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# Unmistakably Clear Coercion: Finding a Balance between Judicial Review of the Spending Power and Optimal Federalism

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# "Unmistakably Clear" Coercion: Finding a Balance Between Judicial Review of the Spending Power and Optimal Federalism

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TABLE OF CONTENTS



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## I. INTRODUCTION

When the Supreme Court announced its decision in *National Federation of Independent Business v. Sebelius*,[1] most media attention focused on the Court upholding the constitutionality of the "individual mandate" of the Affordable Care Act.[2] However, this decision also struck down a provision of the Act relating to Medicaid expansion. The Court held that this provision was an unconstitutional application of Congress's spending power because the provision threatened any state with the loss of all federal funds under Medicaid if that state did not "comply with the Act's new coverage requirements."[3] Noting that "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,"[4] the Court held that this threat amounted to "coercion" and was therefore an unconstitutional application of Congress's spending power.[5]

This decision seems to open up many new challenges to federal programs that include congressional requirements imposed on states, requirements that are incentivized via Congress's spending power. Such programs include the Clean Air Act, the No Child Left Behind Act, the Elementary and Secondary Education Act of 1965, and the Family Educational Rights and Privacy Act of 1974.[6] Brian Galle states that *Sebelius* is "a deliberate invitation to litigation" by states that might challenge these federal programs.[7] Neal Katyal writes that "[t]he fancy footwork that the court

1. 132 S. Ct. 2566 (2012).
2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended at scattered sections of 26 and 42 U.S.C.) [hereinafter Affordable Care Act].
3. *Sebelius*, 132 S. Ct. at 2582, 2608.
4. *Id.* at 2604.
5. *Id.* at 2608.
6. *See* J. Lester Feder & Darren Samuelsohn, *The Medicaid Ruling's Ripple Effect*, POLITICO (July 3, 2012, 11:59 AM), http://www.politico.com/news/stories/0712/78091.html.
7. Alan Greenblatt, *Court Gives States Ammunition in Health Care Battle*, NPR (July 9, 2012), http://m.npr.org/news/U.S./156466010?singlePage=true (internal quotation marks omitted).

employed to view the act as coercive could come back in later cases to haunt the federal government."[8]

Thus, this opinion may also present a challenge to the viability of "optimal federalism."[9] Optimal federalism is an analytical technique for determining the appropriate level of government for carrying out different functions of a public policy.[10] It is related to "cooperative federalism," which suggests that better policy outcomes may be achieved through the cooperation of different levels of government.[11] The difference is that optimal federalism is a structured approach to determine the optimal *division of labor* between levels of government.

The optimal federalism technique divides the functions of public policy into enactment, implementation, and enforcement stages and then analyzes economies and diseconomies of scale for each stage.[12] By comparing economies and diseconomies of scale, the optimal federalism technique enables the identification of the appropriate level of government for carrying out each stage of a policy. This technique has been used to identify the optimal combination of governmental efforts to address environmental, health care, and immigration policies.[13] In many instances, the optimal combination includes federal enactment along with state and local implementation and enforcement. The use of these optimal combinations allows flexible approaches to difficult policy problems, rewards innovation, and maintains respect for local choices, while also providing an effective governmental response to market failures at the lowest possible cost.

Although Congress cannot directly "commandeer"[14] state and local governments to implement and enforce its directives, in the past, Congress

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8. Neal K. Katyal, *A Pyrrhic Victory*, N.Y. TIMES, June 29, 2012, at A25.

9. For more on optimal federalism, see generally Dale B. Thompson, *Optimal Federalism Across Institutions: Theory and Applications from Environmental and Health Care Policies*, 40 LOY. U. CHI. L.J. 437 (2009).

10. *See, e.g.*, *id.* at 439–40.

11. For more on cooperative federalism, see generally Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205 (1997).

12. *See* Thompson, *supra* note 9, at 439–40.

13. *See* Dale B. Thompson, *Immigration Policy Through the Lens of Optimal Federalism*, 2 WM. & MARY POL'Y REV. 236, 237–38 (2011); Thompson, *supra* note 9, at 437–38.

14. New York v. United States, 505 U.S. 144, 161 (1992) (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1991)) (internal quotation marks omitted). Some have argued that the federal government should be able

has been able to design certain incentives to induce state and local governments to carry out the directives contained in federal legislation.[15] For example, in the Clean Water Act, Congress empowered the Federal Environmental Protection Agency (EPA) to set up its own water effluent-permitting program for states that have not created their own EPA-approved implementation program.[16] This threat of external regulation provides a strong incentive for states to create their own water permitting program.[17] Congress has more frequently used its constitutional power under the Spending Clause[18] to *attach strings* to federal grants to states. These strings are conditions on the receipt of federal funds, where the conditions apply specific incentives to have the states implement and enforce directives contained in federal legislation. As noted above, Congress has used this approach across a wide variety of legislation, including environmental programs,[19] educational programs, highway administration programs,[20] and social programs.[21] The use of these incentives thereby enables Congress to capture the benefits of an optimal federalism approach when appropriate.

However, if the rationale of *Sebelius* can be extended to threaten these conditional grants, as suggested by recent commentary,[22] then not only are these particular federal programs threatened but also the whole concept of optimal federalism may be unworkable. Without the tool of conditional strings on federal grants, Congress will be limited in its ability to utilize

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to commandeer state officers. *See* discussion *infra* Part II.C. However, this Article does not address this broader issue; instead it focuses on the coercion limitation on the spending power.

15. Sometimes labeled "sticks" and "carrots." *See* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1020 (1995); Brian Galle, *The Tragedy of the Carrots: Economics and Politics in the Choice of Price Instruments*, 64 STAN. L. REV. 797, 797 (2012).

16. Federal Water Pollution Control Act Amendments of 1972 (Clean Air Act), Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2006)). For more on the Clean Air Act, see generally Dale B. Thompson, *Beyond Benefit-Cost Analysis: Institutional Transaction Costs and Regulation of Water Quality*, 39 NAT. RESOURCES J. 517 (1999).

17. A similar mechanism with respect to Social Security was the subject of the Court's decision in *Steward Machine Co. v. Davis*. *See* 301 U.S. 548, 573–78 (1937).

18. U.S. CONST. art. I, § 8, cl. 1.

19. Such programs include the Clean Air Act.

20. *See* Greenblatt, *supra* note 7.

21. *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991) (addressing family planning services, "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest"); South Dakota v. Dole, 483 U.S. 203, 205 (1987) (addressing the drinking age).

22. *See, e.g.*, Katyal, *supra* note 8; Feder & Samuelsohn, *supra* note 6; Greenblatt, *supra* note 7.

state and local governmental resources to implement and enforce policies. The question that needs to be answered then is this: should the Court's finding of "coercion" in the Affordable Care Act's Medicaid provision be extended to other situations; that is, how slippery is the slope of coercion?

This Article finds that the Court's opinion in *Sebelius* acts as a reasonable judicial check on the power of the legislature. The level of the penalty on the states imposed by the Medicaid provision was so high that it was quite likely that this provision could diminish general welfare and yet still be put into effect. As a result, such a provision would be inconsistent with the principles of optimal federalism. On the other hand, principles of judicial deference, the role of the judiciary, and pragmatic and efficiency reasons all suggest that the reach of the "coercion" defense to the enforcement of congressional spending power conditions should be limited.

Utilizing the language of the joint dissent[23] in *Sebelius*, this Article suggests that a new, more deferential *tier of scrutiny* should be applied to judicial review of congressional authority under the Spending Clause: a condition would be unconstitutional only if it is "*unmistakably clear*"[24] that it is coercive. With this significantly deferential standard, Congress would continue to have the power, in most situations, to utilize conditional strings on federal grants to achieve national policy goals. With this ability, Congress then should continue to search for opportunities to utilize the optimal federalism technique to achieve national objectives in a flexible, innovative, respectful, and low-cost manner.

