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***NFIB v. Sebelius:***

**A Potential Shift in the  
Doctrine of Conditional  
Spending**

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Tharuni Jayaraman  
Taylor Bates

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## INTRODUCTION

On Thursday, June 28, 2012, the Supreme Court handed down its decision in *National Federation of Independent Businesses v. Sebelius*.<sup>1</sup> At issue were two provisions of the Patient Protection and Affordable Care Act (ACA) – (1) the individual mandate and (2) Medicaid expansion.<sup>2</sup> Given the political salience of the former issue in the then on-going presidential election, the media focused its (somewhat misleading) coverage on the Court’s decision to uphold the individual mandate as a valid exercise of Congress’ power to tax.<sup>3</sup> However, it is the Supreme Court’s decision to strike down the Medicaid expansion as an invalid exercise of Congress’ power to spend that has the potential to have wide-ranging impacts. Indeed, huge swaths of our regulatory framework in areas such as environmental and educational policy are conditional spending schemes.<sup>4</sup>

Thus, this Briefing Paper seeks to explore the potential implications of the *Sebelius* decision on Congress’ ability to engage in conditional spending. Part I of this Paper explains the conditional spending doctrine prior to *Sebelius*. Part II then provides an overview of the *Sebelius* decision itself. Building on Part II, Part III explores four approaches to understanding Chief Justice Roberts’ opinion in *Sebelius* and considers a fifth approach suggested by questions that Justice Kennedy asked during oral argument in *King v. Burwell*.<sup>5</sup> Finally, Part IV concludes by discussing the potential implications of *Sebelius* for (i) future attempts to implement Medicaid expansion, (ii) conditional spending regimes enacted via statute, (ii) conditional spending regimes enacted via agency regulation, (iii) conditional spending regimes that involve non-state

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<sup>1</sup> 132 S. Ct. 2566 (2012); Jeff Sonderman, *CNN, Fox News err in covering Supreme Court health care ruling*, THE POYNTER INSTITUTE (June 29, 2012, 7:32 AM), <http://www.poynter.org/news/mediawire/179144/how-journalists-are-covering-todays-scotus-health-care-ruling/>.

<sup>2</sup> *Sebelius*, 132 S.Ct. 2566 at 2577.

<sup>3</sup> Sonderman, *supra* note 1.

<sup>4</sup> Eloise Pasachoff, *Conditional Spending After Nfib v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 581 (2013) [hereinafter *Example of Federal Education Law*].

<sup>5</sup> 759 F.3d 358 (4th Cir. 2014), *cert. granted*, 135 S.Ct. 475 (2014).

entities such local governments and universities, and (iv) Congress' ability to impose unfunded mandates.

## **I. THE CONDITIONAL SPENDING DOCTRINE PRIOR TO *SEBELIUS***

### **A. AN OVERVIEW OF INTERGOVERNMENTAL GRANTS**

Article I, Section 8, Clause 1 of the Constitution states:

The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay Debts and provide for the common Defence and general Welfare of the United States.<sup>6</sup>

This clause is known as the Spending Clause. As its name suggests, it is the constitutional source for Congress' authority to both levy taxes and to spend the collected money in furtherance of the "general welfare."<sup>7</sup> Congress often exercises this authority to issue grants to state and local governments. The federal government is projected to spend more than \$628 billion in grants to state and local governments in FY2015.<sup>8</sup> These grants will take a number of different forms. Some grants like the Department of Transportation's Transportation Investment Generating Economic Recovery (TIGER) grants can only be used to fund specific projects.<sup>9</sup> Other grants like the Department of Energy's Energy Efficiency and Conservation Block Grant give recipients a great deal of discretion in spending the funding that they receive.<sup>10</sup> Unfortunately, the federal government has not adopted a uniform typology for classifying the various types of grants that it issues.<sup>11</sup> Instead, different agencies utilize different schemes of categorization.<sup>12</sup> Moreover, there

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<sup>6</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>7</sup> *United States v. Butler*, 291 U.S. 1, 66-67 (1936).

<sup>8</sup> Robert Jay Dilger, CONG. RESEARCH SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 1 (2014) [hereinafter *Historical Perspective*].

<sup>9</sup> CONG. BUDGET OFFICE, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS 13 (Mar. 2013) [hereinafter *CBO Report*].

<sup>10</sup> *Historical Perspective*, *supra* note 8, at 38; *CBO Report*, *supra* note 9, at 13.

<sup>11</sup> Robert Jay Dilger & Eugene Boyd, CONG. RESEARCH SERV., R40486, BLOCK GRANTS: PERSPECTIVES AND CONTROVERSIES 2 (2014) [hereinafter *Block Grants*].

<sup>12</sup> *Id.*

is “no [current] authoritative count of federal grants to state and local governments.”<sup>13</sup> The most recent authoritative count was compiled by the Office of Budget and Management (OMB) for FY2003.<sup>14</sup> Since this paper is examining the potential long-term budgetary implications of *Sebelius*, the Congressional Budget Office’s (CBO’s) classification methodology is discussed below.

According to the CBO, federal grants vary across two dimensions: (1) the parameters to which the recipients must adhere when spending the funds and (2) the manner in which the funds are allocated among the various recipients.<sup>15</sup> With respect to the first dimension, there are three types of grants – (i) *block grants*, (ii) *categorical formula grants*, and (iii) *project grants*.<sup>16</sup> *Block grants* give state and local governments a great deal of latitude in how they spend their money.<sup>17</sup> For example, according to the Office of Community Services, which administers the Community Services Block Grant program (a block grant program for which \$709,845,000 was appropriated for FY2014),<sup>18</sup> Community Services Block Grants are available for projects that:

- Lessen poverty in communities
- Address the needs of low-income individuals including the homeless, migrants and the elderly
- Provide services and activities addressing employment, education, better use of available income, housing, nutrition, emergency services and/or health<sup>19</sup>

There are obviously many different programs that could fulfill those criteria. *Categorical formula grants* provide recipients with less leeway than do block grants; they usually specify the types of programs on which recipients must spend their funds, though they do leave recipients

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<sup>13</sup> *Historical Perspective*, *supra* note 8, at 9.

<sup>14</sup> *Id.*

<sup>15</sup> *CBO Report*, *supra* note 9, at 12-13.

<sup>16</sup> *Id.* at 13.

<sup>17</sup> *Id.*

<sup>18</sup> *Block Grants*, *supra* note 9, at 13.

<sup>19</sup> *About Community Services Block Grants*, OFFICE OF CMTY. SERVS., ADMIN. FOR CHILDREN & FAMILIES, DEP’T OF HEALTH AND HUMAN SERVS., <http://www.acf.hhs.gov/programs/ocs/programs/csbg/about>.

with the discretion to design the specific projects that will receive the funding.<sup>20</sup> Medicaid is an example of a categorical formula grant program; state administrators have some discretion in shaping how Medicaid operates within their states, provided that their programs conform to certain minimum criteria set by the federal government.<sup>21</sup> Title I funding is another example of a categorical formula grant program.<sup>22</sup> *Project grants* provide recipients with the least amount of discretion and are generally awarded to fund a particular project the specifications for which are set before the federal government awards the funding.<sup>23</sup> As explained by the CBO, project grant recipients are “typically limited to implementing the project for which the grant was awarded.”<sup>24</sup> The grants awarded as part of the Race to the Top initiative are project grants.<sup>25</sup>

With respect to the second dimension, the federal government allocates funds among various grants recipients using either (i) a formula or (ii) a competitive process.<sup>26</sup> Formulas are used to allocate funds for block grants and for categorical formula grants.<sup>27</sup> For example, Community Development Block Grants are awarded to state and local governments based on a formula that utilizes “a community’s population, poverty levels, and housing conditions.”<sup>28</sup> Medicaid is also an example of a grant program that utilizes a formula-based allocation process.<sup>29</sup> Projects grants are generally funded through a competitive process in which the federal government selects specific projects to fund based on detailed project descriptions

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<sup>20</sup> *CBO Report, supra* note 9, at 13.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 14-15.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 15.

submitted by potential recipients that often include “benchmarks [] and timelines that describe the scope of the work to be implemented.”<sup>30</sup>

In addition to setting the parameters to which recipients must adhere when spending grant money and selecting the manner in which a particular grant program’s funds will be allocated among recipients, Congress can attach conditions that state and local governments must meet in order to *receive* grant money.<sup>31</sup> It can attach these conditions to *any* type of grant.<sup>32</sup> In particular, Congress can use its spending power to “induce states to adopt policies that the federal government could not itself impose.”<sup>33</sup> For example, as will be discussed below, Congress has conditioned the receipt of federal highway funds on states setting their minimum drinking age at twenty-one.<sup>34</sup> Moreover, according to the Congressional Research Service (CRS), “[g]rant conditions [have] historically [been] the predominant means used to impose federal control over state and local actions . . . .”<sup>35</sup> Nonetheless, Congress does not have unfettered discretion in setting conditions.<sup>36</sup> Prior to *Sebelius*, the governing doctrine on just how far Congress could go in setting conditions was set forth by the Supreme Court in the 1987 case *South Dakota v. Dole*.<sup>37</sup>

#### **B. *SOUTH DAKOTA V. DOLE*: THE GOVERNING FRAMEWORK PRIOR TO *SEBELIUS***

In 1984, Congress passed a statute directing the Secretary of Transportation to withhold a portion of federal highway funds from states that failed to raise their drinking age to twenty-one.<sup>38</sup> South Dakota, which had its drinking age set at nineteen, sued claiming that (1) Congress had exceeded its constitutionally authorized spending authority and (2) the statute violated the

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<sup>30</sup> *Id.* at 13-15.

<sup>31</sup> *Id.*; see *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (noting that “incident to [the power to tax and spend], Congress may attach conditions on the receipt of federal funds”).

<sup>32</sup> *CBO Report*, *supra* note 9, at 13-14.

<sup>33</sup> *Sebelius*, 132 S.Ct. at 2759.

<sup>34</sup> *Dole*, 483 U.S. at 205.

<sup>35</sup> *Historical Perspective*, *supra* note 8, at 37.

<sup>36</sup> *Sebelius*, 132 S.Ct at 2602.

<sup>37</sup> 484 U.S. 203 (1987).

<sup>38</sup> *Id.* at 205.

Twenty-First Amendment.<sup>39</sup> In a 7-2 decision, the Supreme Court rejected both of these claims. In writing for the Court, Chief Justice Rehnquist articulated (and applied) a multi-factor test that a conditional spending program must meet in order to be authorized by the Spending Clause. The test, explained below, was the prevailing doctrine until *Sebelius*.

First, the *general welfare prong*: Derived directly from the text of the Constitution, the *general welfare prong* stipulates that Congress' exercise of its spending power must be in furtherance of the "general welfare." In determining whether a particular program is in furtherance of the "general welfare," the reviewing court is to "defer substantially to the judgment of Congress."<sup>40</sup> Given this deferential posture, Chief Justice Rehnquist easily concluded that mandating a national drinking age was in furtherance of the "general welfare."<sup>41</sup>

Second, the *clear conditions prong*: Drawing on contract law principles, the *clear conditions prong* stipulates that any conditioning of federal funds "must [be] do[ne] [] unambiguously" so that states can "exercise their choice knowingly, cognizant of the consequences of their participation."<sup>42</sup> Given that the text of the statute at issue in *Dole* explicitly stated the percentage of a state's highway funds that would be withheld from states that failed to raise their drinking age, this criterion was also met.<sup>43</sup> Third, the *directness prong*: the *directness prong* stipulates that the conditions imposed must be related to the "federal interest" of the program to which they are attached.<sup>44</sup> For Chief Justice Rehnquist, this criterion was also met.<sup>45</sup> On his understanding, the

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<sup>39</sup> *Id.* at 207.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 208.

