of links in the congressional-power chain but on the strength of the chain.” How strong are the links in the chain described in Justice Breyer’s five-part decision for the Court?

Civil commitment arises in other public health contexts, such as mental illness and contagious diseases (discussed in Chapter 2). But individuals with those conditions cannot be detained unless the government demonstrates both the disease and dangerousness to the public. Has the federal law here satisfied this standard? Note that the Adam Walsh Act requires civil commitment until the released inmate is “no longer dangerous.” 18 U.S.C. §4248(d)(1). What does this mean for a sexual offender?

Does your impression of the “necessary and proper” nature of the Adam Walsh Act change at all by learning that key experts have admitted that the statistics pertaining to the likelihood of recidivism have been concocted without scientific basis? See, e.g., David Feige, When Junk Science About Sex Offenders Infects the Supreme Court, N.Y. Times (Sep. 12, 2017).

C. Indirect Federal Regulation

This section explores Congress’s powers under Article I, section 8, clause 1, sometimes called the General Welfare Clause, which contains Congress’s powers to tax and to spend for the “general welfare.” In the fields of public health and health care, federal policy choices can be achieved by imposing taxes that penalize undesirable behavior or providing tax breaks for desirable choices, or by offering federal funding to states, localities, or private parties to participate in the implementation of federal policies. Using the taxing and spending powers sometimes enables Congress to accomplish goals that may be beyond the scope of other Article I enumerated powers, such as the commerce power, as we saw in the excerpt of NFIB v. Sebelius, above. The taxing power is exercised to influence health care and health insurance markets indirectly through, for example, offering employers a tax break when they provide health insurance as an employment benefit. Taxes can also influence individual decisions that affect health, for example, by raising the price of a pack of cigarettes. While few Supreme Court decisions address Congress’s taxing power, the use of taxes to influence policy is prevalent at every level of government.

Federal funding under the Spending Clause nearly always comes with strings attached in the form of requirements, called conditions on spending, that recipients must meet to use the federal money. Some federal funding recipients depend so heavily on that money for their continued operation that conditions on spending are virtually equivalent to direct federal regulation. Think of hospitals and physicians that participate in Medicare; it would be nearly impossible to operate a hospital without Medicare funding, so the conditions imposed are not really optional. In this Part, we study the key question of which conditions on spending
are permissible and whether any conditions exceed congressional authority. The following cases illustrate that a variety of federal funding programs impose conditions on both public and private actors in pursuit of health policy. The first case supplies the Supreme Court's approach to evaluating Congress's power to impose conditions on spending.

South Dakota v. Dole
483 U.S. 203 (1987)

Chief Justice Rehnquist delivered the opinion of the Court.

... South Dakota permits persons 19 years of age or older to purchase beer containing up to 3.2% alcohol. S.D. Codified Laws § 35-6-27 (1986). In 1984 Congress enacted 23 U.S.C. § 158, which directs the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from States “in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.” The State sued in United States District Court seeking a declaratory judgment that § 158 violates the constitutional limitations on congressional exercise of the spending power and violates the Twenty-first Amendment to the United States Constitution. The District Court rejected the State's claims, and the Court of Appeals for the Eighth Circuit affirmed.

In this Court, the parties direct most of their efforts to defining the proper scope of the Twenty-first Amendment. . . . South Dakota asserts that the setting of minimum drinking ages is clearly within the “core powers” reserved to the States under § 2 of the Amendment. . . . However, we need not decide in this case whether that Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age. Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. . . . We find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly.

The Constitution empowers Congress to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” Art. I, § 8, cl.1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power “to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” The breadth of this power was made clear in United States v. Butler, 297 U.S. 1, 66 (1936), where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.” Thus, objectives not thought to be within Article I’s “enumerated legislative fields,” may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.
The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare." In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." . . . Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

We can readily conclude that the provision is designed to serve the general welfare, especially in light of the fact that "the concept of welfare or the opposite is shaped by Congress . . .." Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution. The means it chose to address this dangerous situation were reasonably calculated to advance the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. And the State itself, rather than challenging the germaneness of the condition to federal purposes, admits that it "has never contended that the congressional action was . . . unrelated to a national concern in the absence of the Twenty-first Amendment." Indeed, the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel. This goal of the interstate highway system had been frustrated by varying drinking ages among the States. A Presidential commission appointed to study alcohol-related accidents and fatalities on the Nation's highways concluded that the lack of uniformity in the States' drinking ages created "an incentive to drink and drive" because "young persons commut[e] to border States where the drinking age is lower." By enacting §158, Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.

The remaining question about the validity of §158—and the basic point of disagreement between the parties—is whether the Twenty-first Amendment constitutes an "independent constitutional bar" to the conditional grant of federal funds. Petitioner, relying on its view that the Twenty-first Amendment prohibits direct regulation of drinking ages by Congress, asserts that "Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment." But our cases show that this "independent constitutional bar" limitation on the spending power is not of the kind petitioner suggests . . .
... [T]he "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.

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." Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. . . .

... Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE O'CONNOR, dissenting.

... My disagreement with the Court is relatively narrow on the spending power issue: it is a disagreement about the application of a principle, rather than a disagreement on the principle itself. I agree with the Court that Congress may attach conditions on the receipt of federal funds to further "the federal interest in particular national projects or programs." . . .

... [T]he Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and
unconvincing. We have repeatedly said that Congress may condition grants under the spending power only in ways reasonably related to the purpose of the federal program. In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.