The rest of this Article is as follows. Part II describes the debate over the Spending Clause across the *Federalist Papers*, the U.S. Supreme Court in the twentieth century, and scholarly reactions to the Court's decisions. Part III examines the Court's decision in *Sebelius*. Part IV argues that, although judicial review of the spending power is necessary, it should be limited, and this Part proposes and explains a new, more deferential tier of scrutiny—unmistakable clarity. Part V concludes by urging future courts not to overextend the application of *coercion* to spending power review and suggests that proper deference can be shown by using the new unmistakably clear standard.

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23. The joint dissent opinion was written by Justices Scalia, Kennedy, Thomas, and Alito. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2642 (2012).

24. *Id.* at 2662 (emphasis added).

## II. THE DEBATE OVER COERCION AND THE SPENDING CLAUSE UP UNTIL *SEBELIUS*

There has been a long debate over the Spending Clause. After beginning in the *Federalist Papers*, this debate was renewed in the Supreme Court during the first half of the twentieth century. A new focus was given to this debate during the Rehnquist Court, causing legal scholars to scrutinize it closely.

### *A. The Debate Among the Authors of the* Federalist Papers *and the Supreme Court's Take on This Debate*

The debate over the extent of the spending power of the federal government begins at the start with a debate between James Madison and Alexander Hamilton.[25] In *Federalist No. 41*, Madison argued that the spending power of the federal government extended only to those powers already enumerated in the Constitution.[26] On the other hand, Hamilton argued that the power to spend extended beyond those enumerated powers, as long as the spending was done to improve the general welfare.[27]

This debate was carried forward into the Supreme Court during the early twentieth century. In *United States v. Butler*,[28] the Court claimed to adopt the Hamiltonian view[29] but nonetheless declared that the

25. The spending power comes from the Taxing and Spending Clause: "The Congress shall have the Power To lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1.

26. THE FEDERALIST NO. 41 (James Madison) (1788) (stating that the argument "that the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare" was a "misconstruction").

27. *See* ALEXANDER HAMILTON, FINAL VERSION OF THE REPORT ON THE SUBJECT OF MANUFACTURES (1791), *reprinted in* 10 THE PAPERS OF ALEXANDER HAMILTON 230, 303 (Harold C. Syrett et al. eds., 1966), *quoted in* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 22 n.71 (1994); *see also* United States v. Butler, 297 U.S. 1, 65–66 (1935) ("Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.").

28. 297 U.S. at 1. The spending power was challenged by an earlier case, but rather than addressing the substantive argument on the spending power, the Court ruled on the basis of lack of jurisdiction. Massachusetts v. Mellon, 262 U.S. 447, 478–80 (1923).

29. *Butler*, 297 U.S. at 65–66.

Agricultural Adjustment Act of 1933[30] was unconstitutional.[31] Justice Roberts, writing for the Court, held that the Act was "a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end."[32] Despite the Court's claim that the Hamiltonian view was "correct," this reasoning adopted the Madisonian view.[33] The Court also invalidated the Act because it found that the Act could not be saved as an exercise of power where the "end is accomplished by voluntary co-operation."[34] The Court concluded that this Act was unlawful because it amounted to "coercion," with the Court noting that the "power to confer or withhold unlimited benefits is the power to coerce or destroy."[35]

This apparent win for the Madisonian view of the spending power was quickly set aside with two cases announced less than seventeen months later: *Steward Machine Co. v. Davis* and *Helvering v. Davis*.[36] In these cases, Justice Cardozo, writing for the Court, noted, "[t]he conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents."[37] Based on this, in both cases, the Court upheld the constitutionality of the Social Security Act of 1935, finding that the Act was a valid exercise of the spending power for the general welfare.[38] Ten years later, in *Oklahoma v. United States Civil Service Commission*, the Court followed the same reasoning, upholding the constitutionality of the Hatch Act, which included a condition on the management of state political officials in order to receive federal highway funds.[39]

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30. Pub. L. No. 73-10, 48 Stat. 31.
31. *Butler*, 297 U.S. at 68.
32. *Id.*
33. *See* Engdahl, *supra* note 27, at 36–38.
34. *Butler*, 297 U.S. at 70.
35. *Id.* at 71.
36. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).
37. *Helvering*, 301 U.S. at 640.
38. *Steward Mach. Co.*, 301 U.S. at 573–77, 598; *Helvering*, 301 U.S. at 634–39, 646.
39. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947) ("While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.").

### *B. The Debate Renewed During the Rehnquist Court*

In 1987, the Court returned to the spending power in *South Dakota v. Dole*.[40] In this case, South Dakota challenged the constitutionality of a condition on the receipt of federal highway funds that penalized states that had a minimum drinking age below twenty-one.[41] Chief Justice Rehnquist, writing for the Court, again adopted the Hamiltonian view, holding that "objectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[42] Still, though, the Court did note that "[t]he spending power is of course not unlimited" and then described four stated restrictions on the spending power.[43] These restrictions were that (1) the spending must be for the benefit of the general welfare; (2) the condition must be a "clear statement"[44] to allow the state to know what it is agreeing to; (3) the condition should be related to some federal policy interest; and (4) the condition must not require unconstitutional activities.[45]

After stating these specific restrictions, Rehnquist returned to the issue of coercion that supported the *Butler* opinion. Rehnquist noted that in "some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[46] In *Dole*, if South Dakota failed to comply with the national minimum drinking age, then it could lose "5% of the funds otherwise obtainable under specified highway grant programs."[47] Not wanting "to hold that motive or temptation is equivalent to coercion [because that would] plunge the law in endless difficulties," the Court instead concluded that this penalty was not coercion but rather a "relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose."[48]

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40. 483 U.S. 203 (1987).
41. *Id.* at 205.
42. *Id.* at 207 (quoting United States v. Butler, 297 U.S. 1, 65 (1936)) (citation omitted).
43. *Id.* at 207–08.
44. This rule "holds that courts may enforce against states the conditions of a federal grant only if those conditions are stated 'unambiguously' in the statute." Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 878 (2008) (citing Barnes v. Gorman, 536 U.S. 181, 186 (2002); Gregory v. Ashcroft, 501 U.S. 452, 465–67 (1991); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).
45. *See Dole*, 483 U.S. at 207–08.
46. *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).
47. *Id.*
48. *Id.* (quoting *Steward Mach. Co.*, 301 U.S. at 589–90) (internal quotation marks omitted).

After *Dole*, the Court again addressed the issue of the spending power in *New York v. United States*.[49] In this case, Justice O'Connor, writing for the Court, distinguished between the power to regulate and the power to attach conditions to grants under the Spending Clause. The Court held that "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[50] Although Congress cannot do this directly, the Court held that it could use conditional grants to achieve the same results, as long as the grants were not coercive.[51] The Court also held that these particular grants were not coercive because the states did have some choice: "That the States are able to choose whether they will receive federal funds does not make the resulting expenditures any less federal; indeed, the location of such choice in the States is an inherent element in any conditional exercise of Congress' spending power."[52] The Court announced its prohibition against commandeering by the federal government again a few years later in *Printz v. United States*,[53] as Justice Scalia wrote that it was "clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[54]

### *C. Legal Scholars' Responses to the Supreme Court Jurisprudence on This Debate*

As can be expected, legal scholars' responses to this jurisprudence have been varied. Some have argued that the anticommandeering proscription should be abandoned, thereby enabling Congress to fully utilize state resources to carry out federal programs. Others have argued that Congress should not be able to utilize even the spending power in order to induce states to regulate for the general welfare, while others have disputed their conclusions. Still others have suggested that the Court should modify the limitations laid down by the *Dole* Court.

49. 505 U.S. 144 (1992).
50. *Id.* at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).
51. *See id.* at 172–73.
52. *Id.* at 173.
53. 521 U.S. 898 (1997).
54. *Id.* at 925.

