

COERCION, POLITICAL ACCOUNTABILITY,  
AND VOTER IGNORANCE:  
THE MISTAKEN MEDICAID EXPANSION  
RULING IN *NFIB v. SEBELIUS*

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Although the individual mandate was upheld and the Commerce Clause may have been cabined, the decision to strike down a significant element of the “Medicaid expansion” may prove to be the most significant aspect of the Supreme Court’s decision in *NFIB v. Sebelius*. Under the Affordable Care Act (ACA), States were required to extend Medicaid coverage to all individuals under the age of 65 with incomes below 133 percent of the poverty line, a new “essential health benefits” package was required for all new Medicaid recipients, and the increased costs due to the expansion would be entirely covered by the Federal government through 2016, with the Federal payment gradually decreasing to a minimum of 90 percent of the total cost from the expanded coverage. The element found to be unconstitutional was § 1396c of the ACA, which permitted the withdrawal of all Federal Medicaid funds from those States that did not comply with the ACA’s requirements for Medicaid expansion. The effect on access to health care may be significant: roughly half of those expected to gain coverage under the ACA were going to gain it through the Medicaid expansion; it is unclear how many States will choose to opt into that expansion in the absence of § 1396c.<sup>1</sup> Additionally, the argument offered by the Court to strike down that provision might be used to attack other federal programs—concerning transportation, social services, environmental protection, and others—that have a similar structure. This paper will demonstrate that the argument rests on a theoretical mistake concerning the relationships between coercion, compulsion, and political accountability and that, further, this mistake is not one legally forced upon the Court.

I.

Constitutionally, under the Spending Clause (using the “spending power”), Congress is permitted to offer funds in the form of conditional grants to the States

in order to “provide for . . . the general Welfare of the United States.”<sup>2</sup> In their simplest versions, these conditional grants take this form: a State will receive X Federal dollars conditionally upon the state doing A, B, and C. There may be cases in which Congress could, instead, directly regulate or require A, B, and C—by passing Federal legislation that pre-empts State law. But, interestingly, the Supreme Court has made it clear that Congress can condition grants on States taking certain actions—getting them to do A, B, and C—even in cases in which Congress could *not* permissibly regulate A, B, and C directly. As the court in *NFIB* noted, the Supreme Court “has long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States’ ‘taking certain actions that Congress could not require them to take.’”<sup>3</sup> (The reason that Congress could not permissibly regulate directly in these cases would be because those actions were outside of Congress’s express Article I powers.)

So, the Supreme Court has made it clear the federalism balance of power set out in the Constitution does not forbid Congress from attempting to influence States to act in certain ways—even in areas in which Congress cannot regulate—by offering conditional grants. The Court has described conditional grants on the model of a “contract,” and the appropriateness of Congress’s exercise of the spending power through conditional, contract-like grants “rests on whether the State *voluntarily* and *knowingly* accepts the terms of the ‘contract.’”<sup>4</sup>

The Supreme Court has also been clear, however, that the Federal Government may not “commandeer” States; in particular, the “Federal Government may not *compel* the States to enact or administer a federal regulatory program.”<sup>5</sup> There are two main “anti-commandeering” cases in which federal legislation was found to be unconstitutional because the legislation was held to commandeer a State’s legislative or administrative apparatus for federal purposes: *New York v. United States*<sup>6</sup> and *Printz v. United States*.<sup>7</sup> In *New York*, a provision of federal legislation (the “Low-Level Radioactive Waste Policy Amendments Act”) was found to be unconstitutional because it compelled States to either take title to nuclear waste generated within their borders (and assume liability for that waste) or to enact particular state waste regulations as set out by the federal legislation. The Supreme Court held that the Federal Government could not permissibly compel States to take title to nuclear waste, nor could the Federal Government compel States to enact particular state legislation, so the Federal Government could not permissibly compel States to do one or the other of those things. In *Printz*, certain interim provisions of the Brady Handgun Violence Prevention Act were ruled unconstitutional because they required State officials, namely State police officers, to perform various background checks and to have record-keeping responsibilities for a Federal system. As Justice Scalia concluded, in useful summary,