... [T]he Court asserts the reasonableness of the relationship between the supposed purpose of the expenditure—“safe interstate travel”—and the drinking age condition. The Court reasons that Congress wishes that the roads it builds may be used safely, that drunken drivers threaten highway safety, and that young people are more likely to drive while under the influence of alcohol under existing law than would be the case if there were a uniform national drinking age of 21. It hardly needs saying, however, that, if the purpose of §158 is to deter drunken driving, it is far too over- and under-inclusive. It is over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways. It is under-inclusive because teenagers pose only a small part of the drunken driving problem in this Nation. See, e.g., 130 Cong. Rec. 18648 (1984) (remarks of Sen. Humphrey) (“Eighty-four percent of all highway fatalities involving alcohol occur among those whose ages exceed 21”); ... ibid. (remarks of Sen. Symms) (“Most of the studies point out that the drivers of age 21–24 are the worst offenders”).

When Congress appropriates money to build a highway, ... it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State’s social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced. If, for example, the United States were to condition highway moneys upon moving the state capital, I suppose it might argue that interstate transportation is facilitated by locating local governments in places easily accessible to interstate highways—or, conversely, that highways might become overburdened if they had to carry traffic to and from the state capital. In my mind, such a relationship is hardly more attenuated than the one which the Court finds supports §158.” ...

Harris v. McRae
448 U.S. 297 (1980)

Mr. JUSTICE STEWART delivered the opinion of the Court.

This case presents statutory and constitutional questions concerning the public funding of abortions under Title XIX of the Social Security Act, commonly known as the “Medicaid” Act, and recent annual Appropriations Acts containing the so-called “Hyde Amendment.” The statutory question is whether Title XIX requires a State that participates in the Medicaid program to fund the cost of medically necessary abortions for which federal reimbursement is unavailable under the Hyde
Amendment. The constitutional question, which arises only if Title XIX imposes no such requirement, is whether the Hyde Amendment, by denying public funding for certain medically necessary abortions, contravenes the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment, or either of the Religion Clauses of the First Amendment.

The Medicaid program was created in 1965 . . . for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons. Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX.

One such requirement is that a participating State agree to provide financial assistance to the “categorically needy” with respect to five general areas of medical treatment: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and X-ray services, (4) skilled nursing facilities services, periodic screening and diagnosis of children, and family planning services, and (5) services of physicians. Although a participating State need not “provide funding for all medical treatment falling within the five general categories, [Title XIX] does require that the state Medicaid plan establish ‘reasonable standards . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX].’” Beal v. Doe.

Since September, 1976, Congress has prohibited — either by an amendment to the annual appropriations bill for the Department of Health, Education, and Welfare or by a joint resolution — the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances. This funding restriction is commonly known as the “Hyde Amendment,” after its original congressional sponsor, Representative Hyde. The current version of the Hyde Amendment, applicable for fiscal year 1980, provides:

“[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.”


. . . The plaintiffs — Cora McRae, a New York Medicaid recipient then in the first trimester of a pregnancy that she wished to terminate, the New York City Health and Hospitals Corp., a public benefit corporation that operates 16 hospitals, 12 of which provide abortion services, and others — sought to enjoin the enforcement of the funding restriction on abortions. They alleged that the Hyde Amendment violated the First, Fourth, Fifth, and Ninth Amendments of the Constitution insofar as it limited the funding of abortions to those necessary to save the life of the mother, while permitting the funding of costs associated with childbirth. . . .
II

... [W]e turn first to the question whether Title XIX requires a State that participates in the Medicaid program to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. If a participating State is under such an obligation, the constitutionality of the Hyde Amendment need not be drawn into question in the present case, for the availability of medically necessary abortions under Medicaid would continue, with the participating State shouldering the total cost of funding such abortions.

The appellees assert that a participating State has an independent funding obligation under Title XIX because (1) the Hyde Amendment is, by its own terms, only a limitation on federal reimbursement for certain medically necessary abortions, and (2) Title XIX does not permit a participating State to exclude from its Medicaid plan any medically necessary service solely on the basis of diagnosis or condition, even if federal reimbursement is unavailable for that service. It is thus the appellees' view that the effect of the Hyde Amendment is to withhold federal reimbursement for certain medically necessary abortions, but not to relieve a participating State of its duty under Title XIX to provide for such abortions in its Medicaid plan. . . .

Since the Congress that enacted Title XIX did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan, it follows that Title XIX does not require a participating State to include in its plan any services for which a subsequent Congress has withheld federal funding. Title XIX was designed as a cooperative program of shared financial responsibility, not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund. Thus, if Congress chooses to withhold federal funding for a particular service, a State is not obliged to continue to pay for that service as a condition of continued federal financial support of other services. . . . Title XIX does not obligate a participating State to pay for those medical services for which federal reimbursement is unavailable. . . .

III

A

We address first the appellees' argument that the Hyde Amendment, by restricting the availability of certain medically necessary abortions under Medicaid, impinges on the "liberty" protected by the Due Process Clause as recognized in Roe v. Wade . . . . [The Court described Roe v. Wade, which is excerpted in Chapter 6. — Ed.]

In Maher v. Roe, the Court was presented with the question whether the scope of personal constitutional freedom recognized in Roe v. Wade included an entitlement to Medicaid payments for abortions that are not medically necessary. At issue in Maher was a Connecticut welfare regulation under which Medicaid recipients
received payments for medical services incident to childbirth, but not for medical services incident to nontherapeutic abortions.

The doctrine of Roe v. Wade, the Court held in Maher, "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy," such as the severe criminal sanctions at issue in Roe v. Wade, or the absolute requirement of spousal consent for an abortion challenged in Planned Parenthood of Central Missouri v. Danforth.

But the constitutional freedom recognized in Wade and its progeny, the Maher Court explained, did not prevent Connecticut from making "a value judgment favoring childbirth over abortion, and... implement[ing] that judgment by the allocation of public funds."...

The Hyde Amendment... places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest...