Meanwhile, most commentators have found the Court's coercion limitation to be unworkable.

Evan Caminker argued in 1995 that the Court's "anti-commandeering doctrine [announced in *New York v. United States* was] unjustified as a matter of constitutional law."[55] Caminker found that the Court's basis for its decision was "an unpersuasive originalist argument concerning the Framers' constitutional design."[56] Instead, Caminker pointed to a number of justifications for commandeering. These included using commandeering to address negative or positive externalities;[57] to "transcend th[e] prisoners' dilemma"[58] of a "race-to-the-bottom" situation;[59] and to achieve "administrative efficiency and efficacy."[60] Commandeering achieves this efficiency by "enhanc[ing] the prospect that ministerial enforcement decisions will reflect local conditions and concerns" and by "likely increas[ing] the extent of citizen compliance, given local respect for and proximity to the state enforcement authorities."[61] In the end, Caminker finds that a commandeering "approach allows Congress to govern in a decentralized manner that is more respectful of state autonomy."[62]

Around the same time, Lynn Baker argued that the Court should limit the spending power by "presum[ing] invalid that subset of offers of federal funds to the states which, if accepted, would regulate the states in ways that Congress could not directly mandate under its other Article I powers."[63] The spending power would remain if the Court could determine that "the offer of funds constitutes 'reimbursement spending' rather than 'regulatory spending' legislation."[64] The difference between reimbursement spending and regulatory spending was that "'[r]eimbursement spending' legislation specifies the *purpose* for which the states are to spend the offered federal funds and simply reimburses the states, in whole or in

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55. Caminker, *supra* note 15, at 1006. For another critique of *New York v. United States*'s anticommandeering doctrine, see Erwin Chemerinsky, *Right Result, Wrong Reasons:* Reno v. Condon, 25 OKLA. CITY U. L. REV. 823, 824 (2000) ("[I]deally, the Court should have overruled these earlier cases, *New York v. United States* and *Printz v. United States*, and their holding that Congress cannot commandeer state governments." (footnotes omitted)).

56. Caminker, *supra* note 15, at 1006.

57. *Id.* at 1012.

58. *Id.* at 1013.

59. A race-to-the-bottom situation is where no individual state wants to act affirmatively on its own for fear that it will become noncompetitive with another state. *See, e.g.*, *id.*

60. *Id.* at 1014.

61. *Id.*

62. *Id.* at 1007.

63. Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1916 (1995).

64. *Id.*

part, for their expenditures for that purpose."[65] Baker suggested that this distinction was a way to operationalize the *Dole* Court's coercion limitation on the spending power: the difference between reimbursement and regulatory spending is where "mere 'encouragement' ends and 'coercion' begins."[66]

Baker later argued, with Mitchell Berman, that the *Dole* Court's coercion limitation, along with its "relatedness" requirement, had been "toothless" in its implementation by later courts reviewing conditional spending legislation.[67] Although Baker and Berman found that "*Dole* should be abandoned,"[68] they were concerned with the uncertainty of what a new spending power test might look like.[69] One alternative that they discussed is a redefinition of *coercion*. One possible new definition would be that the "Court could reconceptualize the coercion prong as providing that a spending condition is impermissibly coercive if it presents a state with either no rational choice or no fair choice but to accept, even if it leaves the state with a practical choice not to."[70] They also suggested that a more workable coercion test could come from

> adopt[ing] a different sense of coercion than that featured in *Dole*—a sense that turns not on how onerous it would be for state offerees if Congress carried out its threat to withhold federal funds but on whether carrying out the threat would be wrongful in character because animated by the wrong sorts of reasons.[71]

These conclusions have been criticized by some scholars. Brian Galle pointed out that Baker's assumptions about taxes may not be entirely accurate[72] and also pointed out that Baker's "solution of aggressive judicial enforcement of limits on the Spending Clause" could introduce

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65. *Id.* at 1963.
66. *Id.* at 1973.
67. Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459, 466 (2003).
68. *Id.* at 461.
69. *See id.* at 541.
70. *Id.* at 520–21 (emphasis omitted) (footnote omitted).
71. *Id.* at 539.
72. *See* Brian Galle, *Getting Spending: How To Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 189–91 (2004); *see also* Galle, *supra* note 44, at 881 (explaining that "the available economic data belie, or at best do not support the claims that state officials will fail to preserve diversity, or that federal grants wrongly obscure official accountability. As a result, I maintain that decisions applying the clear statement rule, as well as more direct limits on conditional spending, are hard to defend.").

"substantial" "error costs" associated with "the familiar perils of an unelected judiciary rejecting duly enacted legislation based on its own theory of what the Constitution demands."[73] Instead of finding evidence of coercion,[74] Galle concluded that the "use of the Spending Clause restricts the degree to which state preferences can be displaced by the federal government, whether by drastically increasing the support needed for a given piece of legislation, or simply by diminishing the size of the federal government as a whole."[75] Also, while noting the difficulty in determining a baseline upon which to judge coercion, Samuel Bagenstos noted that the coercion concepts offered by Baker and Berman were, even to Baker and Berman themselves, "just too amorphous to be judicially administrable."[76]

In a later article, Brian Galle also suggested that the "clear statement rule" limiting the spending power should be dropped.[77] In doing so, he challenged the notion that state officials face complete fiscal constraints in the face of federal conditional spending. If a state's "own-revenue capacity is an independent check on federal expansion by means of conditional spending," this capacity also reduced the possibility that a federal condition is coercive.[78]

On the other hand, Thomas Merrill argued that the "clear statement strategy prescribes a much more constructive and workable role for the courts in determining the balance between stability and change in the assignment of powers between the federal government and the States."[79] Merrill differentiated between "clear statement" and "prohibitory strateg[ies]" as "limitations on legislative power," as being the distinction between a "collaborative" versus a "unilateral" approach.[80] He explained that the appropriate approach depends on the type of "factual determination[]" being undertaken by the court:

> There is a strong tradition in American public law that politically accountable bodies should be the primary determiners of legislative facts, and politically insulated courts should be the primary determiners of adjudicative facts. This is based in part on assumptions about the comparative competencies of legislatures and courts, and in part on considerations of legitimacy. . . . The Court has always

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73. Galle, *supra* note 72, at 197, 198.
74. *See id.* at 190.
75. *Id.* at 188.
76. Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 374 (2008) (quoting Baker & Berman, *supra* note 67, at 521) (internal quotation marks omitted).
77. Galle, *supra* note 44, at 934.
78. *Id.* at 881.
79. Thomas W. Merrill, *Rescuing Federalism After* Raich*: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 826 (2005).
80. *Id.* at 827.

> deferred to Congress in making such predictions [about predicting future behavior based on legislative changes]. The clear statement strategy comfortably accommodates such deference by asking whether Congress made the appropriate legislative findings. The prohibitory strategy does not, since it is unclear what standard of review courts should apply to legislative findings under this approach, and there is always the temptation to substitute judicial for legislative fact finding.[81]

Merrill's argument was that the relative competency of courts as opposed to legislatures suggests that a court's review of legislative power should focus more on reviewing process rather than drawing its own conclusions as a substitute for legislative fact-finding.

Regardless, one thing that most legal scholars agreed upon in this debate was the intractability and ineffectiveness of applying a coercion test. In her seminal article, *Unconstitutional Conditions*, Kathleen Sullivan explained many of these difficulties.[82] She writes that "deciding under what circumstances government offers, like private offers, are coercive is an inevitably normative inquiry."[83] When courts try to conduct this inquiry, "[c]onclusory labels often take the place of analysis—for example, conditioned benefits are frequently deemed 'penalties' when struck down and 'nonsubsidies' when upheld."[84] As a result, "[n]either the Court nor the commentary, however, has developed a satisfying theory of what is coercive about unconstitutional conditions."[85]

Also, as noted above, Baker and Berman had found that courts' application of the coercion test had been "toothless."[86] Meanwhile, Bagenstos also pointed to the difficulties in determining baselines:

> [I]t is easy to see why the coercion doctrine has proven ineffective as a limit on Congress's power to attach conditions to grants of federal funds to states. The basic problem is well rehearsed in the literature: Determinations that a conditional offer of federal funds coerces the states tend to depend on normatively contestable premises about states' baseline entitlement to federal largesse.[87]

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81. *Id.* at 830 (footnoted omitted).
82. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).
83. *Id.* at 1420.
84. *Id.*
85. *Id.*
86. Baker & Berman, *supra* note 67, at 485.
87. Bagenstos, *supra* note 76, at 372–73.