<sup>42</sup> *Id.* at 207; *Sebelius*, 132 S.Ct at 2602.

<sup>43</sup> *Dole*, 483 U.S. at 208.

<sup>44</sup> *Id.* at 207. The Court did not ground this *prong* in a specific provision of the Constitution. Instead, as explained by CRS, the Court "identifie[d] [the *directness prong*] as a limitation on the Spending Clause." Kenneth R. Thomas, CONG. RESEARCH SERV., R42367, THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS 16 (2012) [hereinafter *Constitutionality of Federal Grant Conditions*].

<sup>45</sup> *Dole*, 483 U.S. at 208.



drinking age of twenty-one (the condition) was “directly related” to ... “safe interstate travel” (the federal interest).<sup>46</sup> Fourth, the *independent constitutional bar prong*: the *independent constitutional bar prong* stipulates that the conditional spending program cannot contravene any other provisions of the Constitution.<sup>47</sup> This prong was the primary focus of disagreement between the parties in *Dole*.<sup>48</sup> Ultimately, Chief Justice Rehnquist concluded that this condition was also met.<sup>49</sup> Finally, the *coercion prong*: Chief Justice Rehnquist, citing to the New Deal era case *Steward Machine Co. v. Davis*,<sup>50</sup> noted:

Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which “pressure turns into compulsion.”<sup>51</sup>

Although he did not go on to define the point at which “pressure turns into compulsion,” Chief Justice Rehnquist noted that regardless of where that point was, it was clearly not implicated in the instant case:

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course ... is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than facts.<sup>52</sup>

Whether or not the *coercion prong* was intended to be an element of the *Dole* test is unclear.

Although some scholars have treated it as such, courts (including the Supreme Court) have

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<sup>46</sup> *Id.* In her passionate dissent, Justice O’Connor sharply criticized Chief Justice Rehnquist’s conclusion that *directness prong* was met. *Dole*, 483 U.S. at 212-18 (O’Connor, J., dissenting).

<sup>47</sup> *Dole*, 483 U.S. at 208.

<sup>48</sup> *Id.* at 209. South Dakota argued that Congress’ actions violated the Twenty-First Amendment, which had overturned Prohibition, i.e., the nationwide ban on the “manufacture, sale, and transportation” of alcohol that had been enacted through the Eighteenth Amendment. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI; U.S. CONST. amend. XXI.

<sup>49</sup> *Dole*, 483 U.S. at 211.

<sup>50</sup> 301 U.S. 548 (1937).

<sup>51</sup> *Dole*, 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). The Court did not explicitly ground this *prong* in a specific provision of the Constitution. However, the cited phrase from *Steward Machine Co.* is part of that Court’s discussion of limitations imposed by the Tenth Amendment. Therefore, it seems fair to conclude that the *coercion prong* is grounded in the Tenth Amendment.

<sup>52</sup> *Dole*, 483 U.S. at 211.

sometimes treated *Dole* as a four-factor test.<sup>53</sup> Likewise, in her partial dissent in *Sebelius*, Justice Ginsburg noted:

The Court in *Dole* mentioned, but did not adopt, a further limitation, one hypothetically raised a half-century earlier: in “some circumstances,” Congress might be prohibited from offering a “financial inducement” . . . so coercive as to pass the point at which “pressure turns into compulsion.” Prior to today’s decision, however, the Court has never ruled that the terms of any grant condition crossed the indistinct line between temptation and coercion.<sup>54</sup>

Until *Sebelius*, however, the deferential posture that courts adopted when evaluating conditional spending schemes essentially rendered moot the question of whether the *coercion prong* was an element of the *Dole* framework. Indeed, the scholarly consensus was that *Dole* was a “toothless” doctrine that did not place any real limits on the Spending Clause.<sup>55</sup>

### C. DOLE AS A TOOTHLESS DOCTRINE

Until *Sebelius*, scholars uniformly believed that the *Dole* test had no “real bite.”<sup>56</sup> Examining why scholars concluded that each prong of the *Dole* test had no bite helps shed light on (i) the degree to which *Sebelius* was a departure from prior Spending Clause jurisprudence and (ii) just how consequential the decision could be. First, given the deferential posture that courts are to adopt when applying the *general welfare prong*, it is essentially impossible for a statute to fall outside of its parameters.<sup>57</sup> As Professor Samuel Bagenstos explains, devising a judicially administrable test for determining whether a piece of legislation serves the “general

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<sup>53</sup> See, e.g., 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, 461-62 (2003) [hereinafter *Getting Off the Dole*]; see e.g., *State of Cal. v. United States*, 104 F.3d 1086 (9th Cir. 1997) (treating *Dole* as a four-factor test but noting that, “the *Dole* court concluded . . . that it would only find Congress’ use of its spending power to be impermissibly coercive, if ever, in the most extraordinary circumstances”).

<sup>54</sup> *Sebelius*, 132 S. Ct at 2634 (Ginsburg, J., dissenting) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)) (internal citation omitted).

<sup>55</sup> *Getting Off the Dole*, *supra* note 53, at 466.

<sup>56</sup> See e.g., Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 355 (2008) (noting that none of *Dole*’s “direct limitations on the spending power has had any real bite . . . .”) [hereinafter *Spending Clause Litigation*].

<sup>57</sup> See *Dole*, 483 U.S. at 207; *Spending Clause Litigation*, *supra* note 56, at 359.

welfare” is difficult because while every piece of spending legislation enhances general welfare in some sense, no piece of legislation can actually benefit *everyone*.<sup>58</sup> Moreover, even if courts were able to devise an administrable test, they might still be reluctant to apply it for fear of being accused of usurping the role of the political branches by making substantive policy determinations about what is in the public interest.<sup>59</sup> In this manner, the *general welfare prong* essentially became a non-justiciable issue.<sup>60</sup>

Second, and somewhat surprisingly, courts also applied the *clear conditions prong* quite leniently.<sup>61</sup> For example, in 1988, the Second Circuit upheld the constitutionality of a scheme that imposed retroactive conditions on states, i.e., the states were not aware that the conditions existed when they accepted the federal funding.<sup>62</sup> Third, courts adopted a similarly deferential stance when applying the *directness prong*.<sup>63</sup> Much like with respect to the *general welfare prong*, Professor Bagenstos speculates that this deference was the result of judges’ fear of being accused of engaging in substantive policy making.<sup>64</sup> Fourth, although the *independent constitutional bar prong* was the source of contention in *Dole*, it rarely came up in future cases.<sup>65</sup>

Finally, as mentioned earlier, in his description of the *coercion prong* in *Dole*, Chief Justice Rehnquist did not articulate the point at which “pressure turns into compulsion.”<sup>66</sup> Nonetheless, after examining cases in which courts applied the *Dole* framework, Professors Lynn Baker and Mitchell Berman believe that courts would have found a condition to violate the

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<sup>58</sup> *Spending Clause Litigation*, *supra* note 56, at 359.

<sup>59</sup> *Id.* at 363.

<sup>60</sup> Lynn A. Baker, *The Spending Power after NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL’Y 71, 73 (2014) [hereinafter *Spending Power after Sebelius*].

<sup>61</sup> *Getting off the Dole*, *supra* note 53, at 465.

<sup>62</sup> *Counsel v. Doe*, 849 F.2d 731, 735-36 (2d Cir. 1988).

<sup>63</sup> For example, in *United Seniors Ass’n v. Shalala*, 2 F. Supp. 2d 39, 42 (D.D.C. 1998), *aff’d* 182 F.3d 965 (D.C. Cir. 1999), the District Court for the District of Columbia failed to consider the *directness* prong even after presenting it as one of the four restrictions on conditional spending set forth by the Supreme Court in *Dole*.

<sup>64</sup> *Spending Clause Litigation*, *supra* note 56, at 365.

<sup>65</sup> *Getting off the Dole*, *supra* note 53, at 465.

<sup>66</sup> *Dole*, 483 U.S. at 211.

*coercion prong* only if the condition left the state with “no practical choice” other than to accept the condition.<sup>67</sup> In the other words, failure to comply with the condition would have had to have been “in a ... figurative sense suicidal.”<sup>68</sup> Professors Baker and Berman therefore conclude that the manner in which courts interpreted the *coercion prong* set the bar for *coercion* so high as to render the *prong* useless.<sup>69</sup> To add teeth to the *coercion prong*, Professors Baker and Berman suggest moving from the “no practical choice” test that they believe the courts were using to a “no rational choice” test. Under the less demanding “no rational choice” test, a condition would be unduly coercive if the “range of alternatives with which the states were faced was unacceptably narrow as a *normative* matter” (emphasis added).<sup>70</sup> Somewhat ironically, (given how *Sebelius* unfolded), Professors Baker and Berman dismiss their own suggestion as implausible, noting:

Very simply, the no-rational-choice and no-fair-choice constructions of impermissible coercion are just too amorphous to be judicially administrable. It is virtually unimaginable that Justice Scalia, for instance, would agree to this formulation.<sup>71</sup>

Thus, the *Dole* test was not a meaningful check on Congress’ spending power.

#### **D. THE POWERFUL ANTI-COMMANDEERING DOCTRINE**

At the same time that the Supreme Court was allowing the *Dole* test to essentially languish, it did reign in Congressional actions through a related doctrine – the anti-commandeering principle. The Supreme Court articulated its understanding of the anti-commandeering doctrine in a pair of cases: *New York v. United States*<sup>72</sup> and *Printz v. United*

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<sup>67</sup> *Getting of the Dole*, *supra* note 53, at 520.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 521-22.

<sup>72</sup> 505 U.S. 144 (1992).

*States*.<sup>73</sup> The doctrine is grounded in the Tenth Amendment’s federalism principle.<sup>74</sup>

Specifically, as noted by the Court in *New York*:

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government’s most detailed organizational chart. The Constitution instead “leaves to the several States a residuary and inviolable sovereignty.”<sup>75</sup>

Thus, per the anti-commandeering doctrine, the federal government cannot “compel states to enact or administer a federal regulatory program” because doing so would contravene state autonomy, which the Tenth Amendment protects as a means of ensuring *individual* liberty.<sup>76</sup> The Court in *New York* used this principle to strike down one component of a Congressional regulatory scheme that required states to either (i) “tak[e] title to low level radio active waste generated within their border” or (ii) regulate the waste “according to the instructions of Congress.”<sup>77</sup> Using language reminiscent of *Dole’s coercion prong* (though the *New York* Court did not reference *Dole* in this portion of its opinion), the Court noted that in enacting this regulatory scheme, “Congress ha[d] crossed the line distinguishing encouragement from coercion.”<sup>78</sup>

The Court distinguished this “take title” provision from schemes that were permissible applications of Congress’ spending power by noting that under this scheme, states had “no option other than that of implementing legislation enacted by Congress.”<sup>79</sup> Due to this lack of choice, the Court concluded that the “take title” provision amounted to Congress

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<sup>73</sup> 521 U.S. 898 (1997).