It is evident that a woman's interest in protecting her health was an important theme in Wade... But, regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in Wade, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in Maher: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in Wade.

Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that, because government may not prohibit the use of contraceptives or prevent parents from sending their child to a private school, government therefore has an
affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. . . . Accordingly, we conclude that the Hyde Amendment does not impinge on the due process liberty recognized in Wade. . . .

. . . By subsidizing the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of women who undergo abortions (except those whose lives are threatened), Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest in protecting potential life. Nor is it irrational that Congress has authorized federal reimbursement for medically necessary services generally, but not for certain medically necessary abortions. Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life. . . .

Where, as here, the Congress has neither invaded a substantive constitutional right or freedom nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest. The Hyde Amendment satisfies that standard. . . .

IV

For the reasons stated in this opinion, we hold that a State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. . . . Accordingly, the judgment of the District Court is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

Mr. JUSTICE MARSHALL, dissenting.

. . . Under the Hyde Amendment, federal funding is denied for abortions that are medically necessary and that are necessary to avert severe and permanent damage to the health of the mother. The Court’s opinion studiously avoids recognizing the undeniable fact that for women eligible for Medicaid—poor women—denial of a Medicaid-funded abortion is equivalent to denial of legal abortion altogether. By definition, these women do not have the money to pay for an abortion themselves. If abortion is medically necessary and a funded abortion is unavailable, they must resort to back-alley butchers, attempt to induce an abortion themselves by crude and dangerous methods, or suffer the serious medical consequences of attempting to carry the fetus to term. Because legal abortion is not a realistic option for such women, the predictable result of the Hyde Amendment will be a significant increase in the number of poor women who will die or suffer significant health damage because of an inability to procure necessary medical services.
The legislation before us is the product of an effort to deny to the poor the constitutional right recognized in \textit{Roe v. Wade}, even though the cost may be serious and long-lasting health damage. . . . the state interest in protecting fetal life cannot justify jeopardizing the life or health of the mother. The denial of Medicaid benefits to individuals who meet all the statutory criteria for eligibility, solely because the treatment that is medically necessary involves the exercise of the fundamental right to choose abortion, is a form of discrimination repugnant to the equal protection of the laws guaranteed by the Constitution. The Court's decision today marks a retreat from \textit{Roe v. Wade} and represents a cruel blow to the most powerless members of our society. I dissent.

\textbf{National Federation of Independent Business, Inc. v. Sebelius}  

Chief Justice Roberts delivered . . . an opinion with respect to Part IV.

. . .

I

The second provision of the Affordable Care Act directly challenged here is the Medicaid expansion. Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. See 42 U.S.C. §1396a(a)(10). In order to receive that funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. By 1982 every State had chosen to participate in Medicaid. Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States' total revenue.

The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act requires state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. The Act increases federal funding to cover the States' costs in expanding Medicaid coverage, although States will bear a portion of the costs on their own. If a State does not comply with the Act's new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds. See §1396c.

. . .

IV

A

The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. They claim that Congress is coercing the States
to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the "Federal Government may not compel the States to enact or administer a federal regulatory program." [citing New York v. United States, 505 U.S. 144, 188 (1992)]

There is no doubt that the Act dramatically increases state obligations under Medicaid. The current Medicaid program requires States to cover only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled. There is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage. The States also enjoy considerable flexibility with respect to the coverage levels for parents of needy families. On average States cover only those unemployed parents who make less than 37 percent of the federal poverty level, and only those employed parents who make less than 63 percent of the poverty line.

The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line. § 1396a(a)(10)(A)(i) (VIII). The Act also establishes a new "[e]ssential health benefits" package, which States must provide to all new Medicaid recipients—a level sufficient to satisfy a recipient's obligations under the individual mandate, §§ 1396a(k)(1), 1396u–7(b)(5), 18022(b). The Affordable Care Act provides that the Federal Government will pay 100 percent of the costs of covering these newly eligible individuals through 2016. § 1396d(y)(1). In the following years, the federal payment level gradually decreases, to a minimum of 90 percent. In light of the expansion in coverage mandated by the Act, the Federal Government estimates that its Medicaid spending will increase by approximately $100 billion per year, nearly 40 percent above current levels.

....

"We have repeatedly characterized ... Spending Clause legislation as 'much in the nature of a contract.' The legitimacy of Congress's exercise of the spending power "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. That system "rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" For this reason, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.

That insight has led this Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes. [citing Printz v. United States, 521 U.S. 898, 933 (1997) (striking down federal legislation
compelling state law enforcement officers to perform federally mandated background checks on handgun purchasers); New York, supra, at 174–175 (invalidating provisions of an Act that would compel a State to either take title to nuclear waste or enact particular state waste regulations)] . . .

. . .

. . . In the typical case we look to the States to defend their prerogatives by adopting “the simple expedient of not yielding” to federal blandishments when they do not want to embrace the federal policies as their own. . . . The States are separate and independent sovereigns. Sometimes they have to act like it.

. . .

In this case, the financial “inducement” Congress has chosen is much more than “relatively mild encouragement”—it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State’s Medicaid plan does not comply with the Act’s requirements, the Secretary of Health and Human Services may declare that “further payments will not be made to the State.” 42 U.S.C. § 1396c. A State that opts out of the Affordable Care Act’s expansion in health care coverage thus stands to lose not merely “a relatively small percentage” of its existing Medicaid funding, but all of it. [citing Dole]. Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs. . . . It is easy to see how the Dole Court could conclude that the threatened loss of less than half of one percent of South Dakota’s budget left that State with a “prerogative” to reject Congress’s desired policy, “not merely in theory but in fact.” . . . The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.