The problem with applying the coercion test, as Bagenstos suggests, was that it would be rare to find a situation in which a consensual baseline can be agreed upon. Nonetheless, that is exactly what the Court found in *Sebelius*.

## III. THE COURT'S OPINION CONCERNING THE SPENDING CLAUSE IN *SEBELIUS*

In *Sebelius*, the Court addressed whether the "Medicaid expansion [in the Affordable Care Act] exceeds Congress's authority under the Spending Clause."[88] Writing for the majority, Chief Justice Roberts held that "the Medicaid expansion . . . portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding."[89] To reach this conclusion, Roberts balanced a respect for congressional authority under the Spending Clause with a concern over the excessive Medicaid condition imposed on states by the Affordable Care Act.

Chief Justice Roberts began the opinion with a recounting of basic judicial review principles. In reviewing the Spending Clause, Roberts explained that "Congress may offer funds to the States, and may condition those offers on compliance with specified conditions."[90] More importantly, "[t]hese offers may well induce the States to adopt policies that the Federal Government itself could not impose."[91] Roberts further notes that the Necessary and Proper Clause[92] extends this power even more: "We have long read this provision to give Congress great latitude in exercising its powers . . . ."[93] Judicial deference to Congress is further supported by "a general reticence to invalidate the acts of the Nation's elected leaders."[94] The reason for this deference is because "[m]embers of this Court are vested with the authority to interpret the law; [they] possess neither the expertise nor the prerogative to make policy judgments."[95]

This deference is also noted in the dissent in part of Justice Ginsburg: "This Court, time and again, has respected Congress' prescription of

88. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601 (2012).
89. *Id.* at 2608.
90. *Id.* at 2579; *see also id.* at 2601 ("We have 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.'" (quoting Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999))).
91. *Id.* at 2579.
92. U.S. CONST. art. I, § 8, cl. 18.
93. *Sebelius*, 132 S. Ct. at 2579.
94. *Id.*
95. *Id.*

spending conditions, and has required States to abide by them."[96] The joint "dissent"[97] of Justices Scalia, Kennedy, Thomas, and Alito likewise reflects this deference: "The power to make any expenditure that furthers 'the general welfare' is obviously very broad, and shortly after *Butler* was decided the Court gave Congress wide leeway to decide whether an expenditure qualifies."[98] Thus, each of the opinions in this case clearly indicates the great deference given by the Court to congressional acts under the Spending Clause.

On the other hand, there are limits to this deference. Drawing from a comparison to contracts and an argument about political accountability, Chief Justice Roberts explained that Congress cannot "commandeer[] a State's legislative or administrative apparatus for federal purposes."[99] A further limit is reached "when 'pressure turns into compulsion'" or coercion.[100] Although courts have struggled to find coercion in previous cases, Roberts agreed with the contention that this case was "far from the typical case," so far "that Congress has 'crossed the line distinguishing encouragement from coercion.'"[101]

Chief Justice Roberts's analysis of coercion examined two key factors: (1) the identification of an identifiable, legitimate baseline and (2) the degree of the threat imposed by the Medicaid condition. As noted above, the difficulty in identifying a legitimate baseline is a frequent barrier to finding coercion. However, the particular situation presented by the Affordable Care Act provided a relatively clear baseline: Medicaid grants to states not connected with the expansion in Medicaid services called for under the Act. Roberts began with a general proposition: "When . . . such conditions [on the receipt of federal funds] 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."[102] With this proposition, Roberts laid the foundation to argue

96. *Id.* at 2633 (Ginsburg, J., dissenting) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

97. Note that for the Medicaid aspect of the decision, the joint "dissent" concurred with the finding of the Roberts opinion. *See id.* at 2666–67 (Scalia, J., dissenting).

98. *Id.* at 2658 (citing Helvering v. Davis, 301 U.S. 619, 640–41 (1937)).

99. *Id.* at 2602 (majority opinion) (citing Printz v. United States, 521 U.S. 898, 933 (1997); New York v. United States, 505 U.S. 144, 174–75 (1992)).

100. *Id.* (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

101. *Id.* at 2603 (quoting *New York*, 505 U.S. at 175).

102. *Id.* at 2604.

that a threat to terminate a state's entire Medicaid reimbursement, which he will view as an "independent grant," is a coercive act.

Justice Ginsburg's dissent in part pointed out that it is a single program that we are examining: Medicaid.[103] Ginsburg noted that there have been "past expansions, plus express statutory warning that Congress may change the requirements participating States must meet."[104] Congress reserved the right to modify the conditions for receiving Medicaid funding in the original Social Security Act legislation. As a result, "[s]tates have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress' terms."[105] When Congress enacted the Affordable Care Act with the condition that states must expand Medicaid or risk losing all Medicaid funds, it was "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."[106]

However, Roberts then explained that, in the Medicaid expansion in the Affordable Care Act, the different target populations, different reimbursement rates, and different coverage levels "accomplish[] a shift in kind, not merely degree."[107] With such significant changes of degree and kind, a "State could hardly anticipate that Congress's reservation of the right to 'alter' or 'amend' the Medicaid program included the power to transform it so dramatically."[108] The effect then is that "the expansion is in reality a new program and that Congress is forcing [the states] to accept it by threatening the funds for the[ir] existing Medicaid program[s]."[109]

What Chief Justice Roberts and Justice Ginsburg argued here is this: what is the proper baseline for comparison for determining whether a condition is coercive? The baseline determines the preexisting state of entitlements. The equity of any condition depends upon whether the condition respects the preexisting state of entitlements, where one party may choose to surrender some portion of the entitlement in exchange for something to which the party was not previously entitled to, or whether the condition attempts to deprive the individual of some portion of the entitlement without sufficient compensation. A parable that this Author read as an undergraduate student illustrates this difference well:

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103. *Id.* at 2630 (Ginsburg, J., dissenting) ("Medicaid, as amended by the ACA, however, is not two spending programs; it is a single program with a constant aim—to enable poor persons to receive basic health care when they need it.").
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 2605 (majority opinion).
108. *Id.* at 2606.
109. *Id.* at 2605.

> A wealthy man is in a snake pit, and is about to die. Above the snake pit is a woman with a ladder. She knows that the man in the pit has a wealth of one million dollars, and so she offers to sell the ladder to the man for one million dollars. The man accepts, and climbs out of the snake pit, alive. Was this a *fair* trade? What if I told you that the woman pushed the man into the snake pit?[110]

In the end, the *fairness* of the expansion condition depends critically upon whether Congress truly has the right to threaten states with the complete loss of all Medicaid funding. If it is accurate to say that each year a state should not expect to receive any funding unless it meets that year's conditions, then the state of the entitlement is truly fluid and the Affordable Care Act's Medicaid condition would be fair. However, if the mutually agreed upon expectations are that each year a state would carry out an adapted implementation of the Medicaid program and also that each state would be reimbursed for a portion of its program by the federal government, then the Medicaid condition would be an unfair act because it would threaten the state with the deprivation of a portion of its mutually agreed upon entitlement without sufficient compensation. The question then becomes, which of these two situations is present in this case? The answer is inextricably connected to the second key coercion factor addressed by Chief Justice Roberts: the degree of the threat imposed by the Medicaid condition.