[w]e held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.<sup>8</sup>

It is worth stressing that neither of these two cases involved the use of conditional grants, and neither implicated the spending power.<sup>9</sup>

Thus, prior to *NFIB*, there were two distinct lines of cases: (1) the explicit conscription/compulsion "anti-commandeering" line of cases, in which the Supreme Court has, on several occasions, found federal legislation partially unconstitutional; and (2) the spending power, conditional grant line of cases, which the Supreme Court has examined for signs of undue influence through financial pressure that "turns into compulsion."<sup>10</sup>

Importantly, although the Court had examined federal spending power legislation in cases prior to *NFIB*,<sup>11</sup> it had been remarkably permissive, only once striking down legislation as an impermissible exercise of the spending power, and this for reasons unrelated to coercion.<sup>12</sup> In the most relevant recent case, *South Dakota v. Dole*, the Supreme Court offered four main spending power limitations:

*The "general welfare" limitation:* "[T]he exercise of the spending power must be in pursuit of 'the general welfare.'"<sup>13</sup>

*The "clear terms" limitation:* "[I]f Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"<sup>14</sup>

*The "nexus" limitation:* "[O]ur cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"<sup>15</sup>

*The "coercion" limitation:* "[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"<sup>16</sup>

The common view, expressed by numerous commentators, is that these limitations on the spending power have been largely "toothless."<sup>17</sup> There are no cases prior to *NFIB* in which a provision of federal legislation was struck down on any of these grounds. Thus, although the Supreme Court has maintained that the spending power might inappropriately be used to coerce or compel states under the guise of "offering" a conditional grant, it isn't until *NFIB* that the Supreme Court actually finds this kind of coercion present in an exercise of the spending power.<sup>18</sup>

## 2.

In *NFIB*, the Court held as unconstitutional the provision of the ACA that allowed the Federal government to withdraw all Medicaid funding if States did not accept the Medicaid expansion. It reached this conclusion by finding that the financial inducement was so coercive as to pass the point at which pressure turns into compulsion. As Chief Justice Roberts put it, “the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”<sup>19</sup>

The “gun” in question was the possibility that, under § 1396c of the ACA, if a State opted out of the Medicaid Expansion, the Secretary of Health and Human Services would have the option of declaring that no more Federal payments for Medicaid would be made to that State. Chief Justice Roberts noted: “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.”<sup>20</sup> He concluded: “[T]he threatened loss of over 10 percent of a State’s overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”<sup>21</sup>

In finding this provision of the ACA unconstitutional, the Supreme Court used language essentially merging these two distinct lines of cases; in particular, bringing those “coercion” spending power cases under the same conceptual umbrella as the “anti-commandeering” line of cases. For example, Chief Justice Roberts writes: “‘The Constitution simply does not give Congress the authority to require states to regulate.’ That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.”<sup>22</sup> And, concluding the relevant part of the opinion: “Congress may not simply ‘conscript state [agencies] into the national bureaucratic army’ and that is what it is attempting to do with the Medicaid expansion.”<sup>23</sup>

This language suggests that the Court in *NFIB* is attempting to set out a general “anti-compulsion” rule, barring the Federal government from commandeering, compelling, or conscripting States or State officials *directly*, via law, and barring the Federal government from achieving this same result *indirectly*, via financial conditional grant offers that (in some sense) cannot be refused.

## 3.

Looking at the two lines of cases prior to *NFIB*, and at *NFIB* itself, two main justifications have been given for this anti-compulsion rule. The first is a legal or constitutional reason: in the US federalist system of “dual sovereignty,” States are sovereign entities, and it is inappropriate for the Federal government to operate in ways that ignore that fact by compelling or conscripting State officials into carrying out Federal projects (except in those cases in which the Federal

government is clearly constitutionally authorized to do so). The second is a moral or democratic reason: if the Federal government forces State governments to act in certain ways, the lines of political accountability will be obscured, and this is bad because it undermines popular democratic control of political officials and political institutions. In what follows, I will argue that neither of these two justifications makes sense. The first justification doesn't make sense in this context (the context of *NFIB*), or in any context that involves pressure, even coercive pressure, rather than compulsion. The second justification doesn't make sense in any context.