Justice GINSBURG claims that Dole is distinguishable because here “Congress has not threatened to withhold funds earmarked for any other program.” But that begs the question: The States contend that the expansion is in reality a new program and that Congress is forcing them to accept it by threatening the funds for the existing Medicaid program. We cannot agree that existing Medicaid and the expansion dictated by the Affordable Care Act are all one program simply because “Congress styled” them as such. If the expansion is not properly viewed as a modification of the existing Medicaid program, Congress’s decision to so title it is irrelevant.

Here, the Government claims that the Medicaid expansion is properly viewed merely as a modification of the existing program because the States agreed that Congress could change the terms of Medicaid when they signed on in the first place. The Government observes that the Social Security Act, which includes the original Medicaid provisions, contains a clause expressly preserving “[t]he right to alter, amend, or repeal any provision” of that statute. 42 U.S.C. § 1304. So it does . . .

The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families
with dependent children. . . . Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.

Indeed, the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program. . . .

. . . As we have explained, "[t]hough Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or ‘retroactive’ conditions." . . . A State could hardly anticipate that Congress’s reservation of the right to "alter" or "amend" the Medicaid program included the power to transform it so dramatically.

. . .

B

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. Section 1396c gives the Secretary of Health and Human Services the authority to do just that. It allows her to withhold all “further [Medicaid] payments . . . to the State” if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion. 42 U.S.C. § 1396c. In light of the Court’s holding, the Secretary cannot apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion. In light of the Court’s holding, the Secretary cannot apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.

That fully remedies the constitutional violation we have identified. The chapter of the United States Code that contains § 1396c includes a severability clause confirming that we need go no further. That clause specifies that “[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.” §1303. Today’s holding does not affect the continued application of § 1396c to the existing Medicaid program. Nor does it affect the Secretary’s ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act.

The question remains whether today’s holding affects other provisions of the Affordable Care Act. . . . The question here is whether Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice
whether to participate in the new Medicaid expansion. Unless it is "evident" that the answer is no, we must leave the rest of the Act intact.

We are confident that Congress would have wanted to preserve the rest of the Act. It is fair to say that Congress assumed that every State would participate in the Medicaid expansion, given that States had no real choice but to do so. The States contend that Congress enacted the rest of the Act with such full participation in mind; they point out that Congress made Medicaid a means for satisfying the mandate and enacted no other plan for providing coverage to many low-income individuals. According to the States, this means that the entire Act must fall.

We disagree. The Court today limits the financial pressure the Secretary may apply to induce States to accept the terms of the Medicaid expansion. As a practical matter, that means States may now choose to reject the expansion; that is the whole point. But that does not mean all or even any will. Some States may indeed decline to participate, either because they are unsure they will be able to afford their share of the new funding obligations, or because they are unwilling to commit the administrative resources necessary to support the expansion. Other States, however, may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive, particularly given the level of federal funding the Act offers at the outset.

We have no way of knowing how many States will accept the terms of the expansion, but we do not believe Congress would have wanted the whole Act to fall, simply because some may choose not to participate. . . . the rest of the Act need not fall in light of our constitutional holding.

***

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.

The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.

The judgment of the Court of Appeals for the Eleventh Circuit is affirmed in part and reversed in part.
It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, ... dissenting in part.

... 

V

Through Medicaid, Congress has offered the States an opportunity to furnish health care to the poor with the aid of federal financing. To receive federal Medicaid funds, States must provide health benefits to specified categories of needy persons, including pregnant women, children, parents, and adults with disabilities. Guaranteed eligibility varies by category: for some it is tied to the federal poverty level (incomes up to 100% or 133%); for others it depends on criteria such as eligibility for designated state or federal assistance programs. The ACA enlarges the population of needy people States must cover to include adults under age 65 with incomes up to 133% of the federal poverty level. The spending power conferred by the Constitution, the Court has never doubted, permits Congress to define the contours of programs financed with federal funds. And to expand coverage, Congress could have recalled the existing legislation, and replaced it with a new law making Medicaid as embrace of the poor as Congress chose.

The question posed by the 2010 Medicaid expansion, then, is essentially this: To cover a notably larger population, must Congress take the repeal/reenact route, or may it achieve the same result by amending existing law? The answer should be that Congress may expand by amendment the classes of needy persons entitled to Medicaid benefits. ...

Medicaid is a prototypical example of federal-state cooperation in serving the Nation's general welfare. Rather than authorizing a federal agency to administer a uniform national health-care system for the poor, Congress offered States the opportunity to tailor Medicaid grants to their particular needs, so long as they remain within bounds set by federal law. In shaping Medicaid, Congress did not endeavor to fix permanently the terms participating states must meet; instead, Congress reserved the "right to alter, amend, or repeal" any provision of the Medicaid Act. States, for their part, agreed to amend their own Medicaid plans consistent with changes from time to time made in the federal law. And from 1965 to the present, States have regularly conformed to Congress' alterations of the Medicaid Act.

The Chief Justice acknowledges that Congress may "condition the receipt of [federal] funds on the States' complying with restrictions on the use of those funds," but nevertheless concludes that the 2010 expansion is unduly coercive. His conclusion rests on three premises, each of them essential to his theory. First, the Medicaid expansion is, in the Chief Justice's view, a new grant program, not an addition to the Medicaid program existing before the ACA's enactment. Congress, the Chief Justice maintains, has threatened States with the loss of funds from an old program in an effort to get them to adopt a new one. Second, the expansion was unforeseeable by the States when they first signed on to Medicaid. Third, the threatened loss
of funding is so large that the States have no real choice but to participate in the Medicaid expansion. The Chief Justice therefore—for the first time ever—finds an exercise of Congress’ spending power unconstitutionally coercive.