<sup>74</sup> *New York*, 505 U.S. at 188.

<sup>75</sup> *Id.* (internal citation omitted).

<sup>76</sup> *Id.* at 181, 188.

<sup>77</sup> *Id.* at 174-75.

<sup>78</sup> *Id.* at 175.

<sup>79</sup> *Id.* at 177.

unconstitutionally commandeering state legislatures.<sup>80</sup> Notwithstanding the Court's attempt to present this portion of *New York* as not implicating the *Dole* framework, there does not seem to be a sensible or sufficiently principled distinction between the two, particularly considering the "cross the line" language found in both opinions.<sup>81</sup> Nonetheless, the Court extended the anti-commandeering doctrine in *Printz v. United States*.<sup>82</sup>

At issue in *Printz* were certain interim provisions of the Brady Handgun Violence Prevention Act.<sup>83</sup> The contested provisions of the Act required local law enforcement officials to conduct background checks on individuals seeking to purchase handguns if (1) the purchaser did not possess a handgun permit that was issued by the state after a background check or (2) the law of the state in which the purchaser sought to purchase the handgun did not require an instant background check prior to sale.<sup>84</sup> Specifically, the law enforcement officials were to "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General."<sup>85</sup> If the law enforcement officials discovered that the sale would be unlawful, the contested provisions did *not* require them to report their finding to the firearms dealer from whom the purchaser was seeking to buy the handgun.<sup>86</sup> Nonetheless, the Court concluded that the contested provisions amounted to an unconstitutional commandeering of state executive officers, noting:

We 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

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<sup>80</sup> *Id.*

<sup>81</sup> Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 16 (2015).

<sup>82</sup> *Printz*, 521 U.S. at 935.

<sup>83</sup> *Id.* at 902-03.

<sup>84</sup> *Id.* at 903

<sup>85</sup> 18 U.S.C. §922(s)(2), *invalidated by Printz v. United States* 521 U.S. 898 (1997).

<sup>86</sup> However, as the Court noted, "it [wa]s perhaps assumed that their state-law duties w[ould] require prevention or apprehension...." *Printz* 521 U.S. at 904.

conscripting the State's 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>87</sup>

Unlike in *New York*, the Court did not even attempt to distinguish *Printz* from *Dole*. Indeed, the only references to *Dole* are found in Justice Stevens' dissent and in Justice Breyer's dissent.<sup>88</sup>

### **E. A SUMMARY OF THE PRE-*SEBELIUS* LANDSCAPE**

As has been demonstrated, prior to *Sebelius*, the Supreme Court adopted two parallel lines of doctrine when assessing the constitutionality of a federal policy that was designed to produce a certain state-level result: (1) the conditional spending doctrine operationalized by a multi-factor test in *Dole* and (2) the anti-commandeering doctrine articulated in *New York* and *Printz*. Notwithstanding the clear similarities between the two, the former doctrine was rendered toothless whereas the latter had bite. Thus, prior to *Sebelius*, there was a disconnect in Supreme Court jurisprudence as to the acceptable manner in which the federal government could induce states into action.

## **II. NATIONAL FEDERATION OF INDEPENDENT BUSINESSES V. SEBELIUS**

### **A. BACKGROUND**

On March 23, 2010, President Obama signed the ACA into law.<sup>89</sup> A primary goal of the ACA was to increase access to healthcare by reducing the number of uninsured. The lengthy bill – which reached into nearly every aspect of healthcare – sought to achieve this end through several different methods, including by expanding Medicaid eligibility.<sup>90</sup>

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<sup>87</sup> *Id.* at 935.

<sup>88</sup> *Printz*, 521 U.S. at 960 n.23 (Stevens, J., dissenting); *Printz*, 521 U.S. at 978 (Breyer, J., dissenting).

<sup>89</sup> *Key Features of the Affordable Care Act*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES (last updated Nov. 18, 2014), <http://www.hhs.gov/healthcare/facts/timeline/> [hereinafter *Key Features*].

<sup>90</sup> *A Guide to the Supreme Court's Decision on the ACA's Medicaid Expansion*, KAISER FAM. FOUN. (Aug. 2012) 2-3, <http://kff.org/health-reform/issue-brief/a-guide-to-the-supreme-courts-decision/> [hereinafter *Guide to Supreme Court's Decision*].

Medicaid is a government health insurance program that was established in 1965 with the goal of providing health insurance to the so-called “deserving poor.”<sup>91</sup> It is funded jointly by the federal government and state governments, but it is administered primarily by state governments.<sup>92</sup> Nationwide, the federal government covers at least 50% of Medicaid’s costs.<sup>93</sup> Specifically, the amount that the federal government contributes to each state’s Medicaid program is set annually by the Federal Medical Assistance Percentage (FMAP).<sup>94</sup> The amount of federal funding that a state receives is, roughly speaking, inversely proportional to the state’s average personal income – poorer states receive more funding than do richer states.<sup>95</sup> Although states are not required to participate in the Medicaid program, all states have participated since 1982.<sup>96</sup> To be eligible to receive the federal funding, state Medicaid programs must cover *at least* those individuals that fall into “mandatory coverage groups” defined by the federal government.<sup>97</sup> Thus, Medicaid is a classic example of a conditional spending scheme.

Prior to the ACA, these mandatory coverage groups principally consisted of: (1) individuals who qualified for Supplemental Security Income (SSI) benefits; (2) caretaker relatives who met the eligibility requirements for the former Aid to Families with Dependent Children (ADFC) program; (3) parents who met the eligibility requirements for the former ADFC program; (4) pregnant women with family incomes at or below 133% of the federal poverty level (FPL); (5) children younger than six with family incomes at or below 133% FPL;

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<sup>91</sup> David Orentlicher, *Medicaid at 50: No Longer Limited to the “Deserving” Poor?* 15 YALE J. HEALTH POL’Y & ETHICS 185, 185 (2015).

<sup>92</sup> *Key Features*, *supra* note 89, at 1.

<sup>93</sup> *Medicaid Financing: An Overview of the Federal Medicaid Matching Rate (FMAP)*, KAISER COMM’N ON MEDICAID AND THE UNINSURED 2 (Sep. 2012), <http://kff.org/health-reform/issue-brief/medicaid-financing-an-overview-of-the-federal/>.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Guide to Supreme Court’s Decision*, *supra* note 90, at 3.



and (6) children between six and eighteen with family incomes at or below 100% FPL.<sup>98</sup> The ACA sought to expand Medicaid eligibility. Specifically, starting in 2014, all states were to cover *all* individuals whose incomes were at or below 133% FPL.<sup>99</sup> The federal government was to cover 100% of the costs of *newly eligible* Medicaid recipients until 2020 at which point the federal contribution amount would start to be phased down.<sup>100</sup> States that failed to expand Medicaid were to lose *all* of their federal funding, i.e., not just the funding for the newly eligible recipients.<sup>101</sup>

In *Sebelius*, Florida (joined by twenty-five other states) challenged the constitutionality of this Medicaid expansion.<sup>102</sup> Bucking the trend of deference to Congress in the Spending Clause arena, the Supreme Court concluded that the Medicaid expansion was unconstitutional.<sup>103</sup> Although seven justices voted to strike down the Medicaid expansion, no opinion commanded five votes. Instead, the Court split 3-4-2. Specifically, Justices Breyer and Kagan joined Chief Justice Roberts' opinion that the Medicaid expansion was unconstitutional and severable from the rest of the ACA. Justices Scalia, Alito, Thomas, and Kennedy issued an unsigned opinion (the so-called "joint dissent") that concluded that the Medicaid expansion was unconstitutional and not severable from the rest of the ACA. Finally, Justice Sotomayor joined Justice Ginsburg's opinion that the Medicaid expansion was a valid exercise of the Spending Clause.

## **B. DIFFERENT APPROACHES TO UNDERSTANDING THE DOCTRINE THAT EMERGES**

Given the deferential stance that the Supreme Court had taken in the Spending Clause arena until *Sebelius*, the absence of a controlling opinion in *Sebelius* is problematic, particularly

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 3.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Sebelius*, 132 S.Ct. 2566 at 2607.

for lower courts that are likely to see an increase in Spending Clause litigation. Thankfully, lower courts are not entirely without a guide. As Professor Bagenstos explains, it seems plausible to advise lower courts to take Chief Justice Roberts' opinion as their guide because Chief Justice Roberts' opinion takes a narrower view of the restraints on Congress' spending power than does the opinion of the joint dissent.<sup>104</sup> In other words, any conditional spending regime that would be unconstitutional under Chief Justice Roberts' framework would also be unconstitutional under the joint dissent's framework (meaning that there would be seven votes to strike down that scheme), but the opposite would not necessarily hold true (only four votes to strike down the scheme would be guaranteed).<sup>105</sup>

With this background in mind, this section explores four different ways to understand Chief Justice Roberts' opinion. The approaches were selected because they are illustrative of the different ways in which lower courts could interpret Chief Justice Roberts' opinion moving forward. Furthermore, the scholars who put forth the selected approaches are associated with views that span the ideological spectrum.<sup>106</sup>

### *1. Sebelius as a resolution to the Dole/New York dichotomy*

As described in Part I, prior to *Sebelius*, the Supreme Court had adopted two parallel (though seemingly indistinguishable) lines of doctrine when assessing the constitutionality of a federal policy that was designed to produce a certain state-level result: (1) the conditional

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<sup>104</sup> Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After Nfib*, 101 GEO. L.J. 861, 866-68 (2013).

<sup>105</sup> *Id.*

<sup>106</sup> Professor Lynn Baker (whose views are summarized in subsection 2) is described as "a leading academic defender of federalism and the rights of states," *Lynn A. Baker, Frederick M. Baron Chair in Law; Co-Director – Center on Lawyers, Civil Justice and the Media*, THE UT LAW FACULTY, THE SCHOOL OF LAW AT THE UNIV. OF TEXAS AT AUSTIN, <http://www.utexas.edu/law/faculty/bakerla/>, whereas Professor Eloise Pasachoff (whose views are summarized in subsection 4) was executive editor of the *Harvard Civil Rights-Civil Liberties Law Review*, *Professor Eloise Pasachoff Receives Award for Distinguished Scholarship in Education Law*, GEORGETOWN LAW, <http://www.law.georgetown.edu/news/pasachoff-receives-award-for-distinguished-scholarship-in-education-law.cfm>., and has blogged for the progressive-leaning American Constitution Society, Eloise Pasachoff, *Education Law and the New Coercion Doctrine*, AM. CONSTITUTIONAL SOC'Y BLOG (Oct. 2, 2013) <https://www.acslaw.org/acsblog/all/eloise-pasachoff>.

spending doctrine operationalized by *Dole* and (2) the anti-commandeering doctrine put forth in *New York* and *Printz*. According to Professor Andrew Coan, Chief Justice Roberts' *Sebelius* opinion finally resolved the disconnect between these two doctrines by holding that "coercive exercises of the conditional spending power and commandeering amount to the same thing."<sup>107</sup> Specifically, Professor Coan explains that the following three factors led Chief Justice Roberts to conclude that the Medicaid expansion was unconstitutional: (i) the "dramatic size" of the Medicaid expansion, (ii) the "enormous size" of the federal payments that states would lose if they did not participate in the expansion, and (iii) "states' long-term reliance" on the federal funds that would be withdrawn if they failed to expand their Medicaid programs.<sup>108</sup> Implicit in Professor Coan's explanation is that Chief Justice Roberts achieved this confluence of the coercion and anti-commandeering doctrines by collapsing the *Dole* test into just the *coercion prong*. In other words, on this account of Chief Justice Roberts' opinion, at the point at which states do not have a choice other than to accept the federal offer, the conditional spending scheme is coercive and therefore a commandeering of the state governments, which pursuant to *New York* and *Printz*, is clearly in contravention of the Tenth Amendment's federalism principle.