### *A. Federalism, Sovereignty, and Coercion*

The United States Federal Government is a government of express, enumerated powers, with the 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.”<sup>24</sup> The balance of power between the Federal government and the States is set out in the Constitution, and much of the reasoning behind the anti-commandeering line of cases is predicated on the idea that there are limits to what Congress and the Federal Government can force the States and State officials to do. As Chief Justice Roberts notes in *NFIB*, “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.’ Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.”<sup>25</sup>

This reasoning clearly supports a bar on Congress literally compelling or commanding State officials to act in some way—making it illegal for them to do otherwise. The suggestion in *NFIB* is that the same basic idea lies behind the “coercion” limitation on the spending power. As Chief Justice Roberts writes, “the legitimacy of Congress’s exercise of the spending power ‘thus rests on whether the State voluntarily and knowingly accepts the terms of the “contract.”’ Respecting 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.”<sup>26</sup>

This presents several questions: Is it appropriate to treat “coercive” uses of the spending power as equivalent to, and just as constitutionally problematic as, actual commandeering or legal compulsion? What constitutes a problematic form of “coercion” in this context? Does the ACA and, in particular, § 1396c of the ACA, amount to a constitutionally problematic coercive use of the spending power? I won't offer full answers to these questions here, but it is worth making several points that, taken together, suggest that the answer to the final question is no, and that suggest that it is at least worth considering whether the accountability rationale can stand on its own.

First, it is clear that there is no actual commandeering or legal compulsion of States or State officials. The States could legally decide not to implement the

Medicaid expansion. So, if there is something objectionable, it will be because the use of the spending power, the offer of the conditional grant, was somehow “coercive.” Another way of putting this is that we are dealing with what Japa Pallikkathayil has called “volitional” coercion: coercion aimed not at limiting what an agent can choose (by, say, use of force or imprisonment) but at getting the agent to choose what one wants her to choose.<sup>27</sup>

Let us refer to a “contingency announcement”<sup>28</sup> as an act with this structure: an initiator agent, A, indicates (typically through verbal communication of some kind) that A will do *X* if and only if the announcement’s recipient, R, does *Y*. It has been notoriously difficult to offer an account of what makes a contingency announcement morally problematic or not, “coercive” or not (if “coercive” is taken to have negative moral connotations).<sup>29</sup> Clearly, not every such contingency announcement is morally problematic. Most offers, transactions, trades, exchanges, agreements, treaties, contracts, etc., have this contingency announcement structure. The questions, then, are what makes some instances of contingency announcements morally problematic, and, in particular, what, if anything, might make a contingency announcement from the Federal Government to the States problematic. Although the more general question is obviously of great philosophical interest, I will not pursue it here. All sides to the debate should acknowledge that there will be at least some differences introduced by the fact that in the *NFIB* context, we are concerned with collective political entities (not individual persons) and that our concern is primarily about legality/constitutionality, not about interpersonal morality.

The Court seems to offer two main ideas regarding what might make a contingency announcement from the Federal Government to the States problematic. The first is that some Federal contingency announcements will make it seem as if the Federal government is attempting to *manipulate* or *pressure* the States into doing what the Federal government would like the States to do. Thus, Chief Justice Roberts writes:

We have upheld Congress’s authority to condition the receipt of funds on the States’ complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the “general Welfare.” Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of *pressuring* the States to accept policy changes.<sup>30</sup>

The Court has said that “relatively mild encouragement” to the States is permissible,<sup>31</sup> but that there is a point at which “pressure turns into compulsion.”<sup>32</sup> The problem, however, is that it is entirely unclear (a) what is meant by “compulsion,” and (b) whether compulsion is always problematic. As suggested above, the relevant kind of compulsion can’t be physical or—also important in this

context—legal. Chief Justice’s Roberts’s “gun to the head” metaphor suggests the kind of compulsion that he has in mind, but it’s not clear that he or the Court is thinking in a particularly fine-grained way about any of this, or whether the use of this metaphor can withstand scrutiny.