Medicaid, as amended by the ACA, however, is not two spending programs; it is a single program with a constant aim—to enable poor persons to receive basic health care when they need it. Given past expansions, plus express statutory warning that Congress may change the requirements participating States must meet, there can be no tenuous claim that the ACA fails for lack of notice. Moreover, States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress’ terms. Future Congresses are not bound by their predecessors’ dispositions; they have authority to spend federal revenue as they see fit. The Federal Government, therefore, is not, as the Chief Justice charges, threatening States with the loss of “existing” funds from one spending program in order to induce them to opt into another program. Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation.

A majority of the Court, however, buys the argument that prospective withholding of funds formerly available exceeds Congress’ spending power. Given that holding, I entirely agree with the Chief Justice as to the appropriate remedy. It is to bar the withholding found impermissible—not, as the joint dissenters would have it, to scrap the expansion altogether. . . . Because the Chief Justice finds the withholding—not the granting—of federal funds incompatible with the Spending Clause, Congress’ extension of Medicaid remains available to any State that affirms its willingness to participate.

A

Since 1965, Congress has amended the Medicaid program on more than 50 occasions, sometimes quite sizably. Most relevant here, between 1988 and 1990, Congress required participating States to include among their beneficiaries pregnant women with family incomes up to 133% of the federal poverty level, children up to age 6 at the same income levels, and children ages 6 to 18 with family incomes up to 100% of the poverty level. These amendments added millions to the Medicaid-eligible population. . . .

Compared to past alterations, the ACA is notable for the extent to which the Federal Government will pick up the tab. Medicaid’s 2010 expansion is financed largely by federal outlays. In 2014, federal funds will cover 100% of the costs for newly eligible beneficiaries; that rate will gradually decrease before settling at 90% in 2020. By comparison, federal contributions toward the care of beneficiaries eligible pre-ACA range from 50% to 83%, and averaged 57% between 2005 and 2008.

Nor will the expansion exorbitantly increase state Medicaid spending. The Congressional Budget Office (CBO) projects that States will spend 0.8% more than they
would have, absent the ACA. Whatever the increase in state obligations after the ACA, it will pale in comparison to the increase in federal funding.

Finally, any fair appraisal of Medicaid would require acknowledgment of the considerable autonomy States enjoy under the Act. Far from “conscript[ing] state agencies into the national bureaucratic army,” Medicaid “is designed to advance cooperative federalism.” Subject to its basic requirements, the Medicaid Act empowers States to “select dramatically different levels of funding and coverage, alter and experiment with different financing and delivery modes, and opt to cover (or not to cover) a range of particular procedures and therapies. States have leveraged this policy discretion to generate a myriad of dramatically different Medicaid programs over the past several decades.” The ACA does not jettison this approach. States, as first-line administrators, will continue to guide the distribution of substantial resources among their needy populations.

The alternative to conditional federal spending, it bears emphasis, is not state autonomy but state marginalization. In 1965, Congress elected to nationalize health coverage for seniors through Medicare. It could similarly have established Medicaid as an exclusively federal program. Instead, Congress gave the States the opportunity to partner in the program’s administration and development. Absent from the nationalized model, of course, is the state-level policy discretion and experimentation that is Medicaid’s hallmark; undoubtedly the interests of federalism are better served when States retain a meaningful role in the implementation of a program of such importance.

B

The Spending Clause authorizes Congress “to pay the Debts and provide for the . . . general Welfare of the United States.” To ensure that federal funds granted to the States are spent “to provide for the . . . general Welfare” in the manner Congress intended, Congress must of course have authority to impose limitations on the States’ use of the federal dollars. This Court, time and again, has respected Congress’ prescription of spending conditions, and has required States to abide by them. In particular, we have recognized Congress’ prerogative to condition a State’s receipt of Medicaid funding on compliance with the terms Congress set for participation in the program.

Congress’ authority to condition the use of federal funds is not confined to spending programs as first launched. The legislature may, and often does, amend the law, imposing new conditions grant recipients henceforth must meet in order to continue receiving funds.

Yes, there are federalism-based limits on the use of Congress’ conditional spending power. In the leading decision in this area, South Dakota v. Dole, the Court identified four criteria. The conditions placed on federal grants to States must (a) promote the “general welfare,” (b) “unambiguously” inform States what is demanded of them, (c) be germane “to the federal interest in particular national projects or programs,”
and (d) not “induce the States to engage in activities that would themselves be unconstitutional.”

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 crossed the indistinct line between temptation and coercion.

The ACA, in contrast, relates solely to the federally funded Medicaid program; if States choose not to comply, Congress has not threatened to withhold funds earmarked for any other program. Nor does the ACA use Medicaid funding to induce States to take action Congress itself could not undertake. The Federal Government undoubtedly could operate its own health-care program for poor persons, just as it operates Medicare for seniors’ health care.

... Congress, aiming to assist the needy, has appropriated federal money to subsidize state health-insurance programs that meet federal standards. The principal standard the ACA sets is that the state program cover adults earning no more than 133% of the federal poverty line. Enforcing that prescription ensures that federal funds will be spent on health care for the poor in furtherance of Congress’ present perception of the general welfare.

... When future Spending Clause challenges arrive, as they likely will in the wake of today’s decision, how will litigants and judges assess whether “a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds”? Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State’s budget at stake? And which State’s—or States’—budget is determinative: the lead plaintiff, all challenging States (26 in this case, many with quite different fiscal situations), or some national median?

At bottom, my colleagues’ position is that the States’ reliance on federal funds limits Congress’ authority to alter its spending programs. This gets things backwards: Congress, not the States, is tasked with spending federal money in service of the general welfare. And each successive Congress is empowered to appropriate funds as it sees fit. When the 110th Congress reached a conclusion about Medicaid funds that differed from its predecessors’ view, it abridged no State’s right to “existing,” or “pre-existing,” funds. For, in fact, there are no such funds. There is only money States anticipate receiving from future Congresses.