Chief Justice Roberts used both statistics and colorful language to demonstrate how extreme the Medicaid condition threat is. Roberts noted that "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."[111] Roberts then illustrated how different this case is from the situation in *Dole*. In *Dole*, the effect of the condition was a "threatened loss of less than half of one percent of South Dakota's budget."[112] In such a case, South Dakota had "a 'prerogative' to reject Congress's desired policy, 'not merely in theory but in fact.'"[113] On the other hand, the effect of the Medicaid expansion condition in the Affordable Care Act was the "threatened loss of over 10 percent of a State's overall budget."[114] By

110. The Author has tried but has not yet identified the original source of this parable. For a similar parable, see Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 648–49 (1988).
111. *Sebelius*, 132 S. Ct. at 2604.
112. *Id.*
113. *Id.* at 2605 (quoting South Dakota v. Dole, 483 U.S. 203, 211–12 (1987)).
114. *Id.*

comparison then, the Medicaid expansion condition "is economic dragooning that leaves the States with no real option but to acquiesce."[115] In addition to calling this condition "dragooning," Chief Justice Roberts colorfully explained that the Medicaid expansion condition "is much more than 'relatively mild encouragement'—it is a gun to the head."[116]

The *extreme* nature of this condition was also highlighted by the joint dissenters. They noted that "Medicaid has long been the largest federal program of grants to the States"[117] and that the "States devote a larger percentage of their budgets to Medicaid than to any other item."[118] They then provided an even more specific comparison, pointing out the differences in amounts for the State of South Dakota between the condition in this case and the condition in *Dole*. Whereas the *Dole* condition threatened South Dakota with the loss of "approximately $614.7 million—or about 0.19% of all [its] state expenditures combined," the threat in this case amounts to "federal funding equaling 28.9% of its annual state expenditures."[119] As a result, the dissent concluded that, although the *Dole* condition was "aptly characterized as 'relatively mild encouragement,'" the Medicaid expansion condition "is a different matter."[120] With a difference of two orders of magnitude, the joint dissenters found that the "dimensions of the Medicaid program lend strong support to the petitioner States' argument that refusing to accede to the conditions set out in the ACA is not a realistic option."[121]

It is precisely here then that the two key factors—the baseline and the extreme nature of the condition—intersect. Although it might seem theoretically possible that Congress could "'repeal' Medicaid, wiping it out entirely,"[122] practically it cannot—at least not overnight. The extent of the reach of Medicaid, both in terms of its fiscal percentages and the populations it services, makes this program self-perpetuating, with Congress unwilling to end it. It is yet another institution that is too big to fail. Meanwhile, the fiscal and political impact of a state ending its participation in Medicaid would likewise imply that no state could ever choose to terminate its receipt of Medicaid funding.[123] As the joint dissenters

115. *Id.*
116. *Id.* at 2604.
117. *Id.* at 2662 (Scalia, J., dissenting).
118. *Id.* at 2663.
119. *Id.* at 2664.
120. *Id.*
121. *Id.* at 2662.
122. *Id.* at 2639 (Ginsburg, J., dissenting).
123. It should be noted that for some time in the beginning, Arizona held and did not participate in Medicaid—until 1982. Charles Brecher, *Medicaid Comes to Arizona: A First-Year Report on AHCCCS*, 9 J. HEALTH POL. POL'Y & L. 411, 411 (1984).

suggested, "Congress never dreamed that any State would refuse to go along with the expansion of Medicaid. Congress well understood that refusal was not a practical option."[124] As a result of the consistency of both sides' expectations, the proper baseline for this situation is one in which the federal government would continue to grant funding for Medicaid reimbursement.

In reaching this conclusion, we see how the two factors are inherently tied together. In order to establish the mutually agreed upon baseline, we must refer to the extreme nature of the impact of "wiping out" Medicaid to show how neither Congress nor the states would contemplate doing that. At the same time though, characterizing the effect as extreme itself depends upon the identification of a baseline, namely extreme compared with what? Because these two factors are mutually dependent, it means that the line—between what is coercive and what is not—is not in a fixed place. A line is there, but its nature makes it difficult to determine precisely where it lies.

Each member of the Court recognized this difficulty in perceiving exactly where the line between coercion and noncoercion lies. As he concluded his analysis, finding that the Medicaid expansion condition is coercive, Chief Justice Roberts recalled that the "Court in *Steward Machine* did not attempt to 'fix the outermost line' where persuasion gives way to coercion. The Court found it 'enough for present purposes that wherever the line may be, this statute is within it.'"[125] Here, Roberts likewise did not attempt to specify where this line lies: "We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it."[126] In a similar theme, Justice Ginsburg asked, "How is a court to judge whether 'only 6.6% of all state expenditures' is an amount States could or would do without?"[127] Ginsburg wonders, "[H]ow will litigants and judges assess whether 'a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds?'"[128]

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However, this was before Arizona ever received any Medicaid funding. It is much more difficult to refuse after local institutional arrangements have arisen to utilize available Medicaid funds.

124. *Sebelius*, 132 S. Ct. at 2665 (Scalia, J., dissenting).

125. *Id.* at 2606 (majority opinion) (citation omitted) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 591 (1937)).

126. *Id.*

127. *Id.* at 2640 n.24 (Ginsburg, J., dissenting) (citation omitted) (quoting *id.* at 2663 (Scalia, J., dissenting)).

128. *Id.* (quoting *id.* at 2602 (majority opinion)).

Moreover, the joint dissent also recognized this difficulty: "Whether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear."[129]

Nonetheless, although finding this line is extremely difficult in general, in this case, seven of the nine members of the Court concluded either that the Medicaid expansion condition "is surely beyond"[130] the line or that "there can be no doubt" that the condition "crosses the line."[131] It is important to point out that this seven-person majority includes not only the five more-conservative Justices but also Justices Breyer and Kagan.[132] Although not unanimous, this decision of the five more-conservative Justices along with two more-liberal Justices represents a situation where there seems to be a reasonable consensus that an appropriate baseline could be established. Using this baseline, the Court then draws a reasonable conclusion that a coercive line has been crossed due to the extreme nature of the threat implied by the Medicaid expansion condition.[133]

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129. *Id.* at 2662 (Scalia, J., dissenting).

130. *Id.* at 2606 (majority opinion).

131. *Id.* at 2662 (Scalia, J., dissenting).

132. Although most of the criticisms of individual Justices' votes in this case have been directed at Chief Justice Roberts, it is important to note that a number of commentators have also criticized Justice Kagan's joining the Roberts opinion on the Medicaid issue. *See* Josh Gerstein, *Justice Elena Kagan: Overlooked Turncoat on Health Care Law?*, POLITICO (July 5, 2012, 1:42 PM), http://www.politico.com/blogs/under-the-radar/2012/07/justice-elena-kagan-overlooked-turncoat-on-health-128095.html ("'Who knew that the Solicitor General thought the Medicaid expansion was unconstitutional?' said Kevin Outterson . . . . Asked how likely he thought it was prior to Thursday's ruling that Kagan would wind up taking such a stance, Outterson said: 'Never in my wildest nightmares.'"); Glenn Greenwald, *Kagan's Medicaid Vote*, SALON (July 7, 2012, 3:22 AM), http://www.salon.com/2012/07/07/kagans_medicaid_vote/; Dahlia Lithwick, *Where Is the Liberal Outrage?*, SLATE (July 6, 2012, 4:38 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/07/while_conservatives_are_furious_about_john_roberts_health_care_decision_liberals_are_silent_about_the_defections_from_the_supreme_court_s_liberal_justices_.single.html.