Consider, for example, which of the two situations seems more closely analogous to the position of the States if the original ACA was implemented without modification:

GUN: A robber puts a gun to your head and makes the following contingency announcement: “I will refrain from shooting you if and only if you give me all of your money.”

SCHOOL: Parents of an adult child, Brian, have been paying for their child’s food, housing, and travel throughout that child’s late twenties. Brian lost his job at twenty-six and has been working at a variety of non-permanent jobs while trying to make a successful career out of his music. When Brian turns thirty, the parents make the following contingency announcement: “We will continue to pay for all of your expenses and we will pay for you to enroll in some educational or job-training program if and only if you enroll in an educational or job-training program. Otherwise, we will stop paying for any of your expenses one year from today.”

I hope it is intuitive that SCHOOL is considerably closer to a depiction of the relationship between the Federal government and the States with respect to the Medicaid expansion. Perhaps Brian feels like what his parents are doing is unfair, and he would be correct in feeling that his parents were attempting to pressure him into doing something (namely, enrolling in an educational or job-training program) that he doesn’t necessarily want to do. And it is certainly true that the parents make that contingency announcement because they want and intend to get Brian to act in a certain way. But it isn’t clear that there is anything objectionable about what the parents do, despite all of that. It doesn’t follow *from the fact that his parents are pressuring him* that what his parents do is problematic or inappropriate. The mere fact that it constitutes pressure, even substantial pressure, is not sufficient to establish that a contingency announcement is problematic—something else must be present.

One thing this example highlights is that the baseline matters. As one commentator has put the point in the spending power context, “[d]eterminations that a conditional offer of federal funds coerces the states tend to depend on normatively contestable premises about states’ baseline entitlement to federal largesse.”<sup>33</sup> A similar point can be made with respect to the parents and Brian. Additionally, it is clearly not sufficient to make such an announcement morally problematic that, among other reasons, the initiator, A, *wants* or *intends* to get R to do something, and that this explains why A made the announcement.<sup>34</sup> That would result in most ordinary transactions and exchanges coming out as morally problematic.

This brings us to the second, related thought present in the Court's opinion: that some Federal contingency announcements will prevent the possibility of States acting autonomously, which threatens the dual sovereignty system. This line of thought appears in the overheated rhetoric—"gun to the head,"<sup>35</sup> "dragooning,"<sup>36</sup> "conscript"<sup>37</sup>—the Court uses to refer to the situation of the States, and also in some of the more moderate language: "The threatened loss of over 10 percent of a State's overall budget . . . leaves the States with *no real option* but to acquiesce in the Medicaid expansion."<sup>38</sup> Ultimately, this last idea, the idea that § 1396c of the ACA leaves the States with "no real option" but to go along with the Medicaid expansion, seems to be at the heart of the Court's reasoning with respect to coercion and the merging of the commandeering and coercion lines of cases.

The problem is that just as a contingency announcement does not become problematic simply for being an instance of pressure, so, too, a contingency announcement is not problematic simply because it leaves the recipient with "no real option." Consider, for example, a third case:

CARS: A car dealer makes this contingency announcement: "I will sell you, Jill, this particular kind of car if and only if you, Jill, pay \$12,000 for it (with appropriate financing)." As it turns out, Jill really needs a car, and this particular kind of car is the car that Jill evaluates to be safest, most aesthetically pleasing, most fuel-efficient, most useful for her daily needs, and most fun to drive, and \$12,000 is significantly cheaper than all of the other kinds of cars and instances of this car that she has found, in addition to being clearly within her budget.