D

Congress has delegated to the Secretary of Health and Human Services the authority to withhold, in whole or in part, federal Medicaid funds from States that fail to comply with the Medicaid Act as originally composed and as subsequently
amended. The Chief Justice, however, holds that the Constitution precludes the Secretary from withholding “existing” Medicaid funds based on States’ refusal to comply with the expanded Medicaid program. For the foregoing reasons, I disagree that any such withholding would violate the Spending Clause.

But in view of the Chief Justice’s disposition, I agree with him that the Medicaid Act’s severability clause determines the appropriate remedy. That clause provides that “[i]f any provision of [the Medicaid Act], or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.”

The Court does not strike down any provision of the ACA. It prohibits only the “application” of the Secretary’s authority to withhold Medicaid funds from States that decline to conform their Medicaid plans to the ACA’s requirements. Thus the ACA’s authorization of funds to finance the expansion remains intact, and the Secretary’s authority to withhold funds for reasons other than non-compliance with the expansion remains unaffected.

Notes and Questions

1. Dole’s four-part test. In Dole, the Court explained its method of analyzing Congress’s exercise of Spending Clause power when it imposes conditions on federal funding. This is called the “Dole test.” Consider whether it is challenging for Congress to satisfy this test. The first prong—that an exercise of the spending power itself must be for the general welfare, and not for a single state or favored group—is straightforward, especially because courts defer to Congress’s judgment of what counts as spending for the general welfare. This threshold test for valid exercise of the spending power addresses the purpose of the legislation that authorizes spending federal monies, not conditions on receiving the monies.

The second prong—that the condition imposed on receiving federal monies be clear and unambiguous—is fairly straightforward, in that recipients of federal funds should not have to guess at what they must do to qualify for funding. Yet the second prong does not address the issue of temporal mismatch in long-standing federal spending programs, such as Medicaid, which states come to rely on through decades of federal funding. When a new federal condition is imposed, states may have a hard time turning it down, but that does not mean the condition is ambiguous in the moment it is created. This question was at issue in NFIB v. Sebelius. In addition, this prong has been employed successfully by states challenging federal legislation that does not (in the state’s view) provide sufficient funding for the amount of work to be performed; for example, in the context of federal rules structuring education for children with special needs. See, e.g., Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006).
The third prong raises more questions than have been answered. The conditions on receipt of federal grants must be related “to the federal interest in particular national projects or programs.” What is the national project or program in Dole? It cannot be the requirement that states have minimum drinking age laws, because that is the condition on funding. Rather, the national program must be the purpose for which the money is spent; in Dole that was the allocation of federal funds to states to build and maintain highways, and the National Minimum Drinking Age Amendment added the condition regarding age for legally drinking alcoholic beverages. How exactly is the drinking age related to building and maintaining safe highways? Justice O’Connor’s dissent argued that the majority had misapplied “germaneness.” Her dissenting analysis is the most thorough consideration of the third Dole prong in a Supreme Court opinion to date. The third prong was a factor in the plurality’s Medicaid analysis in NFIB v. Sebelius, but not thoroughly explored.

The fourth prong—that the condition cannot require anything the Constitution forbids—is the focus of Rust v. Sullivan and USAID v. Alliance for Open Society, below. Note that the condition in Dole and in NFIB applied to the states, whereas the condition in Rust and USAID applies to private entities. How does that difference affect the analysis? Recall that the federal condition in Dole required the states to enact a new law (minimum drinking age). Thus, the question to ask is whether a state has authority to enact minimum drinking age legislation. Did the state’s police power include the power to limit the age for the purchase or consumption of alcoholic beverages? What if Congress sought to reduce drunk driving in all age groups by withholding 5% of federal highway funding from states unless they had legislation in effect forbidding the purchase or consumption of alcoholic beverages entirely, regardless of age, in the state? South Dakota already had legislation setting a minimum drinking age but did not want to raise its minimum age, presumably because it was politically unpopular. But political opposition is not a constitutional bar. The state had to choose between the federal money and the voters. (Most states choose the money.)

2. Broad reach of federal spending for health. Congress has relied on the spending power to create the most significant health care programs in the United States, including Medicare, Medicaid, the Veterans’ Health Administration, and other federal grants that cover key public health projects, such as Title X (which pays for family planning for low-income individuals; see Rust v. Sullivan, below). Medicare and Medicaid offer examples of the difference between pure federal spending and conditional federal spending.

Medicare is the federal program that creates true social insurance for the nation’s elderly population—everyone who has paid Social Security taxes for 40 quarters (a total of 10 years) is enrolled automatically at age 65. 42 U.S.C. §§ 1395–1395lll. Medicare has four “parts,” which function as separate health insurance benefits: Part A is hospital and some institutional coverage and is the provision into which automatic enrollment occurs at age 65. Part B is physician and other health care professional
outpatient coverage, and it requires active enrollment with payment of low premiums. Part D is a prescription drug benefit that also requires enrollment and payment of premiums. Part C is an alternative option for enrollees that delivers Parts A and B and sometimes D through private managed care organizations (Medicare Advantage plans) that contract with HHS to cover people age 65 and older. Medicare is a pure federal spending program in that the federal government is spending its money without using the states as intermediaries; rather, it pays health care providers through private contractors. The Dole test is not in play, unless a health care provider were to claim that a Medicare provision somehow constitutes an unconstitutional condition on federal spending. For more information on Medicare, see Medicare.gov; the Medicare Payment Advisory Commission, http://www.medicap.gov/; and Kaiser Family Foundation fact sheets, https://www.kff.org/medicare/.