133. *See Sebelius*, 132 S. Ct. at 2603–04. Another way to state this argument is as follows: given the magnitude of the Medicaid program, there should be no rational possibility that Congress would act to terminate it overnight. Any threat to do so would be evidence of an irrational bargaining stance. How might a bargaining counterparty respond to such an irrational threat? If available, many counterparties would withdraw from bargaining. However, if withdrawal is not possible, then a rational counterparty almost certainly would feel compelled to accept the offered condition or risk retaliation by a demonstrably irrational sovereign. Just as in the text, this coercion argument depends on both the existence of a reasonably consensual baseline along with an extreme threat as measured from that baseline.

## IV. GOING FORWARD: IS JUDICIAL REVIEW OF THE SPENDING POWER NEEDED, AND IF SO, AT WHAT LEVEL OF SCRUTINY?

The Court's finding of coercion in this case leads to a number of questions about how far this logic will be extended. There are a wide range of policies, from environmental and educational to social programs, where Congress has used its spending power to give incentives to states to follow federal preferences. This case revives a previously dormant avenue for invalidating these incentives. The question then becomes, to what extent will the Court apply coercion, or in other words, what level of scrutiny should the Court apply to these conditions?

This Article recommends that courts grant Congress great deference, even more deference than "rational basis" review,[134] in examining whether a particular legislative condition imposed under its authority under the Spending Clause is coercive. To use the language of the joint dissenters in *Sebelius*, the standard should be that it is "unmistakably clear"[135] that the condition is coercive. This is, by its nature, an extremely vague standard, but nonetheless, the significant deference represented by it is necessary to maintain a proper balance between the need for judicial checks on legislative power and the benefits from the separation of powers along with the efficiency of optimal federalism. Only by maintaining this significant deference can we preserve opportunities to utilize optimal federalism approaches that enable us both to save critical resources and to achieve policy objectives that may not be obtained otherwise. Before turning to the reasoning behind this level of scrutiny, let us review the need for judicial review of possibly coercive conditions.

### *A. The Need for Scrutiny of Spending Power Conditions*

It is essential that courts review congressional conditions imposed on states under the spending power. As noted in *Sebelius* and others, Congress's authority under the Spending Clause extends beyond its other enumerated powers, supplemented by its authority under the Necessary and Proper Clause.[136] Under our constitutional system, there must be some

134. Some scholars refer to a slightly higher standard than rational basis review, for example, a "rational basis with bite." *See, e.g.*, Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 425–27 (2009). The standard proposed here goes the other direction.

135. *Sebelius*, 132 S. Ct. at 2662 (Scalia, J., dissenting).

136. *See supra* text accompanying note 93.

check on this legislative power, and it must be the judiciary who provides that check. Without that check, limits on Congress's enumerated powers would have no meaning, as Congress could utilize its spending power to evade them at will.[137] Congress also could commandeer the states at will, possibly eliminating the states' role as "independent sovereigns," the importance of which is signified by remembering that "freedom is enhanced by the creation of two governments, not one."[138]

In addition to these constitutional principles, a judicial check on the spending power may also be needed to overturn inefficient legislation. Consider a simple example with a similar structure as that of the Medicaid condition from the Affordable Care Act: Let us say that Congress wishes to induce State A to perform Task 1 that will bring a benefit to the nation of $10. If this were a situation of arms-length bargaining, in order to induce State A to do Task 1, Congress would have to promise State A something in return for doing Task 1 that would be worth more than State A's net cost of performing Task 1. Let us assume that State A's private benefit is zero and that its cost of performing Task 1 is $12—performing this task would be inefficient because its cost is larger than its benefit. Now, in order to induce State A to perform Task 1, Congress enacts legislation stating that if State A performs Task 1, Congress will reimburse $6 of State A's cost of performing Task 1. Additionally, the legislation states that if State A fails to perform Task 1, State A will not only lose the $6 payment but Congress will also take away a payment of $10 that Congress previously paid State A for performing Task 2.[139] Faced with these congressional spending power conditions, how would State A respond?

The reader should recognize that, under these circumstances, State A will feel compelled to perform Task 1. This is true, even though it would be inefficient to do so. However, with numbers as clear as this, a court could easily find evidence of coercion such that this legislation could not be supported by the spending power. Thus, this provides one example of how judicial review of the coerciveness of congressional spending power conditions could help ensure the efficiency of legislation.

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137. *See* Baker, *supra* note 63, at 1914.

138. *Sebelius*, 132 S. Ct. at 2602 (quoting Bond v. United States, 131 S. Ct. 2355, 2364 (2011)) (internal quotation marks omitted). For more on the benefits of competition between federal and state governments, see Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 332–37 (2003).

139. Assume that State A gets no other private benefit from performing Task 2 and so that without this payment, State A would no longer perform Task 2.

### *B. How Much Deference?*

Now that we have seen that judicial review of coerciveness is needed for both constitutional and efficiency reasons, the next question is how much deference should the judiciary show Congress. To determine this, we will examine constitutional, political theoretical, and pragmatic factors.

#### *1. Constitutional and Political Theoretical Factors*

To begin, one of the key components of the federal system designed by the Constitution is the notion of the separation of powers. Within their specific realms, each branch of government should be afforded great deference. This deference is explained in Chief Justice Roberts's opinion in *Sebelius*. He writes,

> Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders. "Proper respect for a coordinate branch of the government" requires that we strike down an Act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated."[140]

In addition, although the judiciary is well suited to guarantee procedural protections such as when it engages in "clear statement" analysis of spending power conditions, political theory suggests that the judiciary is ill suited to conduct narrow line-drawing exercises when baselines are not clear.[141] This difficulty for the judiciary is seen across a wide range of policy issues, including redistricting,[142] abortion rights,[143] economic

140. *Sebelius*, 132 S. Ct. at 2579 (quoting United States v. Harris, 106 U.S. 629, 635 (1883)).

141. *See* Galle, *supra* note 72, at 197–98.

142. *See* Vieth v. Jubelirer, 541 U.S. 267, 296 (2004) ("[E]ach of the last four steps requires a quantifying judgment that is unguided and ill suited to the development of judicial standards . . . ."); Duckworth v. State Admin. Bd. of Election Laws, 332 F.3d 769, 777 (4th Cir. 2003).

143. *See* Note, *After* Ayotte*: The Need To Defend Abortion Rights with Renewed "Purpose,"* 119 HARV. L. REV. 2552, 2560 & n.62 (2006) ("[C]ourts are especially ill-suited to translate abstract rights into practice when this translation requires line-drawing." (citing Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 861 (1999))).

regulation,[144] the difference between male and female,[145] and climate change.[146]

The example used in the previous subpart demonstrates the difficulties that the judiciary can face in conducting line-drawing analysis to determine the coerciveness of spending conditions. In that example, there were a number of embedded assumptions. One assumption was a clear articulation of a baseline: State A was already performing Task 2 and was being compensated a specific amount by Congress, $10. Other assumptions involved the specific valuations of the costs and benefits of Tasks 1 and 2 for State A, with that specific information provided to the court. A court trying to examine the coerciveness of a different spending condition would need to collect similar information. Because of the difficulty in identifying baselines and in valuing benefits and costs used to conduct line drawing, a court should give significant deference to the political bodies making these choices.

### *2. Pragmatic and Efficiency Factors: The Need To Preserve Opportunities To Apply Optimal Federalism*

Moreover, there are strong pragmatic efficiency reasons for granting significant deference. One of the more troubling possibilities of overextending the Court's finding of coercion in the Medicaid condition is that courts may use coercion as a means to impede beneficial applications of optimal federalism. The optimal federalism framework has been used previously to analyze environmental, immigration, and health care policies.[147] In each of these analyses, the optimal approach to carry out a particular policy was never completely at the federal level or completely

144. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 799 (2006) ("In matters such as economic regulation the courts believe they are ill-suited to play a vigorous oversight role and thus allow the coordinate branches of government wide latitude to determine the law.").