There is a definite sense in which Jill has "no real option" but to purchase that car. But that hardly makes it problematic for the car dealer to make that offer to Jill, nor does it do anything to undermine Jill's autonomy if and when she goes ahead and decides to buy the car. There is also a straightforward sense in which, of course, Jill has the option of not buying the car, just as there are both of these senses in the GUN case, the SCHOOL case, and the Medicaid expansion case. The point is that suggesting that a contingency announcement leaves a person with "no real option" is not *sufficient* to establish either that the announcement is problematic, or that a person who accepts the offer does so via diminished agency or through something other than his or her own autonomous choice. As Pallikkathayil puts the point, a contingency announcement may

shape . . . the alternatives such that the balance of reasons points strongly in one direction. This can make it seem to an agent as though there is no decision left to be made and hence that the ensuing behavior is not up to her. This appearance involves a slide between two thoughts: (1) that the recipient does not choose to act as she does and (2) that the recipient has no other meaningful options. It is important to see that these really are two distinct claims and that (2) does not imply (1).<sup>39</sup>



This distinction is one that the Chief Justice appears to miss, and the joint dissenters (Justices Scalia, Kennedy, Thomas, and Alito), who are not dissenting with respect to the Medicaid expansion, also completely miss this distinction:

[T]he meaning of coercion in the present context—is straightforward. As we have explained, the legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States’ choice to accept or decline the offered package. Therefore, if States *really have no choice* other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power.<sup>40</sup>

There appears to be a direct inference from the States having no real options to the choice made being non-voluntary. One wonders what they would say about Jill in the CARS case, in which it seems true both that Jill has “no real options” and that the choice she makes is completely voluntary.

Much more could be said about what constitutes a coercive or otherwise inappropriate contingency announcement, a task that others have undertaken elsewhere. The point I wish to make here is just that it is not obvious that § 1396c of the ACA was “coercive” in a problematic or voluntariness-undermining way, and that this does not at any rate follow simply from the fact that States were significantly *pressured*, that the Federal government may have *wanted* to pressure the States into accepting the Medicaid expansion, or even that the Federal government’s contingency announcement left the States—in some sense—with *no real option* but to accept the Medicaid expansion. All of that is compatible with there being no coercion (if one thinks there is no coercion in the SCHOOL case) and with there being voluntary choice (if one thinks there is voluntary choice in the CARS case).

### *B. Political Accountability, Voter Ignorance, and Coercion*

The second rationale offered for a general anti-compulsion rule—barring both commandeering and coercive use of the spending power—is a moral or democratic reason: if the Federal government forces State governments to act in certain ways, the lines of political accountability will be obscured, and this is bad because it undermines popular democratic control of political officials and political institutions. This rationale appears prominently in *New York* and in *Printz*, and it is one the main rationales offered in *NFIB*. It is worth stressing that this second rationale—at least as explicitly stated—relies on the premise that the Federal government has forced the States to act in certain ways. If that premise is undermined, as I have suggested it is, in the case of *NFIB*, then this rationale doesn’t get off the ground. (The analogue of this argument for *perceived* coercion or compulsion, rather than actual coercion or compulsion, is considerably harder to run, precisely because it is an argument predicated on the coercion or compulsion in question *not* having been perceived.) Because the arguments regarding coercion

are likely to be contentious, I think it is worth considering this accountability argument in some detail.

Here is the argument as it appears in *New York v. United States*:

[B]y any . . . permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people. By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials who suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.<sup>41</sup>

This same basic argument is presented in *NFIB*, transported explicitly to the Spending Clause context:

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. . . . Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability, just as in *New York* and *Printz*.<sup>42</sup>

The basic argument, informally reconstructed, is this:

- (1) Democratic control is good (for a variety of normative reasons related to both process values and outcome values).