Medicaid is a safety net program for the nation’s poor, discussed with varying degrees of specificity (and accuracy) in NFIB, which provides generous federal funds to states that agree to abide by Medicaid’s rules for mainstreaming the poor into medical care. 42 U.S.C. §§1396-1-1396w-5. Medicaid for most of its history covered only the “deserving poor” such as children, the disabled, and the elderly; the ACA expanded eligibility to anyone earning up to 138% of the federal poverty level (an index issued every year by HHS, see https://aspe.hhs.gov/poverty-guidelines). The Court often describes Medicaid as a classic cooperative federalism program, because the federal government offers the states money and the states agree to implement federal policy when accepting that money, which engages the second prong of the Dole test.

If a state does not accept the federal conditions on Medicaid funds, then the Medicaid program would not exist in that state. This is why the ACA’s Medicaid expansion has not occurred in the states that have not agreed to take federal money to expand eligibility to childless, nonelderly adults. In contrast, consider the structure of the ACA’s health insurance exchanges, which facilitate purchase of individual and small group health insurance plans. If a state did not use federal funds to create its own exchange (or “marketplace”) under the ACA, then the federal government runs the exchange in its place (a variant of cooperative federalism known as “backstop” federalism). For a deep look at the federalism in the ACA and beyond, see Abbe R. Gluck & Nicole Huberfeld, What Is Federalism in Healthcare For?, 70 Stan. L. Rev. 1689 (2018). For more basic information on Medicaid, see Medicaid.gov; the Medicaid and CHIP Payment and Access Commission, https://www.macpac.gov/; and Kaiser Family Foundation fact sheets, https://www.kff.org/interactive/medicaid-state-fact-sheets/.

3. Federal funding before South Dakota v. Dole. Harris v. McRae predates Dole by a few years, but if the Dole test were applied, what do you imagine the outcome would have been? Even though federal law prohibits federal funding for certain Medicaid services, states may provide them if funded entirely with state dollars. In this case, some states pay for Medicaid beneficiaries’ reproductive care, regardless of the Hyde Amendment (but a majority do not). Justice Marshall’s dissent was the only opinion
to account for the fact that—by definition—women enrolled in the Medicaid program cannot afford to pay for any medical care. Notably, as part of a legislative compromise, the ACA extended the funding limitation of the Hyde Amendment to private health insurance purchased with federal tax credits.

4. NFIB, coercion, and the Dole test. In *Dole*, the Court predicted that circumstances could arise in which a condition “might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” Scholars long considered this idea to be *dictum* because coercion had not been used to strike down any condition on federal spending—until *NFIB v. Sebelius*, which effectively made coercion the *Dole* test’s fifth prong. The *NFIB v. Sebelius* decision did not examine the *Dole* test in a straightforward fashion, yet it was the meat of the Medicaid expansion decision. The most prominent points of analysis appear to be the third prong (germaneness) and the new fifth prong, coercion.

As to germaneness, can you discern any principle in Chief Justice Roberts’ opinion that distinguishes an acceptable amendment to an existing federal program from the creation of a new federal program? What makes this Medicaid eligibility expansion different in kind rather than degree, if anything, such that it was deemed a “new” and constitutionally suspect Medicaid program? Justice Ginsburg noted in her dissenting opinion that the Medicaid statute had been amended perhaps 50 times since its enactment in 1965, with many amendments adding new categories of eligibility, and the states did not protest. What made the ACA amendment to Medicaid different?

As to the fifth prong, the federal government was not withholding funds but instead would pay 100% of the cost of enrolling newly eligible Medicaid beneficiaries (decreasing to 90% by 2020). How could total coverage be considered coercive? The Court found that the loss of 5% of highway funding was not coercive in *Dole*, but the possible loss of 100% of federal Medicaid funding was coercive in *NFIB*. The Court focused on a possible penalty listed in the Medicaid Act for a state’s noncompliance with a federal requirement—that the state could lose all of its Medicaid funding for noncompliance, but that penalty has never been exercised and is extremely unlikely to ever be used. Consider why HHS is reluctant to penalize a state by withholding all of its Medicaid funding; who would be harmed most by a total withdrawal of federal funding?

None of the justices supporting the coercion doctrine articulated a standard to determine what constitutes an unconstitutionally coercive condition on federal funding. It is somewhere between 5% and 100% loss of federal funding, which leaves Congress with a wide range of possible statutory problems. But the amount of funding offered must be important, too. For example, if Congress offered states $100 to fund a new cooperative federalism program, any state could easily turn down that offer without being “coerced.” What, then, is the Court’s determining factor? Is it any of the questions posed by Justice Ginsburg’s dissent? For a critique of the Court’s Medicaid analysis, see Nicole Huberfeld, Elizabeth Weeks & Kevin
Rust v. Sullivan
500 U.S. 173 (1991)

Chief Justice Rehnquist delivered the opinion of the Court.

...In 1970, Congress enacted Title X of the Public Health Service Act (Act), as amended, 42 U.S.C. §§ 300 to 300a-6, which provides federal funding for family-planning services. The Act authorizes the Secretary to “make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services.” § 300(a). Grants and contracts under Title X must “be made in accordance with such regulations as the Secretary may promulgate.” § 300a-4(a). Section 1008 of the Act, however, provides that “none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” 42 U.S.C. §§ 300a-6. ...In 1988, the Secretary [of Health and Human Services] promulgated new regulations designed to provide “clear and operational guidance” to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning.” 53 Fed. Reg. 2923–2924 (1988). The regulations clarify, through the definition of the term “family planning,” that Congress intended Title X funds “to be used only to support preventive family planning services.” 42 CFR § 59.8(a) (1) (1989). ... Title X projects must refer every pregnant client “for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child.” Id. ... The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request.