## 2. *Sebelius* as a departure from *Dole*

Professor Baker takes a different approach from that which Professor Coan took. She asserts that it was the joint dissent's opinion, not Chief Justice Roberts' opinion, that collapsed *Dole* into the *coercion prong*.<sup>109</sup> However, she does believe that Chief Justice Roberts' opinion reimaged *Dole*. Specifically, she interprets Chief Justice Roberts' opinion as (1) reading the *general welfare* and *independent constitutional bar prongs* out of the *Dole* test; (2) reinterpreting

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<sup>107</sup> Coan, *supra* note 81, at 3.

<sup>108</sup> *Id.* at 11-12.

<sup>109</sup> *Spending Power after Sebelius*, *supra* note 60, at 78.

the *clear conditions* and *directness prongs*; and (3) failing to add sufficient clarity to the *coercion prong*.<sup>110</sup>

First, Professor Baker asserts that Chief Justice Roberts' opinion followed the post-*Dole* trend of treating the *general welfare* prong as a non-justiciable issue.<sup>111</sup> Likewise, she observes that the *independent constitutional bar prong* was not addressed by Chief Justice Roberts' opinion.<sup>112</sup>

Second, according to Professor Baker, the *clear conditions prong* as set forth in *Dole* was included to ensure that states are fully cognizant of the consequences of conditional spending schemes *before* they enter into those schemes.<sup>113</sup> For example, the statute at issue in *Dole* cleared this prong because *at the time that the statute went into effect*, the states were aware that if they did not raise their minimum drinking age to twenty-one, they would lose a portion of their federal highway funding. Likewise, the Medicaid expansion at issue in *Sebelius* easily passes this traditional understanding of the *clear conditions prong* – at the time that the Medicaid expansion went into effect, the states clearly knew what their “obligations would be if [they] accepted the deal [and] what the implications would be if [they] turned it down.”<sup>114</sup> Yet, Chief Justice Roberts' opinion held that the Medicaid expansion did not pass the *clear conditions prong*.<sup>115</sup>

According to Professor Baker this is because Chief Justice Roberts changed the *clear conditions prong* from a requirement about the degree of clarity that states must have at the time that the *particular offer at issue* is being made into a *foreseeability* requirement, i.e., an inquiry into whether at the time that states entered into a particular program they could have foreseen the

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<sup>110</sup> *Id.* at 74-81.

<sup>111</sup> *Id.* at 73.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 75-76.

<sup>114</sup> *Id.* at 76.

<sup>115</sup> *Id.*

existence of a future program that would threaten the funding of the program into which they were entering.<sup>116</sup> In other words, according to Professor Baker, the relevant question for Chief Justice Roberts in *Sebelius* was not whether the states clearly understood the consequences of Medicaid expansion at the time that the expansion was put in place but instead was whether the states could have foreseen the conditions attendant to the Medicaid expansion at the time when they *first agreed* to participate in Medicaid.<sup>117</sup> Since Chief Justice Roberts concluded that the states could not have foreseen the expansion's requirements, the expansion failed to pass his version of the *clear conditions prong*. In this manner, on Professor Baker's view, *Sebelius* transformed the previously lifeless *clear conditions prong* into a robust prong that "pose[s] a significant threat to any new condition on previously available funds, even if the condition is both clear and entirely prospective in its application."<sup>118</sup>

Likewise, Professor Baker interprets Chief Justice Roberts' opinion as adding teeth to the *directness prong*.<sup>119</sup> The *directness prong* as set forth in *Dole* was included to ensure that the conditions imposed by the federal government were related to the "federal interest" in the programs to which they were attached.<sup>120</sup> The Medicaid expansion would therefore have easily passed even under the most restrictive version of the traditional understanding of the *directness prong* – the condition (expand Medicaid eligibility) was attached to federal *Medicaid* funding.<sup>121</sup> Yet, Chief Justice Roberts concluded that the Medicaid expansion did not pass the *directness prong*. Professor Baker appears to have a harder time explaining Chief Justice Roberts' reasons for deviating from the traditional understanding of the *directness prong* than she did for

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 76-77.

<sup>120</sup> *Dole*, 483 U.S. at 207.

<sup>121</sup> *Spending Power after Sebelius*, *supra* note 60, at 76-77.

explaining his reasons for deviating from the traditional understanding of the *clear conditions prong*. Indeed, she simply notes:

The Roberts group [] appeared to read this *Dole* requirement [the *directness prong*] to permit only “modification[s] of Medicaid,” defined somehow, and deemed the Medicaid expansion “an attempt [by Congress] to foist an entirely new health care system upon the States.”<sup>122</sup>

Third, much like Professor Coan, Professor Baker contends that while Chief Justice Roberts declined to identify that the point at which “persuasion gives way to impermissible coercion,” it was clear to Chief Justice Roberts that 10% of state’s budget was beyond the line “wherever [it] might be.”<sup>123</sup> However, Professor Baker adds a caveat to her analysis of Chief Justice Roberts’ treatment of the *coercion prong* that could prove to be important to lower courts moving forward; she notes that it is not clear that a piece of legislation’s failure to meet the *coercion prong* would, on its own, be sufficient to invalidate that piece of legislation.<sup>124</sup>

### 3. *The Congressional Research Service’s approach*

CRS interprets Chief Justice Roberts’ opinion as reducing the *Dole* framework into a two-step inquiry that first considers the *directness prong* (which it calls “relatedness”) and then – depending on the result of the *directness* analysis – considers the *coercion prong*.<sup>125</sup> Specifically, through a careful parsing of Chief Justice Roberts’ opinion, CRS has developed the following typology of grant conditions:<sup>126</sup>

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<sup>122</sup> *Id.* at 77.

<sup>123</sup> *Id.* at 78.

<sup>124</sup> *Id.* at 78-79.

<sup>125</sup> *Constitutionality of Federal Grant Conditions*, *supra* note 44 at 10-16. CRS would likely resist this characterization of its framework because in its report, CRS equivocates on whether Chief Justice Roberts applied the *directness prong*. Notwithstanding this equivocation, the most natural reading of CRS’ explanation of its framework suggests that *Dole* has been collapsed into this two-step inquiry.

<sup>126</sup> *Id.* at 10-16.

- *Directly related conditions*: These are conditions that limit the use of funds in the grant to which they are attached. Such conditions are presumptively constitutional under Chief Justice Roberts' opinion. Thus, there is no need to conduct a *coercion* analysis.
- *Indirectly related conditions*: These are conditions that are related to the "policy goals" of the grants to which they are attached. Such conditions are also likely presumptively constitutional under Chief Justice Roberts' opinion. Thus, there is no need to conduct a *coercion* analysis. The condition at-issue in *Dole* is an example of an "indirectly related condition." Indeed, a drinking age of twenty-one (the condition) is related to the policy goal of ensuring "transportation safety," and ensuring "transportation safety" is one of the goals of federal highway funding.
- *Independent grant conditions*: These are conditions that are related to the goals of a "new and independent" program but that threaten the funding of an existing program. Such conditions are not presumptively constitutional under Chief Justice Roberts' opinion. Instead, the constitutionality of such a scheme can only be determined after a *coercion* analysis has been conducted. Chief Justice Roberts understood the Medicaid expansion to be an "independent grant condition." Specifically, drawing on contract law principles, he interpreted the requirement that states expand their Medicaid programs (the condition) as (i) serving the goals of an expanded Medicaid program ("a new and independent" program) and (ii) threatening the funding of Medicaid as it existed prior to the passage of the ACA (an existing program).
- *Unrelated grant conditions*: These are conditions that are not related to the goals of the grant to which they are attached and are presumptively unconstitutional under Chief Justice Roberts' framework.

In sum, while “directly related” grant conditions and “indirectly related” grant conditions are presumptively constitutional and “unrelated grant” conditions are presumptively unconstitutional, whether “independent grant” conditions are constitutional turns on a *coercion* analysis. Unfortunately, CRS does not provide specific guidance on how to carry out the necessary *coercion* analysis.<sup>127</sup> Indeed, although CRS concludes that the dispositive factor is the amount of federal funding that could be withheld, it does not indicate the point at which the amount of funding at stake becomes problematic.<sup>128</sup> In other words, CRS interprets Chief Justice Roberts as saying that at some point, the amount of funding at stake is so large that the states are coerced into complying with the federal condition, but it does not identify that point.<sup>129</sup> Instead, it concludes that the tipping point is somewhere between 0.5% of a state’s budget (the amount that was at stake in *Dole*) and 10% of a state’s budget (the amount that was at stake in *Sebelius*.)<sup>130</sup>

#### 4. *A more systematic approach*

As shown in Figure 1, Professor Eloise Pasachoff devises a three-part inquiry for determining whether a conditional spending program would be constitutional under Chief Justice Roberts’ opinion.<sup>131</sup> Like CRS’ framework, her approach incorporates the *directness* and *coercion prongs* from the *Dole* framework in a sequential manner. She, however, adds an additional step between the *directness* and *coercion* inquires that analyzes whether states had sufficient *notice* about the possibility of the condition at-issue.

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<sup>127</sup> *See id.* at 16-19.

<sup>128</sup> *Id.* at 17-18.

<sup>129</sup> This omission is due to the fact that Chief Justice Roberts refused to identify the specific point in his opinion.

<sup>130</sup> *Id.* at 17.

