be required to comply with other conditions to receive the waiver.[206]

Budgetary arguments and the rationales for the coercion principle combine to push federal conditional funding for education into susceptible territory. By finding the ACA's Medicaid provisions unconstitutionally coercive, the Supreme Court has placed the constitutionality of federal education funding in serious doubt.

C. The Future of Federal Education Funding: An Upward Trend

As of April, 2013, the prospects for a serious coercion-based challenge to NCLB are minimal. With the reauthorization of ESEA pending before Congress, NCLB slowly approaches the end of its life cycle. ESEA reauthorization would undermine any successful challenge to NCLB. And as previously discussed, the coerciveness of NCLB conditional funding has diminished since its inception. But future conditional funding schemes for education—including the reauthorized version of ESEA—will need to comply with the Supreme Court's post-*NFIB* coercion doctrine. Thus, the relevant focus shifts away from NCLB and to the potential conditional funding scheme of the pending ESEA reauthorization.

Budgetary trends suggest that the reauthorized ESEA will grant an even greater amount of conditional funding in proportion to states' total budgets, increasing its vulnerability to a coercion challenge post-*NFIB*. Specifically, these trends reflect increased federal funding of education that is distributed through the states. Since the time of *Dole*, the proportion of state education expenditures financed by federal funding has increased markedly. Dramatic increases in federal education funding in absolute terms has fueled this financial shift. Federal funding for elementary and secondary education more than doubled between 1985 and 2010, rising from $32.9 billion to $88.8 billion.[207] In addition to overall expenditures, federal education funding comprises a large portion of states' elementary and secondary education spending. In the aggregate, twenty-one percent of states' elementary and secondary education spending in 2010 came from federal funds.[208]

206. *See supra* text accompanying notes 142–45 (noting that NCLB waivers apply to only select provisions and that future waivers will entail tougher requirements).

207. NAT'L CENTER FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2011 543 tbl.D (2012).

208. NAT'L ASSOC. OF STATE BUDGET OFFICERS, *supra* note 188, at 16 tbl.7. The proportion of federal funding within a budget category, such

V. LEGISLATIVE CHANGES TO RECONCILE FEDERAL EDUCATION LEGISLATION WITH *NFIB*

The coercion principle restrains Congress from overstepping its Spending Clause power to financially twist the arms of the states. Courts invoke the principle to preserve to the vertical segregation of duties envisioned under the Tenth Amendment. In seeking to preserve state control over certain policy areas, one should ask what rationales exist for maintaining state control. To further that line of questioning, this Part first discusses the justifications for preserving state and local control over education. In accordance with those justifications, this Part then offers recommendations for ESEA reauthorization to harmonize it with the coercion principle.

A. Problems with Federal Involvement in Education

Often the justifications for state control over an area derive from a tradition of state control. As discussed above, education represents a prime example of an area rooted in state control. Even in *NFIB*, the dissenting Justices used primary and secondary education for a hypothetical to illustrate how the coercion principle protects "areas traditionally governed primarily at the state or local level."[209] But other rationales supplement the case for state and local control over elementary and secondary education. The crux of these other rationales is that local and state entities are better suited to govern education.

To begin, spreading authority over three levels of government—local, state, and federal—fractures decision making. Federal involvement entails an added layer of information sharing and requires decision makers to notice and react to the actions of other authorities. Of the three levels of government, the federal government is the least apt for promulgating responsive education policies. The top-down approach inherent to federal regulation of elementary and

as education, indicates reliance in situations where a state will struggle to replace lost federal funding within that category. For instance, states where constituents disfavor education compared to other public services will likely not replace lost federal education funding with additional state revenue. Because the state cannot replace the education funds, a higher proportion of federal education funding to state education expenditures serves as the best indicator of reliance. A state relying on federal money for forty percent or more of its education expenditures will abide by the conditions on that money if the state's citizens will not support revenue increases specifically for education. But for states with a neutral or positive willingness to fund education, the proportion of federal education funding to total state expenditures serves as a better indicator of reliance.

209. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2662 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

secondary education creates the largest disconnect between the decision makers and the actual education environment.[210] In implementing education policy, individual states and localities benefit from greater understanding of local conditions and a more homogeneous citizenry.[211] Thus, more localized control enables the tailoring of education to a community's individual needs.