- (2) Within a political system like the United States, democratic control requires electoral political accountability—democratically elected officials must be politically accountable to those over whom they govern.
- (3) Political accountability requires that citizens know which political officials are responsible for particular policy decisions, so that the citizens' votes for elected officials can reflect their views about the policy decisions those officials have made.
- (4) If the Federal government compels or coerces State governments to act, individual citizens will not know (or fewer citizens will know) who is responsible for those particular political actions.
- (5) Therefore, Federal commandeering or coercion of State officials threatens a good thing, and should not be permitted.

There are a number of points that might be made with respect to this argument. One might, for example, suggest that (3) is false, given the possibility of using proxies and signals of various kinds. Individuals might be able to use various “work-arounds” so that even if one does not know much about which individuals are responsible for which decisions, one might still be able to hold one's representative meaningfully accountable. Most of these strategies amount to a kind of deference to the monitoring and evaluation done by some other individual or group. So, for example, membership in a particular political party, endorsement from activist organizations or media institutions, and public endorsements from particular individuals might all seem to help individuals overcome personal ignorance to hold their representatives accountable.<sup>43</sup>

The two main points I want to make, however, are that (4) seems both false in this particular context, as an empirical claim about voter knowledge with respect to Medicaid, and, more generally, that there is no reason to think that (4) is true. Considering the particular context of *NFIB*, we can reformulate premise (4) as follows:

- (4\*) If the Federal government compels or coerces State governments to accept the Medicaid expansion, individual citizens will not know (or fewer citizens will know) who is responsible for the Medicaid expansion.

Given that the ACA is one of the most significant pieces of Federal legislation in the past fifty years, given that the Medicaid expansion was a significant part of the health care legislation, and given that it was the focus of national attention for months, it is very hard to see any Federal officials escaping responsibility. Justice Ginsburg, in a footnote in her dissent, makes the point that there is no threat to political accountability in this case, since “Medicaid's status as a federally funded, state-administered program is hardly hidden from view.”<sup>44</sup> This “blurred accountability” argument seems particularly misguided in this context, given that the mechanism of “coercion” (if we, for the sake of argument, grant that it is coercion) set out in § 1396c of the ACA is just that a Federal official, the Secretary of

Health and Human Services, is given *permission* to withdraw all Federal Medicaid funding to a State that doesn't go along with the expansion. It is very difficult to imagine a scenario in which the choice as to whether to exercise that permission or not isn't the subject of significant public scrutiny. This is different than the situation in, say, *New York*, in which the Federal government was requiring State officials either to take title to nuclear waste or to *pass regulations* dealing with nuclear waste. In that case, one might imagine that it could be somewhat murkier whether a particular State political official actually supported the regulations, or was being forced to enact State regulations in order to comply with Federal law. Finally, and this leads me to the broader point, it is plausible to think that Federal coercion would actually make it *more* likely that individual citizens will know who is responsible for the Medicaid expansion, precisely because State officials would raise a ruckus if forced by the Federal government into doing something that they didn't want to do. This broader point seems to apply in the *New York* and the *Printz* commandeering cases as well.

It is worth stressing that (4) is an empirical claim, and neither Chief Justice Roberts nor any of those who have offered versions of this argument offers any evidence to support the empirical claim. Such evidence would clearly be welcome. I will conclude this section by offering two reasons to doubt that (4) will generally be true. First, it is not obvious why we should think that awareness of which politicians are responsible for which political actions should vary inversely with the extent to which Federal officials are compelling or coercing State action. We might expect that the conflict between Federal and State officials would draw attention, as it has in this case. And we might expect that State officials themselves will raise a ruckus about the Federal government's behavior, at least insofar as those State officials want to disassociate themselves from what is being done—effectively disavowing responsibility. And if State officials attempted to disavow responsibility for choices in contexts in which they were not compelled or coerced, Federal officials would be in a position to note that State officials could do what they wanted, and to apportion responsibility accordingly. It is plausible that the ordinary confusions that arise from any federalist system will actually be lessened in contexts such as these, as both Federal and State officials will have an interest in making sure that voters know who is responsible for what precisely in those areas where they are overlapping and possibly conflicting. These suggestions would make it plausible that awareness will *increase* as compulsion or coercion increases. It would be one thing if the coercion or compulsion somehow made it impossible for State officials to speak up, but there is no reason to think that will be the case.