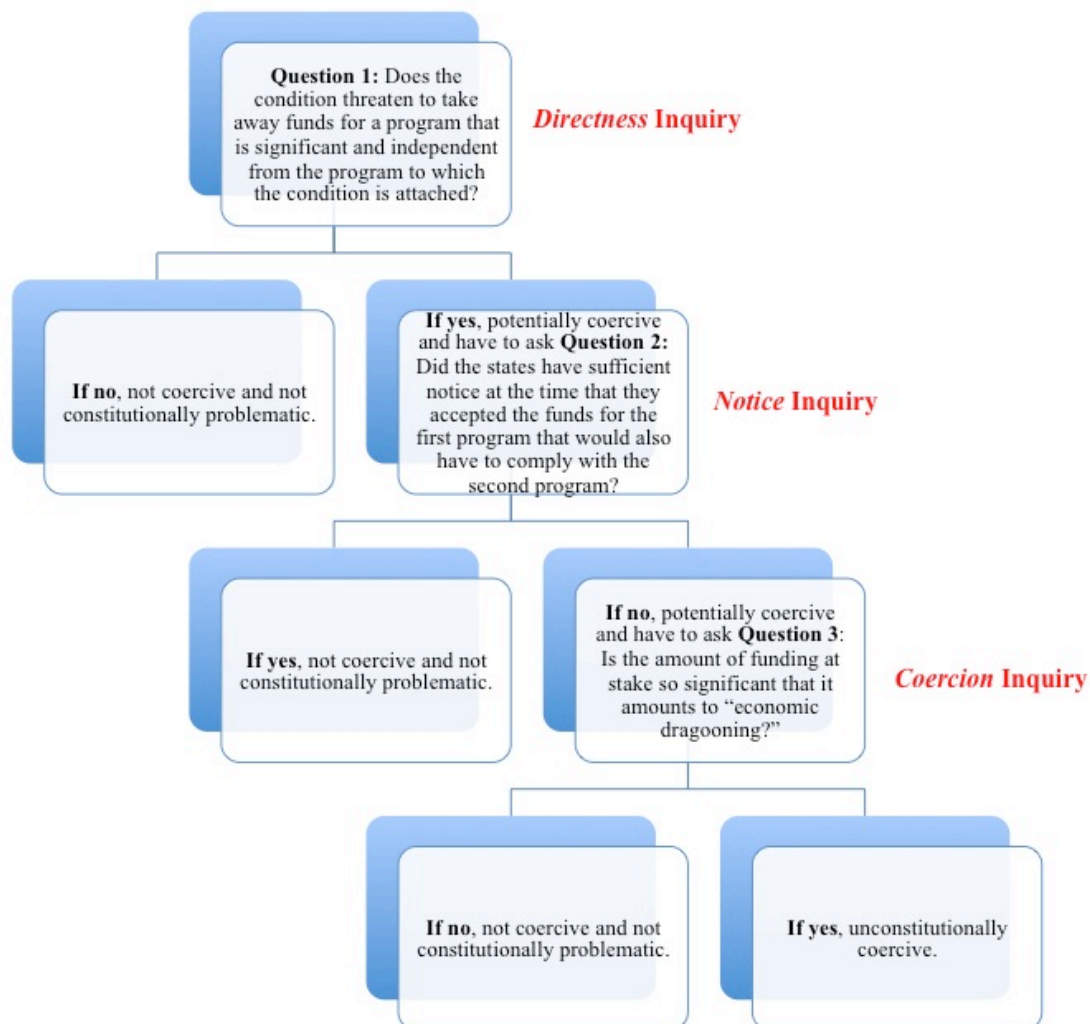
<sup>131</sup> *Example of Federal Education Law, supra* note 4, at 583.





**Figure 1: Eloise Pasachoff's three-part inquiry**

Figure 2 provides a more detailed explanation of Professor Pasachoff's framework, including the questions that are to be asked when conducting the *directness*, *notice*, and *coercion* inquiries. It is important to note that each stage of her framework builds on the previous stage. In particular, a *notice* inquiry is not triggered unless the question associated with the *directness* inquiry yields a particular answer. Likewise, a *coercion* inquiry is not triggered unless the question associated with the *notice* inquiry yields a particular answer. Finally, a conditional spending program cannot be found to be unconstitutional unless the question associated with the *coercion* inquiry yields a particular answer.



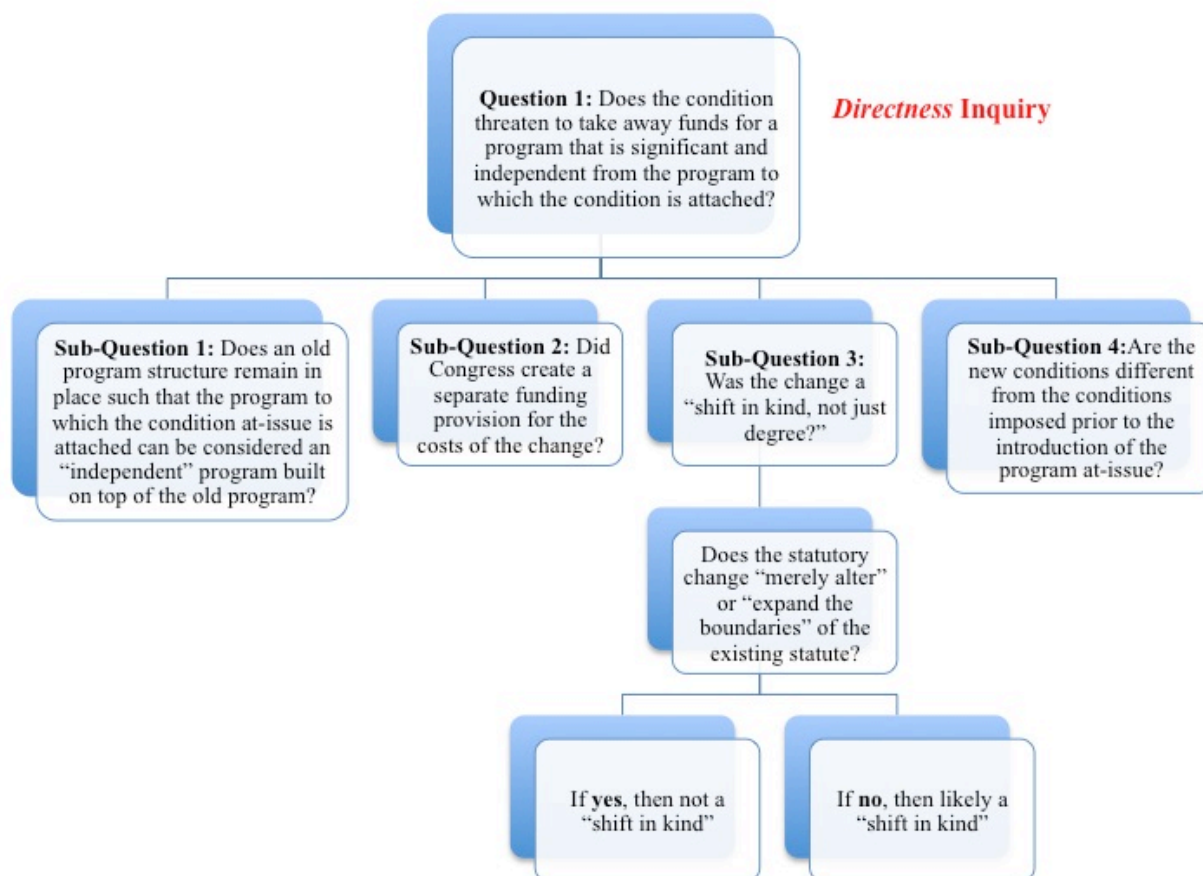
**Figure 2: A more detailed breakdown of Eloise Pasachoff's three-part inquiry<sup>132</sup>**

Professor Pasachoff's framework is particularly useful because she provides additional guidance on how to answer the vague questions associated with the *directness* and *coercion* inquiries. As shown in Figure 3, with respect to the *directness* inquiry, she identifies four Sub-Questions that should inform the consideration of Question 1.<sup>133</sup> Specifically, the more sub-questions that have an answer of "yes," the more likely it is that the answer to Question 1 is "yes." Furthermore, as is also shown in Figure 3, she provides further questions to help inform

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 598-600.

the consideration of the most amorphous Sub-Question in the *directness* inquiry – was the change a “shift in kind, not just degree?” (Sub-Question 3).<sup>134</sup>



**Figure 3: Eloise Pasachoff’s *directness* inquiry**<sup>135</sup>

Likewise, as is shown in Figure 4, she provides guidance on how to conduct the *coercion* inquiry.<sup>136</sup>

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 605-612.

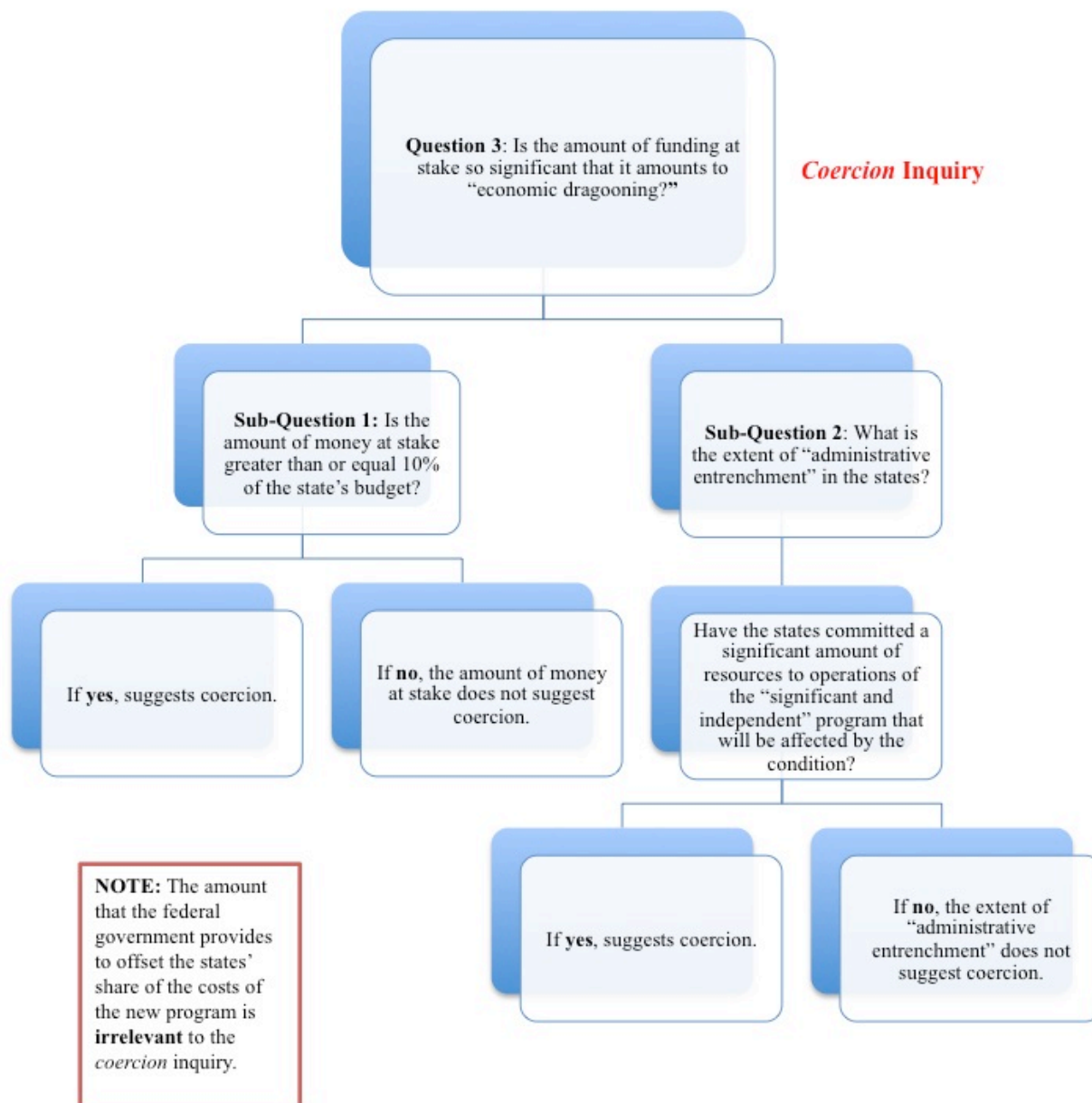


Figure 4: Eloise Pasachoff's coercion inquiry<sup>137</sup>

### C. ORAL ARGUMENT IN *KING V. BURWELL*

Notwithstanding the scholarly consensus that the reasoning put forth by Chief Justice Roberts is likely the best indication of how the Supreme Court will approach future Spending Clause challenges, Justice Kennedy's questions during the recent oral argument in *King v.*

<sup>137</sup> *Id.*

*Burwell*<sup>138</sup> – a challenge to a different aspect of the ACA – suggest that the Court might adopt a broader limitation on the Spending Clause (perhaps one closer to the joint dissent’s view) than the above analyses predict. Indeed, although questions at oral argument are not necessarily indicative of the opinion that the Court eventually issues, the fact that Justice Kennedy is currently the “swing Justice” makes it worthwhile to explore the understanding of *Sebelius* that he implicitly suggested through his questions.