When the federal government imparts education policy, as opposed to state and local entities, the policy's implementation will necessarily involve a wider range of actors.[212] State and local implementers are subject to different political climates and confront different challenges than federal policy makers, which induces motley execution of the same policy.[213] This effect subverts the idea that federal education policy achieves consistency. Any remaining hope of consistent reform implementation weakens further at the school level.[214]

Broad, overarching federal education policies spurn the spectrum of different educational views and philosophies. Thanks to great thinkers like Noah Webster, Thomas Jefferson, and John Dewey, numerous theories about the relationship between education and democracy pervade modern education. The nature of this relationship defines the core objectives of public education, which in turn dictate the means for achieving those objectives.[215] Given the fundamental differences between these conflicting educational philosophies, citizens should have the ability to meaningfully choose between them. But the electoral dilution of federal elections erodes the chance for citizens to

210. Barolsky, *supra* note 79, at 741.

211. Shannon K. McGovern, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1533 (2011).

212. Superfine, *supra* note 150, at 93.

213. *See id.* at 94–95.

214. Jennifer A. Mueller & Katherine H. Hovde, *Theme and Variation in the Enactment of Reform: Case Studies*, *in* THE IMPLEMENTATION GAP: UNDERSTANDING REFORM IN HIGH SCHOOLS 21, 21 (Jonathan A. Supovitz & Elliot H. Weinbaum eds., 2008) (observing significant policy implementation differences between fifteen high schools); *see also* Richard Weatherly & Michael Lipsky, *Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform*, 47 HARV. EDUC. REV. 171, 193 (1977) (reflecting on the importance of school level implementation of federal education law).

215. Diane Ravitch, *Education and Democracy*, *in* MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 15, 26–27 (Diane Ravitch & Joseph P. Viteritti eds., 2001). For example, Thomas Jefferson advocated for public education to enable people to protect their own individual freedom from tyranny. *Id.* at 16–17. In contrast, Noah Webster desired to use education to mold society and promote cultural cohesion. *Id.* at 16.

advocate for the type of education provided in their communities.[216] Thus, education decisions should be localized to minimize electoral dilution and give citizens the ability to democratically shape education policy.

In addition, federal education policy stunts the benefits of local experimentation, commonly termed as using the "states as laboratories." Over America's educational history and still today, policy makers, teachers, administrators, and scholars have rarely uniformly supported the same policies.[217] Current disagreements surrounding the wisdom of high-stakes assessments, merit-based pay, and school choice strengthen the case for allowing states to pursue their own policies.[218] The alternative—imposing federal reforms—risks nationalizing and entrenching popular yet unproven reforms.[219] Moreover, implementing nationally homogeneous reforms hinders the development of a research base from which informed policy could be derived.

Despite the benefits of concentrating control over education policy in local and state entities, an ideal allocation of authority still contemplates some federal involvement. By engaging in an oversight role, the federal government can advance national educational interests that escape state and local stakeholders.[220] But for the reasons outlined in this section, federal influence should be minimal.

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216. A system of state, as opposed to local, control would entail similar electoral dilution but to a much lesser degree. Citizens stand a better chance of influencing education policy at the state level. This Note does not address the allocation of authority between state and local entities because it is beyond the scope of the U.S. Constitution.

217. *See* REESE, *supra* note 85, at 336 (connecting Americans' dissimilar education policy preferences to different views on the primary objectives of education); Liguori, *supra* note 131, at 1051–52 (reviewing divergent views about the wisdom of NCLB).

218. Charles Clotfelter et al., *High-Poverty Schools and the Distribution of Teachers and Principals*, 85 N.C. L. REV. 1345, 1378 (2007) ("More experimentation and evaluation . . . are clearly needed if good policies are to be developed . . . ."); *see also* Maris A. Vinovskis, *Missed Opportunities: Why the Federal Response to* A Nation at Risk *was Inadequate*, *in* A NATION REFORMED? AMERICAN EDUCATION 20 YEARS AFTER A NATION AT RISK 115, 126, 130 (David T. Gordon ed., 2003) (spotlighting the deficient research base available for deciding education policy).

219. *See* McGovern, *supra* note 211, at 1541–42.

220. *See id.* at 1542–46 (identifying global competitiveness and interstate resource inequality as examples of federal interests not addressed by state and local stakeholders).

B. Recommendations

The current NCLB conditional funding scheme and the likely scheme of its successor raise serious coercion concerns. Assuming Congress continues to expand its role in education—as budgetary trends suggest it will—the utilization of conditional funding to achieve that expansion will receive heightened judicial scrutiny in light of *NFIB*.

As mentioned by four of the Justices in *NFIB*—a case about health care—states retain the ultimate ability to choose education policies.[221] Part V.A provides a few reasons for why this arrangement is ideal. However, modern conditional spending schemes for education threaten this arrangement. Therefore, to help restore the states' ability to *choose* their education policies and to improve political accountability, Congress should consider taking the following steps to reconcile ESEA with the Supreme Court's coercion jurisprudence.