145. *See* Julie Debeljak, *Parliamentary Sovereignty and Dialogue Under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making*, 33 MONASH U. L. REV. 9, 65 (2007) ("In so concluding, Lord Nicholls held that such an interpretation 'would represent a major change in the law, having far-reaching ramifications', raising issues that 'are altogether ill-suited for determination by courts and court procedures' but which are 'pre-eminently a matter for Parliament . . . .'" (quoting Bellinger v. Bellinger, [2003] UKHL 21, [37], [2003] 2 A.C. 467 (appeal taken from Eng.))).

146. *See* Matthew Edwin Miller, Note, *The Right Issue, the Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims*, 109 MICH. L. REV. 257, 258–60 (2010).

147. *See* Thompson, *supra* note 13, at 237–38; Thompson, *supra* note 9, at 437–38.

at the state level. Instead, the best approach was to utilize the combined resources of the federal, state, and sometimes local governments.

The optimal federalism approach identified when certain levels of government would be better to carry out certain tasks than others. For example, the best approach for protecting endangered species[148] was a complex combination of federal and state authority. The federal government should be responsible for enacting national legislation to protect endangered species, "establishing baseline protection, coordinating rule development for multi-state species,"[149] and "addressing the need to coordinate multi-state mitigation projects, and to provide oversight in order to ensure baseline protections."[150] On the other hand, "states should be responsible for determining rules for protection beyond baselines, and for collecting and managing data for protecting species,"[151] along with having primary responsibility for enforcing endangered species policies.[152]

Immigration policy likewise should be carried out using the resources of the federal, state, and local governments. Enactment of immigration policy should be carried out by the federal government, and "this legislation should focus on enactment issues as opposed to implementation issues. It should also use general revenue tax-funded transfers to compensate states that bear more of the education and health care costs of immigration."[153] The federal government should also be responsible for "determining immigration procedures and database management."[154] However, the states collectively should be responsible for "determining the appropriate level of immigration . . . . This determination requires the collection and interpretation of data from local labor markets, along with assessments of immigration needs to fulfill family reunification objectives—tasks where" states have resource advantages over the federal government.[155] Finally, all levels of government, and even nongovernmental agents, should be involved in the enforcement of immigration policy:

148. Note that the *Optimal Federalism Across Institutions* article also examines environmental policies for protecting wetlands. *See* Thompson, *supra* note 9, at 445–47.
149. *Id.* at 468.
150. *Id.* at 471.
151. *Id.* at 468.
152. *See id.* at 470.
153. Thompson, *supra* note 13, at 255.
154. *Id.* at 257.
155. *Id.* at 257–58.

> Certain aspects should be strictly federal: border patrol and conducting deportation hearings. However, verification of employment eligibility initially should occur at the lowest level—the employer. State agents who can utilize their local knowledge and long-term relationships with employers should oversee employer verification, leading to economies of scope. . . . Meanwhile, local police should be authorized to check immigration status, but only the status of those accused of aggravated felonies or participating in drug trafficking. . . . [C]ommunity integration should be pursued vigorously at the state and local level.[156]

Finally, the optimal federalism framework has also been used to show that the current Medicaid program—a shining example of the cooperative federalism approach[157]—has been constructed in such a way as to efficiently utilize the comparative advantages of federal and state governments. As noted, "The current process of enactment at both the federal and state levels enables Medicaid policy to benefit from both [a larger tax base] by allowing some funding of the programs at the federal level, and also from the flexibility of . . . allowing states to tailor their programs to their needs."[158] Meanwhile, "the primary responsibility for implementing and enforcing Medicaid policy is properly placed with state governments"[159] because state governments have natural advantages "in negotiating with plans to provide [health care] services; in enrolling individual beneficiaries; and in collecting encounter data."[160]

It should be noted here that this sharing of authority between federal and state governments embodied in the Medicaid program is accomplished via Congress's authority under the Spending Clause.[161] It is not implausible that a judge in a future case, challenging the entire Medicaid program, might apply the coercion rationale revived by *Sebelius* as a means for invalidating Medicaid.[162] In response, the federal government might be forced to implement and enforce a similar program on its own, without access to state resources. Such a program might be doomed to failure

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156. *Id.* at 262.

157. *See* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 583–84 (2011); Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 419–20 (2008); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 62–63 (2011) ("The Medicaid program was initially designed as a classic spending power-based program of cooperative federalism . . . ."); Stephen Utz, *Federalism in Health Care: Costs and Benefits*, 28 CONN. L. REV. 127, 129 (1995).

158. Thompson, *supra* note 9, at 475.

159. *Id.* at 480.

160. *Id.* at 479–80.

161. *See* Ryan, *supra* note 157, at 62–63.

162. A judge might also apply it to invalidate one of the other federal-state programs supported by Congress's spending power. *See supra* notes 6–8 and accompanying text.

and would at least be significantly more wasteful than the current Medicaid program.[163]

Thus, the revival of the coercion rationale for invalidating conditions placed on states by Congress under its spending power opens the door to the possibility that Medicaid itself, or one of the other programs designed to take advantage of optimal federalism efficiencies, might be ruled unconstitutional. Such a ruling could make certain public policies infeasible to fully implement and enforce and would certainly greatly increase the costs of other policies, as we would lose the benefits of an optimal federalism approach. Mindful of these pragmatic and efficiency reasons, in addition to the constitutional and political theoretical reasons discussed above, judges should be cautioned to grant significant deference to Congress when examining whether a spending power condition is coercive.

### *C. What Level of Scrutiny?*

Now that we see the need for a significant amount of deference, the final question we need to answer is, what level of scrutiny should be applied? Judicial review of congressional legislation is typically thought of as occurring at three different "tiers of scrutiny."[164] The three tiers are "strict scrutiny," "intermediate scrutiny," and "'rational basis' review," with the most deferential of these being rational basis review.[165] At each tier, "courts . . . analyze the means and the ends of legislation by asking whether the governmental purpose rises to the requisite level (the ends) and whether the legislation has the requisite connection to that purpose (the means)."[166] Rational basis review "merely requires that the legislation ha[ve] a legitimate governmental purpose and [be] rationally related to that purpose," which can be "any conceivable, hypothetical governmental purpose that the legislature could have had in mind."[167]

One might think that a deferential court should apply rational basis review to determine whether a spending condition is coercive. However,

163. It will be wasteful because it will not have access to the state government's more efficient resources for implementation and enforcement.

164. Keller, *supra* note 134, at 459.

165. *Id.* at 460.

166. *Id.* at 459. For an example of the application of means-ends analysis to examine takings jurisprudence, see James E. Holloway & Donald C. Guy, *Weighing the Need To Establish Regulatory Takings Doctrine To Justify Takings Standards of Review and Principles*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 315 (2010).

167. Keller, *supra* note 134, at 460 (emphasis omitted).

the problem of applying rational basis review in this setting is the notion that the government purpose must be "legitimate." As discussed above, it is difficult to define the boundaries of what is legitimate in the context of Congress's authority under the Spending Clause.

Another problem with rational basis review is the discretion it leaves to individual judges in deciding whether there is a rational connection between the means and the ends. We can see this difficulty in Justice Brennan's dissent in *Nollan v. California Coastal Commission*.[168] In *Penn Central Transportation Co. v. New York City*,[169] Justice Brennan, writing for the majority, applied a rational basis standard to assess the validity of New York's Landmarks Preservation Law.[170] In his dissent in *Nollan*, Justice Brennan returned to the rational basis standard: "It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."[171] Brennan then criticized Justice Scalia's majority opinion as having a too "narrow conception of rationality"[172]:

> The Court finds fault with this measure because it regards the condition as insufficiently tailored to address the precise type of reduction in access produced by the new development. The Nollans' development blocks visual access, the Court tells us, while the Commission seeks to preserve lateral access along the coastline. Thus, it concludes, the State acted irrationally. Such a narrow conception of rationality, however, has long since been discredited as a judicial arrogation of legislative authority. "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government."[173]

Brennan here suggested that, in his view, rationality is quite broad, broad enough to allow a connection between the means of providing lateral access to the beach as a substitute for the end of protecting the public's view of the beach. To Brennan, the ability of someone to use the easement across the Nollan's property to move closer to the beach and then see the entire beach would be enough to establish a rational connection between the means and the ends. However, to Justice Scalia, such a connection is "quite impossible to understand."[174] Therefore, even with as deferential

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168. 483 U.S. 825, 842–64 (1987) (Brennan, J., dissenting).