In *Burwell*, the Court is deciding whether the IRS exceeded its statutory authority when it promulgated a rule that interpreted the phrase “established by the State” in §1401 of the ACA as allowing the use of premium tax credits on federally-facilitated exchanges.<sup>139</sup> The relevant factual background is as follows: The ACA’s individual mandate (which as mentioned in the Introduction was upheld in *Sebelius*) stipulated that starting on January 1, 2014, individuals whose annual income exceeds \$10,000 or who are part of a family whose annual income exceeds \$20,000 are required to purchase health insurance, provided that doing so would not result in them spending more than 8% of their income on the insurance.<sup>140</sup> Individuals who fail to purchase insurance must pay a penalty.<sup>141</sup> To facilitate the purchase of health insurance, the ACA provided for the establishment of health insurance exchanges, which are online marketplaces through which individuals can purchase health insurance plans.<sup>142</sup> To help low- and middle-income individuals participate in these exchanges, the ACA created premium tax credits, which are grants of money that can be used to purchase insurance on the exchanges.<sup>143</sup> The drafters of the ACA expected that most states, if not all, would establish their own exchanges. This has not

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<sup>138</sup> 759 F.3d 358 (4th Cir. 2014), *cert. granted*, 135 S.Ct. 475 (2014).

<sup>139</sup> *See* 26 U.S.C. §36B.

<sup>140</sup> *The Requirement to Buy Coverage under the Affordable Care Act*, THE KAISER FAM. FOUND., <http://kff.org/infographic/the-requirement-to-buy-coverage-under-the-affordable-care-act/>.

<sup>141</sup> *Id.*

<sup>142</sup> 42 U.S.C. §18031(b)(1).

<sup>143</sup> *Id.*

happened. Instead, only fourteen states have established state-run exchanges; the thirty-six remaining states have federally-facilitated exchanges.<sup>144</sup>

The challengers in *Burwell* contend that the IRS exceeded its statutory authority in allowing the premium tax credits to be used on federally-facilitated exchanges.<sup>145</sup> They argue that those credits can only be used on state-run exchanges.<sup>146</sup> In other words, their argument is that in order for individuals residing in particular states to receive premium tax credits (federal funds), states have to establish their own exchanges (a condition). In oral argument, Justice Kennedy suggested that, under *Sebelius*, interpreting § 1401 of the ACA in this manner would “raise[] a serious constitutional question” as to whether the states were being coerced into establishing their own exchanges.<sup>147</sup> Justice Kennedy was concerned that the challengers’ interpretation would leave states with the untenable choice of “create your own Exchange, or we’ll send your insurance market into a death spiral” – a non-choice that could amount to coercion.<sup>148</sup>

An amicus brief submitted by several states in support of the federal government’s position in *Burwell* fleshes out a variant of this argument,<sup>149</sup> and it could have been the source of Justice Kennedy’s questions at oral argument. In the amicus brief, the states argue that interpreting § 1401 of the ACA as precluding the use of tax credits on federally-facilitated exchanges would run afoul of the *clear conditions prong*.<sup>150</sup> In particular, drawing on the

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<sup>144</sup> Annie L. Mach & C. Stephen Redhead, CONG. RESEARCH SERV., R43066, FEDERAL FUNDING FOR HEALTH INSURANCE EXCHANGES 1 (2014).

<sup>145</sup> Transcript of Oral Argument at 7, *King v. Burwell*, No. 14-114 (2015) [hereinafter *Burwell Transcript*].

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 18.

<sup>148</sup> *Id.* at 16.

<sup>149</sup> Brief for Commonwealth of Virginia et al. as Amici Curiae Supporting Respondents, *King v. Burwell*, No. 14-114 (2015) [hereinafter *Amicus Brief*].

<sup>150</sup> *Id.* at 12-16. The states did not frame their argument in terms of the *Dole* test. Instead, they framed their argument in terms of the “clear notice” requirement set forth by the Supreme Court in *Pennhurst State School &*

understanding of Chief Justice Roberts’ opinion articulated by Professor Baker, the brief contends that the states did not have “clear notice” that relying on federally-facilitated exchanges could send their insurance markets into a death spiral because the states had no idea that there was a possibility that tax credits would not be allowed on federally-facilitated exchanges.<sup>151</sup> As proof, the brief cites to (1) the fact that the extensive deliberations in which most states engaged when considering whether or not to establish their own exchanges were premised on the assumption that “tax credits would be available without regard to which sovereign created the [e]xchange”<sup>152</sup> and (2) an Issue Brief published in 2011 by the National Governors Association designed to assist states in deciding whether or not to establish their own exchanges that did not even mention the possibility that tax credits would not be allowed on federally-facilitated exchanges.<sup>153</sup>

As one might expect, conservative scholars have rejected the argument put forth by these states. For example, in a piece for the *Washington Post*’s *Volokh Conspiracy*, Professor Ilya Somin offers three reasons to reject the states’ arguments.<sup>154</sup> First, he contends that it is disingenuous for the states to claim that the challengers’ view impermissibly coerces states when their alternative “imposes tighter constraints on state governments and includes a greater deal of federal control of health regulation.”<sup>155</sup> Second, he asserts that *Dole*’s conditions are inapplicable because, on his reading of the doctrine, the conditions are only relevant to conditional spending schemes in which *states* are the recipients of the funding; he argues that in the case of the premium tax credits that are at issue in *Burwell*, individual private citizens (not the states) are the

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*Hospital v. Halderman*, 451 U.S. 1 (1981). However, the *Dole* court incorporated the *Pennhurst* “clear notice” doctrine in its entirety through the *clear conditions prong*.

<sup>151</sup> *Amicus Brief*, *supra* note 149, at 12-16.

<sup>152</sup> *Id.* at 16-17.

<sup>153</sup> *Id.* at 17.

<sup>154</sup> Ilya Somin, *Federalism arguments in King v. Burwell*, WASH. POST (Mar. 7, 2015)

<http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/07/federalism-arguments-in-king-v-burwell/>.

<sup>155</sup> *Id.*

recipients of the federal funding.<sup>156</sup> Third, he draws a distinction between (1) federal statutes that use the threat of increased burdens on state governments to incentivize states to regulate on their own and (2) statutes that “use the threat of increased federal regulation to incentivize states to regulate on their own.”<sup>157</sup> He argues that the former type of statute has the potential to be impermissibly coercive while the latter group – which for him is where the relationship between the health insurance exchanges and premium tax credits at issue in *Burwell* falls – does not have the potential to be impermissibly coercive because the burden of increased federal regulation (the consequence of the state government not taking the federal government’s incentive) would be born by private citizens, not by the state governments.<sup>158</sup>

### **III. IMPLICATIONS OF SEBELIUS MOVING FORWARD**

Given the different ways to interpret the rationale behind the decision in *Sebelius*, this final section considers the implications of the decision on a wide range of policy areas.

#### **A. POTENTIAL WORKAROUNDS FOR EXPANDING MEDICAID**

Setting aside political feasibility considerations, if Congress wanted to expand Medicaid to cover all individuals at or below 133% FPL (the goal of the ACA’s Medicaid expansion), Justice Ginsburg’s dissent in *Sebelius* suggests two possible avenues that it could pursue.<sup>159</sup> First, Congress could repeal the current Medicaid program and pass a new program with the expanded coverage requirements.<sup>160</sup> States would then choose whether or not to opt into the program. Such a program would easily pass under CRS’ framework and under Professor Pasachoff’s framework since the condition (cover all individuals at or below 133% FPL) would only govern the use of funds to which it was attached (the newly created Medicaid program). Nonetheless, given that

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Sebelius*, 132 S. Ct at 2629, 2632-33 (Ginsburg, J., dissenting).

<sup>160</sup> *Id.* at 2629.



Justice Kennedy is the “swing Justice” on the Court, it is possible that abolishing and reestablishing Medicaid would not pass constitutional muster. Indeed, it is hard to see how Justice Kennedy could conclude that conditioning the receipt of health insurance premiums on the establishment of state-run exchanges raises “a serious constitutional question” but that abolishing and reestablishing Medicaid would not. Both schemes involve (i) the establishment of an entirely new program and (ii) a condition that only governs the use of funds to which it is attached. Justice Kennedy would likely argue that abolishing and reestablishing Medicaid would leave states with the untenable choice of: “opt into this new Medicaid program or we will let the neediest of your citizens suffer.” Moreover, considering (i) the inequities of a system in which only some states offer Medicaid and (ii) the fact that for the past thirty-three years, all fifty states have participated in Medicaid, this argument has some bite (at least more than it does in the context of *Burwell*).

Second, Justice Ginsburg’s dissent suggests that Congress could simply nationalize Medicaid.<sup>161</sup> Although this suggestion theoretically would not violate any understanding of the *Sebelius* decision, it would be impractical and inefficient to implement. In order to steer clear of the anti-commandeering doctrine, the federal government – using federal personnel and resources – would have to administer the program, right down to the day-to-day operations.

## **B. IMPLICATIONS FOR OTHER CONDITIONAL SPENDING PROGRAMS**

### *1. Conditions established by statute*

Due to the prevalence of conditional spending regimes, *Sebelius* might have the potential to render large swaths of our regulatory system unconstitutional. However, CRS’ and Professor Pasachoff’s understandings of Chief Justice Roberts’ opinion suggest that *Sebelius* will render a very limited number of conditional spending programs established by statute unconstitutional.

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<sup>161</sup> *Id.* at 2632-33.

This section seeks to explore the contours of Chief Justice Roberts’ opinion by examining its application to (1) a series of environmental laws and (2) The No Child Left Behind Act of 2001.

(a) *Most federal environmental legislation would withstand a Sebelius-style challenge*

Drawing on the work of Professor Erin Ryan,<sup>162</sup> this subsection applies Professor Pasachoff’s test to four major environmental laws to determine whether they would withstand a *Sebelius*-style challenge.<sup>163</sup> The four environmental laws are the Coastal Zone Management Act, the Clean Water Act’s State Revolving Fund, the Safe Drinking Water Act, and the provisions in the Clean Air Act that require states to develop State Implementation Plans. These four laws were chosen because according to Professor Ryan, they are the only federal environmental laws that could “meaningfully trigger” a *Sebelius* challenge.<sup>164</sup> As will be demonstrated, at least three of these laws would withstand a *Sebelius*-style challenge.