Second, it is not obvious that judges will be particularly well situated to identify when and why voters are doing a good job tracking what their elected officials are doing. If the Justices begin policing concerns about voter knowledge and political accountability in a consistent way, there might be all kinds of practices that would be called into question. After all, there are many things that might undermine

voter awareness, making it less likely that individual citizens will know who is responsible for which political actions. Consider the work of lobbyists, or the use of committees for drafting, or the delegation to administrative agencies, or the complexity and length of modern legislation. Of course, there are countervailing considerations, but there are similar countervailing considerations in this context, too. The constitutional basis for the Supreme Court to worry about federalism as a risk to political accountability is rather thin; Chief Justice Roberts cites no constitutional text to motivate this concern.

## 4.

Many aspects of *NFIB v. Sebelius* were unprecedented. One of those is that it was the first case in which, although there was no literal compulsion, the Supreme Court struck down a substantial portion of a Federal statute as being an impermissibly coercive exercise of the spending power. It remains to be seen what will happen in the absence of § 1396c. It is possible that all the States will eventually sign on to the Medicaid expansion; it is, after all, an excellent deal for the States—perhaps one that is even rationally compelling. It is very possible, however, that not all States will sign on. If they don't, then thousands and even millions of people might not receive health care who otherwise likely would have. Additionally, there is a question of which other Federal programs, structurally similar to Medicaid, might be vulnerable under the Court's reasoning in *NFIB*. I have argued that this result was not one forced upon the court. Indeed, neither of the two rationales for the stance taken by the Court—a concern about coercion and State sovereignty, and a concern about coercion and political accountability—justifies the decision to strike down § 1396c of the Affordable Care Act. That section of the ACA is not coercive in any objectionable sense, and there is no demonstrated connection between Federal coercion and political accountability.

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## NOTES

1. As of December 2012, there is good evidence that the following states will opt into the expansion: California, Washington, Nevada, Missouri, Minnesota, Illinois, Arkansas, New York, Vermont, Massachusetts, Connecticut, Rhode Island, Delaware, Maryland, Hawaii, and the District of Columbia. These states look likely to opt out (although it is difficult to know given the possibility of political posturing, and the fact that the expansion doesn't go into effect until January 1, 2014): Texas, South Dakota, Oklahoma, Mississippi, Alabama, Georgia, South Carolina, Maine, New Jersey, and Virginia. For the other twenty-five states, it is unclear what decision will be made. This site provides a sourced summary: <http://www.advisory.com/Daily-Briefing/2012/11/09/MedicaidMap#lightbox/1/>.

2. U.S. Const., art. I, § 8, cl. 1.

3. *NFIB v. Sebelius*, 567 U.S. \_\_\_\_ (2012), slip op. at 46, quoting *College Savings Bank* 527 U.S. at 686.

4. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added). The Supreme Court has clarified that the “contract” model is just an analogy, and not all contract law rules apply to spending power legislation that takes the form of conditional grants. *Barnes v. Gorman*, 536 U.S. 181, 186, 188 n. 2 (2002).

5. *New York v. United States*, 505 U.S. at 188 (emphasis added).

6. *New York v. United States*, 505 U.S. 144 (1992).

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

8. *Printz v. United States*, 521 U.S. 935 (1997).

9. Additionally, it is worth mentioning that the general anti-commandeering line of cases has been somewhat constrained by *Reno v. Condon*, 528 U.S. 141 (2000), in which facts similar to those in *Printz* were held not to constitute impermissible commandeering.

10. *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

11. See, for example, *Helvering v. Davis*, 301 U.S. 619 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *South Dakota v. Dole*, 483 U.S. 203 (1987).