1. Extend More Funding Through Competitive Grant Programs

The competitive funding model used in the Race to the Top program operates in accordance with the coercion principle in its current form. Because states choose whether to apply and what measures to enact to boost their applications, the competition model allows states greater ability to choose their education policies.[222] By distributing more money through a renewed Race to the Top program, Congress can rely less on the traditional conditional scheme used by ESEA and its various reincarnations. Lowering the amount of conditional funding will in turn diminish the chances of a coercion ruling.

Nonetheless, grant competitions still allow the federal government to influence education policy. For example, the Race to the Top formula awarded forty points for the adoption of common standards,[223] which advanced the adoption of the Common Core State Standards by at least forty-six states.[224] Thus, coercion issues would

221. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2662 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

222. For a number of reform recommendations for the Race to the Top program, see McGovern, *supra* note 211, at 1550–54. McGovern explains that the initial program's prioritization of specific education reforms compelled states to adopt the federally-endorsed reforms. Sharing my concern for federally driven education policy, she advocates that the federal government can serve a more proper role of innovation facilitator by instead assessing grant applications in an unbiased manner. This kind of financing can be especially beneficial on a national scale because of the informational externalities produced by local experimentation.

223. U.S. DEP'T OF EDUC., *supra* note 137, at 7.

224. *See* Michele McNeil, *46 States Agree to Common Academic Standards Effort*, EDUC. WK., June 10, 2009, at 16 (reporting that all states have

arise if the amount of funding at stake through a program exceeds a certain level much higher than what Race to the Top currently awards. Money that citizens pay to fund the program is money that the states cannot collect to directly fund education. Yet courts would struggle to apply the coercion principle to a grant competition because of difficulties in determining the amount of funding at stake.

2. Attach Tiered Conditions to Funding

As opposed to typical all-or-nothing conditions, tiered conditions would receive more favorable treatment by the courts. Under NCLB, noncompliance with one provision may allow the Department of Education to pull all of an entity's funding.[225] States desiring to deviate from funding conditions must consider the harsh consequences of doing so. Thus, all-or-nothing conditions restrain state policy makers from deviating from those conditions even when compelling reasons exist for the deviation.

Recall in *Riley*, the court mentioned that withholding Virginia's entire $60 million annual IDEA grant because it did not comply with a funding condition that affected only a small percentage of students would have been unconstitutionally coercive.[226] Tiered conditions may have solved this problem.

Congress can avoid some coercion issues by simply unbundling the amount of funding at stake for each condition. As an alternative to all-or-nothing conditions, Congress may dictate the withholding of a certain amount of conditional funds for failure to comply with a specific condition. Reducing the financial punishment for not complying with a condition accordingly reduces the conditional spending's coerciveness. Tiered conditions provide a middle ground between all-or-nothing conditions and a scheme in which only the funding related to a condition is at stake for that condition.[227]

CONCLUSION

In ruling the ACA's Medicaid provisions unconstitutionally coercive in *NFIB*, the Supreme Court transformed the coercion principle from a mere rhetorical threat into a credible, federalism-based restraint on Congress's spending power. However, the decision stopped well short of precisely demarcating mere encouragement from

agreed to common standards except for Alaska, Missouri, South Carolina, and Texas).

225. *See supra* Part II.C.

226. Va. Dep't of Educ. v. Riley, 106 F.3d 559, 569 (4th Cir. 1997) (en banc) (per curiam).

227. By assigning different amounts for its funding conditions, the federal government can use tiered conditions to prioritize its provisions.

impermissible coercion. As Congress increasingly relies on conditional spending to accomplish its policy objectives, the importance of knowing what divides encouragement from coercion grows.

Over a span of decades, Congress has steadily expanded its influence in elementary and secondary education through conditional spending. NCLB, the most recent authorization of ESEA, has offered states large amounts of conditional funding while demanding controversial reforms in return. Using *NFIB*'s approach to coercion, NCLB's conditional funding falls in a middle ground below the funding at stake in *NFIB* but above the funding at stake in other coercion cases. Applying the rationales underlying the coercion principle to elementary and secondary education reinforces the argument for coercion.

Therefore, if the reauthorized ESEA continues the trend of increased conditional spending for education, the legislation will be vulnerable to coercion challenges. To avoid these challenges, and to restore states' control over education, Congress should increasingly employ two alternative devices for distributing education funding: competitive grant programs and tiered conditions. Without these or other changes, the reauthorized ESEA will likely prompt the Supreme Court to reaffirm its newfound commitment to the coercion principle.

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