- *The Coastal Zone Management Act of 1972 (CZMA)*: The CZMA is designed to encourage states to create coastal management plans.<sup>165</sup> It seeks to accomplish this goal by offering four different types of grants to encourage states to establish such plans – *administrative grants, enhancement grants, nonpoint pollution control grants, and estuarine research reserve grants*.<sup>166</sup> Each of these grants would survive a *Sebelius*-style challenge because the conditions attached to each type of grant (funding should be used in furtherance of the coastal management development plans) only govern the funds

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<sup>162</sup> Erin Ryan, *The Spending Power and Environmental Law After Sebelius*, 85 U. COLO. L. REV. 1003 (2014) [hereinafter *Environmental Law After Sebelius*].

<sup>163</sup> In her paper, Professor Ryan articulates (and applies) her own multi-factor test for understanding *Sebelius*. For the sake of consistency, I apply Professor Pasachoff’s test, though I draw significantly from Professor Ryan’s reasoning. I have chosen not to apply CRS’ test because (as described in Part II) it does not provide clear guidance on how to conduct its *coercion* analysis. Likewise, neither Professor Coan’s interpretation nor Professor Baker’s interpretation of Chief Justice Roberts’ opinion is easily operationalized.

<sup>164</sup> *Id.* at 1037.

<sup>165</sup> *Id.* at 1044-46.

<sup>166</sup> *Id.*

found in the CZMA grants themselves (the funds to which the conditions are attached).

Thus, the inquiry into the permissibility of the grant conditions would stop at Question 1 of Professor Pasachoff's framework.

- *The Clean Water Act's State Revolving Fund (CWA SRF)*: The CWA SRF provides states with annual grants to fund projects for watershed and estuary management, wastewater treatment, and nonpoint source pollution control.<sup>167</sup> These grants would survive a *Sebelius*-style challenge because the conditions attached to the grant (funding should be used to fund projects for watershed and estuary management, wastewater treatment, and nonpoint source pollution control) only govern the funds in the CWA SRF annual grants themselves (the funds to which the conditions are attached). Thus, the inquiry into the permissibility of the grant conditions would stop at Question 1 of Professor Pasachoff's framework.
- *The Safe Drinking Water Act (SWDA)*: The SWDA established the Drinking Water State Revolving Loan Fund, which provides grants that help public water agencies finance projects that further compliance with the SWDA's drinking water guidelines.<sup>168</sup> These conditions would survive a *Sebelius*-style challenge because the conditions attached to the grant (funding should only be used for projects that are in furtherance of the SWDA's drinking water guidelines) only govern the funds made pursuant to the Drinking Water State Revolving Loan Fund (the funds to which the conditions are attached). Thus, the inquiry into the permissibility of the grant conditions would stop at Question 1 of Professor Pasachoff's framework.

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<sup>167</sup> *Id.* at 1046-47.

<sup>168</sup> *Id.* at 1047-49.

- The Clean Air Act (CAA)*: Pursuant to the CAA, each state must develop and adhere to a State Implementation Plan (SIP) that outlines how the state will attain federally designated air-quality standards.<sup>169</sup> States that fail to do so lose a portion of their federal highway funds.<sup>170</sup> Since the conditions (develop and adhere to a State Implementation Plan) threaten to take away the funding for a “significant and independent” program (federal highway funding), per Question 1 of Professor Pasachoff’s framework, the CAA is potentially coercive, and a *notice* analysis must be conducted. Given that Congress first passed the Federal-Aid Highway Act in 1956 – fourteen years before the EPA was even established – states did not have sufficient notice at the time that they entered into the Federal-Aid Highway Act that they would also have to develop SIPs in order to receive the federal highway funding.<sup>171</sup> Thus, per Question 2 of Professor Pasachoff’s framework, the CAA is potentially coercive, and a *coercion* analysis must be conducted. Three factors suggest that the CAA is not coercive under Question 3 of Professor Pasachoff’s framework. First, although the amount of funding at stake is more than what was at stake in *Dole*, it is less than what was at stake in *Sebelius*.<sup>172</sup> Second, the CAA allows states to opt-out of preparing a SIP and instead adopt a Federal Implementation Plan.<sup>173</sup> However, according to Professor Ryan, “most states prefer the autonomy of managing their own plans.”<sup>174</sup> Nonetheless, the very existence of such an opt-out undermines a finding of coercion. Third, in *Texas v. EPA*,<sup>175</sup> the D.C. Circuit explicitly rejected the parallel that the State of Texas tried to draw between the Medicaid expansion

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<sup>169</sup> *Id.* at 1049-50.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1052.

<sup>172</sup> *Id.* at 1051.

<sup>173</sup> *Id.* at 1050.

<sup>174</sup> *Id.*

<sup>175</sup> 726 F.3d 180, 197 (D.C. Cir. 2013).

and the EPA’s new requirement that state SIPs be updated to include greenhouse gas regulations. Notwithstanding these three factors, scholars are divided on whether the CAA’s SIP requirement would survive a *Sebelius*-style challenge.<sup>176</sup> On the one hand, David Baake, a fellow at the Natural Resources Defense Council,<sup>177</sup> has concluded that the CAA’s SIP requirement would withstand a *Sebelius*-style challenge because, on his view, (1) “the funds at issue are smaller than Medicaid’s by a factor of seven”<sup>178</sup> and (2) the CAA’s penalty is “much more avoidable” than the consequences of not complying with the ACA. On the other hand, Professor Jonathan Adler has concluded that CAA’s SIP requirement would not survive a *Sebelius*-style challenge because, on his view, federal highway funding (which is collected through gasoline taxes) is even “less directly related to air pollution (particularly from stationary sources) than traditional Medicaid is to the Medicaid expansion.”<sup>179</sup>

(b) *The No Child Left Behind Act of 2001 would withstand a Sebelius-style challenge*

This subsection applies Professor Pasachoff’s test to determine whether the No Child Left Behind Act of 2001 (NCLB) would withstand a *Sebelius*-style challenge. NCLB is the eighth and current iteration of the Elementary and Secondary Education Act of 1965 (ESEA).<sup>180</sup> The ESEA – which was part of President Johnson’s Great Society Program – dramatically expanded federal involvement in education.<sup>181</sup> Indeed, although the federal government had previously been involved in funding education through targeted programs, after the passage of the ESEA, nearly

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<sup>176</sup> *Environmental Law after Sebelius*, *supra* note 162, at 1052-53.

<sup>177</sup> *Ford Foundation Law School Public Interest Fellows*, Harvard Law School, OFFICE OF PUBLIC INTEREST ADVISING, HARVARD LAW SCHOOL, [http://www.law.harvard.edu/current/careers/opia/fellowships/summer-and-winter-term-funding/hls\\_ford\\_fellows\\_6.16.14.pdf](http://www.law.harvard.edu/current/careers/opia/fellowships/summer-and-winter-term-funding/hls_ford_fellows_6.16.14.pdf).

<sup>178</sup> *Environmental Law after Sebelius*, *supra* note 162, at 1053.

<sup>179</sup> *Id.* (quoting Jonathan H. Alder, *Could the Health Care Decision Hobble the Clean Air Act?*, PERC BLOG (July 23, 2012), <http://perc.org/blog/could-health-care-decision-hobble-clean-air-act>.)

<sup>180</sup> *Example of Federal Education Law*, *supra* note 4, at 613.

<sup>181</sup> *Id.*

every school district in the country received federal funding and was subject to the conditions attached to said funding.<sup>182</sup> Although each reauthorization of the ESEA changed the Act, NCLB “significantly increased” both the federal funding and the attendant conditions.<sup>183</sup> Thus, it is arguable that:

NCLB : ESEA :: ACA’s Medicaid expansion : Medicaid

Indeed, much like how Chief Justice Roberts distinguished the ACA’s Medicaid expansion from prior amendments to the Medicaid program as being a “shift in kind, not degree,” one could distinguish NCLB from previous ESEA reauthorizations as being a “shift in kind, not degree.”

Nonetheless, a *Sebelius*-style challenge would likely falter at Question #1 of Professor Pasachoff’s framework. Unlike the ACA’s Medicaid expansion, there is no way to characterize the conditions set forth in NCLB as threatening to take away funds from a “significant and independent” program; upon the passage of NCLB – unlike upon the passage of the Medicaid expansion – the previous iteration of the ESEA no longer existed.<sup>184</sup> NCLB completely supplanted the previous iteration of the ESEA, meaning that the conditions set forth in NCLB could only govern the use of funds allocated by NCLB.

2. *Conditions established through agency regulations would likely have a harder time withstanding a Sebelius-style challenge than conditions established through statutes*

A related but distinct issue from the manner in which *Sebelius* will affect conditional spending schemes established by statutes is the manner in which *Sebelius* could affect conditional spending schemes established through *agency* action. This sub-section explores this issue.

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 617.

In a recent law review article, now-Judge David Barron and Professor Todd Rakoff describe the increasing importance of a phenomenon in administrative law that they term “big waiver.”<sup>185</sup> A “big waiver” is a “broad, open-ended grant of administrative discretion to make policy judgments ... [that empowers an agency] to substantially revise and not [just] modestly tweak” the regulatory scheme set forth in a statute.<sup>186</sup> The manner in which the Department of Education has implemented NCLB is a prime example of an agency asserting its “big waiver” authority.<sup>187</sup> Per the statutory language of NCLB, in order to receive certain federal funding for education, states were required, on an annual basis, to demonstrate “adequate yearly progress” of all of their students with the ultimate goal of ensuring that by the end of the 2013-2014 academic year, “all students ... me[t] or exceed[ed] the State’s proficient level of academic achievement.”<sup>188</sup> Notwithstanding this clear statutory directive, the Department of Education (DOE) has been *waiving* NCLB’s statutory requirements.<sup>189</sup> For example, rather than conditioning the receipt of federal funding on states ensuring that all students meet the “State’s proficient level of academic achievement” by the end of the 2013-2014 academic year, DOE said that states can continue to receive federal funding so long as they set “‘annual measurable objectives’ that are ‘ambitious yet achievable’” such as a half percent reduction in the number of students who are not proficient by the end of the 2016-2017 academic year.<sup>190</sup>

The conditional spending doctrine as laid out in *Sebelius* has the potential to limit such exercises of “big waiver” authority. Indeed, although “big waiver” authority is most easily understood as means through which agencies can relax requirements on funding recipients, now-

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<sup>185</sup> David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 2 (2013) [hereinafter *Big Waiver*].

<sup>186</sup> *Id.* at 278.

<sup>187</sup> *Id.* at 279.

<sup>188</sup> *Id.*; 20 U.S.C. § 6311(b)(2)(F) (2006).

<sup>189</sup> *Big Waiver*, *supra* note 185, at 279.

<sup>190</sup> *Id.* at 279-280 (quoting U.S. DEP’T OF EDUC., *ESEA Flexibility: Frequently Asked Questions* 15 (2011)).