12. For relevant discussion, see Coan (forthcoming). The one case in which federal spending legislation was struck down was *United States v. Butler*, 297 U.S. 1 (1936), and Coan and others have suggested that *Butler* is a historical anomaly, best explained by the Court’s felt need to protect the commerce clause limitations it had recently announced.

13. *South Dakota v. Dole*, 483 U.S. 207 (1987).

14. *Ibid.*, quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). As Justice Ginsburg makes clear in dissent, this requirement “demands that conditions on federal funds be unambiguously clear at the time a State *receives* and *uses* the money—not at the time, perhaps years earlier, when Congress passed the law establishing the program.” *NFIB*, 567 U.S. \_\_\_\_, slip op. at 54, Ginsburg, J., dissenting (emphasis added). To support this assertion, Justice Ginsburg cites *Bennett v. Kentucky Dept. of Ed.*, 470 U.S. 656 (1985); and *Dole*. In *Dole* itself, the Supreme Court found that this “clear terms” limitation was satisfied based on the clarity of the Federal Aid Highway Act as amended in 1984, without looking back to whatever the terms might have been in 1956, the year of the Act’s adoption. 483 U.S. at 208.

15. *Dole*, 483 U.S. at 207, quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978). This limitation clearly isn’t relevant, and none of the justices in *NFIB* find it to be a concern, let alone violated.

16. *Ibid.* at 211, quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

17. Baker (2001), pp. 104, 113. See also Bagenstos (2008), pp. 346, 355, which notes that although the Court has announced several potential limitations on the spending power, none of them “has had any real bite in the cases.”

18. It is worth mentioning that, as two legal scholars note, “the lower courts have consistently failed to find impermissible coercion, even when a state has demonstrated

that either the absolute amount or percentage of federal money at stake is so large that it has ‘no choice but to accept the [federal legislation’s] many requirements.’” Baker and Berman (2003), pp. 459, 468–469, quoting *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000).

19. NFIB, 567 U.S. \_\_\_\_ (2012), slip op. at 51.

20. *Ibid.*

21. *Ibid.* at 52.

22. *Ibid.* at 47–48, quoting *New York*, 505 U.S., at 178.

23. *Ibid.* at 55, quoting *FERC v. Mississippi*, 456 U.S. 742, 775 (1982) (O’Connor, J., concurring in judgment in part and dissenting in part) (emphasis added).

24. U.S. Const. Tenth Amendment.

25. NFIB, 567 U.S. at slip op. at 47, quoting *New York*, at 162.

26. *Ibid.*, quoting *Pennhurst*, at 17.

27. Pallikkathayil (2011).

28. This term is borrowed from Pallikkathayil (2011); I find it a useful neologism devised to avoid the baggage-laden “offer”/“threat” terminology.

29. For an introduction to and entry into these efforts, see Wertheimer (1987); and the classic work, Nozick (1969).

30. NFIB, 567 U.S., slip op. at 50 (emphasis added).

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

32. *Ibid.*, at 211, quoting *Steward Machine*, at 590.

33. Bagenstos (2008), pp. 372–373.

34. In this context, Mitchell Berman (2013) has suggested that the reasons or purpose should matter for whether coercion is present, at least for purposes of constitutional adjudication.

35. NFIB, 567 U.S., at slip op. at 51.

36. *Ibid.* at p. 52.

37. *Ibid.* at p. 55.

38. *Ibid.* at p. 52 (emphasis added).

39. Pallikkathayil (2011), p. 5.

40. NFIB, 567 U.S., slip op., joint dissent, at 35.

41. *New York*, 505 U.S., at 168–169.

42. NFIB, 567 U.S. \_\_\_\_, slip op. at 48.

43. See, for example, the papers in Ferejohn and Kuklinski (1990).

44. NFIB, 567 U.S. \_\_\_\_, slip op., Justice Ginsburg dissent, at 45 n. 17.

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