169. 438 U.S. 104 (1978).

170. *See id.* at 131 ("[D]ecisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare . . . .").

171. *Nollan*, 483 U.S. at 843 (Brennan, J., dissenting) (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981)).

172. *Id.* at 846.

173. *Id.* at 845–46 (quoting Sproles v. Binford, 286 U.S. 374, 388 (1932)).

174. *Id.* at 838 (majority opinion).

of a standard as rational basis review, courts must necessarily apply their own standard of rationality to assess the connection between the means and the ends. Consequently, in order to assess the coerciveness of spending conditions, we might want to consider a standard that grants Congress even more deference.

The Court in *Sebelius* seems to recognize the need for an even more deferential standard in reviewing congressional authority under the Spending Clause. As noted above, because members of the judiciary "possess neither the expertise nor the prerogative to make policy judgments," the standard that Chief Justice Roberts would apply is that coerciveness of a spending condition must be "clearly demonstrated."[175] As also described above, Justice Ginsburg likewise noted, "[t]his Court, time and again, has respected Congress' prescription of spending conditions."[176] Ginsburg further reminded us that the judiciary is ill suited to examine the coerciveness of conditions: "The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation."[177] Even the joint dissenters seem to recognize the need for a standard that is even more deferential than rational basis, as they explain that the judiciary "should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear."[178]

This standard, that coercion must be "unmistakably clear," seems to be the appropriate one. This standard would expand our tiers of scrutiny to a fourth, even more deferential category. Although it does not provide a bright line, in the case of coercion, bright lines rarely exist. On the other hand, this standard does allow the Court to provide some check on congressional power, when it is unmistakably clear that a condition has crossed the fuzzy line into coercion. At the same time though, this standard also offers significant deference to congressional Spending Clause authority, which is justified by constitutional, political theoretical, pragmatic, and efficiency reasons. A condition that might be narrowly considered as perhaps coercive will remain valid; only when the coercion is unmistakably clear will the Court invalidate it.

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175. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012) (quoting United States v. Harris, 106 U.S. 629, 635 (1883)) (internal quotation marks omitted).

176. *Id.* at 2633 (Ginsburg, J., dissenting) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

177. *Id.* at 2641.

178. *Id.* at 2662 (Scalia, J., dissenting).

### *D. How Would a Court Apply an "Unmistakably Clear" Coercion Standard?*

Although an unmistakably clear standard might seem vague, there is still some practical structure to support it. There are two factors that a court would need to apply in determining whether a spending power condition is coercive: (1) there must exist some reasonably consensual baseline for comparison, and (2) the condition must then have such an extreme effect that it is unmistakably clear that the condition crosses a somewhat fuzzy line into coercion.

To see how this standard would be applied, let us use it to assess the coerciveness of the Medicaid expansion condition in the Affordable Care Act. This analysis will be similar as that conducted by the Court itself.

To apply an unmistakably clear standard, a court should begin by determining whether there is a reasonably consensual baseline. If no consensual baseline exists, the court should stop and uphold the condition. However, if one can be found, the court should identify it and then proceed to the next step. In this case, although Justice Ginsburg argues that there could be an alternative baseline in which Congress could "wipe out" Medicaid, in practical terms, Medicaid will continue. Consequently, a reasonable baseline for examining the Medicaid expansion condition would be a state's participation in the existing Medicaid program.

The next step is to examine whether the condition itself is unmistakably clearly coercive. To do this, the court should examine the effects on the state of the conditional task required by Congress and also examine the effects of what the condition itself would impose on the state if it chose not to perform that task. It should examine these effects in reference to the baseline established in the prior step. After examining these effects, the court should balance them to weigh whether the condition would impose an unmistakably clearly coercive impact.

For the Medicaid expansion condition, initially, the fiscal effects on a state would be mild: the federal government would reimburse the state at a one hundred percent rate through 2016 and gradually reduce that to a still-high ninety percent rate.[179] However, this reimbursement funding must come from somewhere, and the state could expect that its citizens would face higher federal taxes as a result. On the other hand, if the state chose not to expand Medicaid as required by the Act, then the state would face the loss of its entire prior Medicaid reimbursement, which it would have received under the established baseline. This loss would be catastrophic for the state because, as the Court noted above, "Medicaid spending accounts for over 20 percent of the average State's total budget,

179. Affordable Care Act, 42 U.S.C. § 1396d(y)(1) (Supp. IV 2010).

with federal funds covering 50 to 83 percent of those costs."[180] The threat of a loss of over *ten percent* of a state's annual budget for failure to comply with this condition seems quite excessive and as the Court concluded, "surely [went] beyond"[181] the line into "unmistakably clear" coercion. As the reader can see, although this analysis does require a vague determination of when coercion is unmistakably clear, it does provide some guideposts for examining the condition, while embedding significant deference for congressional spending conditions. This new standard for judicial review of Congress's authority under the Spending Clause should therefore maintain optimal federalism opportunities for efficiently allocating policy responsibilities between different levels of government.

## V. CONCLUSION

This Article proposes a new tier of scrutiny, unmistakably clear, for conducting judicial review of congressional authority under the Spending Clause. Under this standard, a condition would be unconstitutional only if it is unmistakably clear that it is coercive. Courts applying this standard will grant Congress significant deference, even more than rational basis review. Nonetheless, this standard does provide some limits to congressional authority, limits that were crossed by the Affordable Care Act's Medicaid expansion condition. On the other hand, the level of deference inherent in the unmistakably clear standard will allow Congress to continue to seek opportunities where a cooperative, optimal federalism approach can lead to innovative solutions to complex policy problems in a flexible and low-cost manner.

In order to develop this proposal, this Article traces the debate over the spending power from the *Federalist Papers* up through the decision in *Sebelius*, finding strong arguments for granting significant deference to Congress's Spending Clause authority. Meanwhile, careful analysis of the different opinions in *Sebelius* yields not only the name for the new standard of review—from the joint dissenters—but also the technique for conducting it. Just as was done in this case, courts applying the unmistakably clear standard of review must first find a reasonably consensual policy baseline. Courts must then weigh different factors deriving from a spending power condition in reference to that baseline to determine whether it is

180. *Sebelius*, 132 S. Ct. at 2604.
181. *Id.* at 2606.

unmistakably clear that the condition is so excessive that it must be considered coercive.

The purpose of this Article in defining this new standard of review is to urge future courts not to overextend the application of *coercion* as a means of invalidating congressional spending conditions. For a long time, it seemed as though there were no practical means of invalidating a spending condition, to the point that some wondered whether the enumeration of congressional powers would have no limiting effect on the ultimate authority of Congress. The Court in *Sebelius* put an end to this leniency by finding the Medicaid extension condition coercive, a correct result under the unmistakably clear standard.

Now though, we may face the danger of the pendulum swinging too far in the other direction, as courts may become overzealous in finding coercion in many other policies. Doing so may jeopardize the ability of federal, state, and local governments to work together to solve pressing policy problems. The optimal federalism framework shows how such cooperative approaches can deliver respectful and innovative outcomes that save valuable social resources. These solutions and resources may be lost if cooperative policies are inappropriately invalidated as being coercive.

In order to maintain a balanced perspective, courts should apply the unmistakably clear standard to their review of congressional spending power conditions. Doing so will enable courts to define appropriate limits to congressional authority under the Spending Clause and at the same time, will permit federal, state, and local governments to solve public policy problems in a cooperative, optimal federalism manner.