Judge Barron and Professor Rakoff note that it is conceptually possible for “big waiver” authority to be used by agencies to impose new conditions on funding recipients.<sup>191</sup> Specifically, they write:

... we think it is proper for an agency to condition its grant of a waiver on the recipients’ being subject to new requirements not contained in the statute as originally written. This means, of course, germane new requirements relevant to Congress’s purposes; this is not an authorization just to bargain for whatever the agency wants.<sup>192</sup>

If an agency were to exercise its “big waiver” authority to impose new conditions on funding recipients, then the inquiry into whether those conditions are permissible would likely be guided by *Sebelius*. There is no case law on this point. However, it seems likely that that a reviewing court would be even more searching in its application of *Sebelius* when it is reviewing agency-imposed conditions as compared to when it is reviewing statutorily-imposed conditions for two reasons. First, the Supreme Court generally places more requirements on agencies than it does on Congress. For example, when an agency departs from its prior precedent, it is required to (1) acknowledge that it is doing so and (2) explain its reasoning for departing.<sup>193</sup> Congress does not have to fulfill either requirement when it passes a bill that contradicts a law that is already on the books; the new bill is automatically understood to supersede the old one. Second, *Sebelius*’ concerns about conditions contravening the Tenth Amendment are arguably exacerbated in the context of agency-imposed conditions as compared to statutorily-imposed conditions. Indeed, as noted by Professor Coan, Chief Justice Roberts explained his Tenth Amendment concern in *Sebelius* in terms of a “political accountability argument.”<sup>194</sup> Specifically, it noted, “[When the state has no choice] but to accept a federal offer, ‘the Federal Government can achieve its

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<sup>191</sup> *Id.* at 325-27.

<sup>192</sup> *Id.* at 326.

<sup>193</sup> *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

<sup>194</sup> Coan, *supra* note 81, at 18. It is important to note that Professor Coan disagrees with the Court’s characterization of the accountability problem. He conceptualizes it as “the risk of Congress and its national constituency wresting control of state governments away from their local constituencies.” *Id.*



objectives without”” being held accountable to the public.<sup>195</sup> Since agency officials (unlike members of Congress) are not elected, this lack of accountability is exacerbated in the context of agency-imposed conditions.

### C. IMPLICATIONS FOR CONDITIONAL SPENDING PROGRAMS INVOLVING NON-STATE ENTITIES

Thus far, the discussion of the potential implications of *Sebelius* has focused on conditioning a *state*’s receipt of federal funds on its compliance with conditions set forth by the federal government. A related (but possibly distinct) issue is the potential implication of *Sebelius* on conditioning the receipt of federal funds by non-state entities such as local governments and private universities. Whether *Sebelius* would implicate such programs differently from the manner in which it affects programs in which *states* are the recipients of the funding turns on the nature of the principles underlying the *Sebelius* decision.

The principles underlying *Dole*’s *general welfare prong* and *clear conditions prong* are the Spending Clause’s general welfare requirement<sup>196</sup> and contract law doctrine, respectively. Although, the *Dole* Court did not reference specific provisions in the Constitution as the sources for the *directness*, *independent constitutional bar*, and *coercion prongs*, the constitutional underpinnings of these prongs can be discerned. First, as surmised by CRS, the *directness prong* appears to have been derived as a limitation inherent to the Spending Clause itself.<sup>197</sup> Second, the *independent constitutional bar prong* can likely be rooted in the Supremacy Clause since the Supremacy Clause establishes that the “Constitution ... is the Supreme Law of the Land.”<sup>198</sup> Third, *Steward Machine Co.* (the case that the *Dole* Court cited as the source for the *coercion*

<sup>195</sup> *Id.* at 17 (quoting *Sebelius*, 132 S. Ct at 2603).

<sup>196</sup> See U.S. CONST. art. I, § 8, cl. 1; *Dole*, 483 U.S. at 207.

<sup>197</sup> *Constitutionality of Federal Grant Conditions*, *supra* note 44, at 16.

<sup>198</sup> U.S. CONST. art. VI, cl. 2.

*prong*) grounds its contention that there exists a point at which “pressure turns into compulsion” in the Tenth Amendment’s federalism principle.<sup>199</sup> Thus, if *Dole* were still the governing framework, an argument could be made that non-state recipients should be treated differently from state recipients because the former entities are not protected by the Tenth Amendment, meaning that the *coercion* principle would not be implicated.<sup>200</sup>

Three of the four interpretations of Chief Justice Roberts’ opinion discussed in Part II indicate that *Sebelius* is also best understood as being grounded in the Tenth Amendment. Indeed, Professor Coan interpreted Chief Justice Roberts’ opinion as boiling *Dole* down to the anti-commandeering principle – a doctrine that is explicitly derived from the Tenth Amendment. Likewise, under CRS’ understanding and under Professor Pasachoff’s understanding of the opinion, a condition does not exceed Congress’ Spending Clause authority until it is found to be coercive, and as explained by Professor Pasachoff, the indicators of “coercion” that Chief Justice Roberts identified are “strongly rooted in the idea that states are sovereigns with independent constitutional rights under the Tenth Amendment.”<sup>201</sup>

Professor Baker’s test, however, is indeterminate as to whether *Sebelius* is best understood as being grounded in the Tenth Amendment. As explained in Part II, although Professor Baker believed that the *coercion prong* played a key role in Chief Justice Roberts’ opinion, she was careful to note that it was unclear to her as to whether failing the *coercion prong* would, on its own, be a sufficient basis for rejecting a piece of conditional spending legislation.

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<sup>199</sup> 301 U.S. 548, 590 (1937).

<sup>200</sup> This argument is similar to Professor Somin’s reasoning for why *Dole*’s requirements should not apply to the relationship between health insurance exchanges and premium tax credits that is at issue in *Burwell*.

<sup>201</sup> *Example of Federal Education Law*, *supra* note 4, at 652-53.

Still, since three of the four tests interpret Chief Justice Roberts' opinion as being grounded in the Tenth Amendment, *Sebelius* likely does not affect conditional spending programs in which non-state entities are the recipients because non-state entities (unlike state governments) are not recognized by the Tenth Amendment as sovereigns whose autonomy is to be protected against federal encroachment.<sup>202</sup>

#### **D. IMPLICATIONS FOR MANDATES**

There is also the possibility that *Sebelius* could impact the federal government's ability to impose unfunded mandates on state and local governments. As its name suggests, an unfunded mandate is a requirement imposed by the federal government for which the federal government does not provide funding. Although, as mentioned earlier, conditional spending programs have historically been the primary means by which the federal government has exercised control over state and local governments – a trend that arguably was amplified by the toothless nature of the *Dole* doctrine – unfunded mandates have been an important tool in the federal government's arsenal since the 1960s.<sup>203</sup> In fact, Republican members of Congress were so concerned about the degree of control being exercised over state, local, and private entities through the use of unfunded mandates that they passed the Unfunded Mandate Reform Act of 1995 (UMRA).<sup>204</sup> The UMRA was designed to reduce the number of unfunded mandates by forcing members of Congress to consider the financial burdens that mandates impose on the entities that would have to comply with the mandates.<sup>205</sup> Specifically, the UMRA directs the CBO to (1) “prepare full quantitative estimates” for mandates that impose costs above a certain threshold “in any of the

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<sup>202</sup> Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 298-99 (2014). If, on the other hand, Chief Justice Roberts' opinion were best understood as being grounded in an inherent limitation in the Spending Clause, then it could potentially impact conditional spending programs with non-state recipients.

<sup>203</sup> *Historical Perspective*, *supra* note 8, at 28, 37.

<sup>204</sup> *Id.* at 33.

<sup>205</sup> *Id.*

first five fiscal years [in which] the legislation would be in effect” and (2) “prepare brief statements of cost estimates for those mandates that have estimated costs below the[] threshold[.]”<sup>206</sup> In 2013, the threshold for intergovernmental mandates was \$75 million while the threshold for private sector mandates was \$150 million.<sup>207</sup> Notwithstanding the UMRA’s purpose, CRS has found that its impact on the number of unfunded mandates has been “relatively limited.”<sup>208</sup>

There are several types of mandates that are exempt from the UMRA’s requirements. For example, it “does not apply to any provision in a bill, joint resolution, amendment, motion, or conference report before Congress that enforces the constitutional rights of individuals.”<sup>209</sup> The UMRA’s requirements also generally do not apply to “duties that are imposed as a condition of federal assistance or that arise from participation in a voluntary federal program.”<sup>210</sup> However, there is an exception to this exemption.<sup>211</sup> The UMRA’s requirements do apply to legislation that increases the “stringency of conditions” associated with or that “decreases federal financial assistance” for federal entitlement programs that provide state, local, or tribal governments with more than \$500 million annually if the recipient governments “lack the authority to offset the new costs by amending their financial or programmatic responsibilities for the program.”<sup>212</sup> Historically, the bar for determining whether the recipients “have the authority to offset the new costs” appears to have been quite low. For example, in a 2009 Issue Brief, the CBO noted:

Some estimates indicate that more than 60 percent of Medicaid spending by the states is for optional services or optional categories of beneficiaries. Even though ...

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Stacy Anderson & Russell Constantine, *Unfunded Mandates* 6 (Harvard Law Sch. Briefing Papers on Federal Budget Policy, Paper No. 7, 2006).

<sup>210</sup> CONG. BUDGET OFFICE, A REVIEW OF CBO’S ACTIVITIES IN 2009 UNDER THE UNFUNDED MANDATES REFORM ACT 63 (Mar. 2010) [hereinafter *Review of CBO’s Activities*].

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

programmatic changes are often politically unpopular or run counter to other policy goals, the additional costs stemming from federal actions – although quite real – could be offset by changes in state and local policies.<sup>213</sup>

The conditional spending doctrine as laid out in *Sebelius* has the potential to change this by imposing a much more restrictive definition of the phrase “authority to offset the new costs.” Indeed, given that (at least on one view) Chief Justice Roberts’ opinion (1) fundamentally changed the nature of the *clear conditions* and *directness prongs* and (2) read two other prongs out of the *Dole* test, it is not inconceivable that a future Court (or Congress) would extend the logic underlying Chief Justice Roberts’ modifications to the *Dole* framework to read the phrase “authority to” out of the phrase “authority to offset the new costs,” thereby allowing the analysis of whether the UMRA’s requirements should apply to turn entirely on whether the recipient governments would actually be able to offset the increased costs. To answer that question, the Court (or Congress) could then turn to Chief Justice Roberts’ more robust application of the *coercion* prong in *Sebelius* to determine whether an increase in the “stringency of conditions” or a decrease in “federal financial assistance” could be construed as a “gun to the [recipients’] head.”<sup>214</sup>

## CONCLUSION

The impact of *Sebelius* on future challenges to conditional spending schemes is unclear. On the one hand, scholarly analyses of Chief Justice Roberts’ opinion suggest that only a small subset of the conditional spending schemes in which *states* are the recipients would be found to exceed Congress’ authority under the Spending Clause. On the other hand, Justice Kennedy’s questions during oral argument in *Burwell* suggest that the Supreme Court might adopt a broader restriction on Congress’ ability to condition funds than the one articulated by Chief Justice

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<sup>213</sup> CONG. BUDGET OFFICE, ISSUE BRIEF: INTERGOVERNMENTAL MANDATES IN FEDERAL LEGISLATION 4-5 (July 2009) [hereinafter *CBO Issue Brief*].

<sup>214</sup> See *Sebelius*, 132 S.Ct. 2566 at 2604.

Roberts in *Sebelius*. Under such a framework, more conditional spending programs could be in jeopardy. Given that there was no controlling reasoning for the Court's conclusion in *Sebelius*, the true extent of the decision will likely only be known in the Summer of 2015 when the Supreme Court issues its opinion in *Burwell*. Nonetheless, given that Chief Justice Roberts' *directness* and *coercion* analyses are best interpreted as being grounded in the Tenth Amendment's federalism principle, it seems fair to conclude that *Sebelius* will not have a significant impact on conditional spending programs in which non-state entities (such as local governments and universities) are the recipients.

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