Second, the regulations broadly prohibit a Title X project from engaging in activities that “encourage, promote or advocate abortion as a method of family planning.”

Third, the regulations require that Title X projects be organized so that they are “physically and financially separate” from prohibited abortion activities....

Petitioners are Title X grantees and doctors who supervise Title X funds suing on behalf of themselves and their patients. Respondent is the Secretary of HHS....
[The Court first found that the text and legislative history of Section 1008 of the Act, prohibiting funding abortion as a method of family planning, was ambiguous and that HHS's interpretation of that section as forbidding funding for counseling, referral, and advocacy for abortion was reasonable.—Ed.]

... Petitioners contend that the regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit "all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term."...

There is no question but that the statutory prohibition contained in § 1008 is constitutional. In 

*Maher v. Roe*, 432 U.S. 464 (1977), we upheld a state welfare regulation under which Medicaid recipients received payments for services related to childbirth, but not for nontherapeutic abortions. The Court rejected the claim that this unequal subsidization worked a violation of the Constitution. We held that the government may "make a value judgment favoring childbirth over abortion, and... implement that judgment by the allocation of public funds." Here the Government is exercising the authority it possesses under *Maher* and *Harris v. McRae*, 448 U.S. 297 (1980), to subsidize family planning services which will lead to conception and childbirth, and declining to "promote or encourage abortion." The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."...

... This is not a case of the Government "suppressing a dangerous idea," but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope.

... The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. ... The regulations govern the scope of the Title X project's activities, and leave the grantee unfettered in its other activities. The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.

In contrast, our "unconstitutional conditions" cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient
from engaging in the protected conduct outside the scope of the federally funded program.

... The [Title X grantee] employees remain free ... to pursue abortion-related activities when they are not acting under the auspices of the Title X project. The regulations, which govern solely the scope of the Title X project’s activities, do not in any way restrict the activities of those persons acting as private individuals. The employees’ freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.

... We turn now to petitioners’ argument that the regulations violate a woman’s Fifth Amendment right to choose whether to terminate her pregnancy. We recently reaffirmed the long-recognized principle that “the Due Process Clause generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.” Webster, 492 U.S. at 507, quoting DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989). The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected... 

... The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X.

... Petitioners also argue that by impermissibly infringing on the doctor-patient relationship and depriving a Title X client of information concerning abortion as a method of family planning, the regulations violate a woman’s Fifth Amendment right to medical self-determination and to make informed medical decisions free of government-imposed harm...

In Akron [Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983)], we invalidated a city ordinance requiring all physicians to make specified statements to the patient prior to performing an abortion in order to ensure that the woman’s consent was “truly informed.” Similarly, in Thornburgh [Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986),] we struck down a state statute mandating that a list of agencies offering alternatives to abortion and a description of fetal development be provided to every woman considering terminating her pregnancy through an abortion. Critical to our decisions in Akron and Thornburgh to invalidate a governmental intrusion into the patient-doctor dialogue was the fact that the laws in both cases required all doctors within their respective jurisdictions to provide all pregnant patients contemplating an abortion a litany of
information, regardless of whether the patient sought the information or whether
the doctor thought the information necessary to the patient’s decision. Under the
Secretary’s regulations, however, a doctor’s ability to provide, and a woman’s right
to receive, information concerning abortion and abortion-related services outside
the context of the Title X project remains unfettered. It would undoubtedly be easi-
er for a woman seeking an abortion if she could receive information about abortion
from a Title X project, but the Constitution does not require that the Government
distort the scope of its mandated program in order to provide that information.

Petitioners contend, however, that most Title X clients are effectively precluded
by indigency and poverty from seeing a health-care provider who will provide
abortion-related services. But once again, even these Title X clients are in no worse
position than if Congress had never enacted Title X. “The financial constraints that
restrict an indigent woman’s ability to enjoy the full range of constitutionally pro-
tected freedom of choice are the product not of governmental restrictions on access
to abortion, but rather of her indigency.” McRae.

The Secretary’s regulations are a permissible construction of Title X and do not
violate either the First or Fifth Amendments to the Constitution.

United States Agency for International Development v. Alliance
for Open Society International, Inc.
570 U.S. 205 (2013)

Chief Justice Roberts delivered the opinion of the Court.

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act
of 2003 (Leadership Act), 22 U.S.C. §7601 et seq., outlined a comprehensive strat-
ey to combat the spread of HIV/AIDS around the world. As part of that strategy,
Congress authorized the appropriation of billions of dollars to fund efforts by non-
governmental organizations to assist in the fight. The Act imposes two related con-
ditions on that funding: First, no funds made available by the Act “may be used to
promote or advocate the legalization or practice of prostitution or sex trafficking.”
§7631(e). And second, no funds may be used by an organization “that does not
have a policy explicitly opposing prostitution and sex trafficking.” §7631(f). This
case concerns the second of these conditions, referred to as the Policy Require-
ment. The question is whether that funding condition violates a recipient’s First
Amendment rights.

... Congress found that the “sex industry, the trafficking of individuals into such
industry, and sexual violence” were factors in the spread of the HIV/AIDS epidemic,
and determined that “it should be the policy of the United States to eradicate” prosti-
tution and “other sexual victimization.”
The Department of Health and Human Services (HHS) and the United States Agency for International Development (USAID) are the federal agencies primarily responsible for overseeing implementation of the Leadership Act. To enforce the Policy Requirement, the agencies have directed that the recipient of any funding under the Act agree in the award document that it is opposed to “prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.” 45 CFR § 89.1(b) (2012). . . .

Respondents are a group of domestic organizations engaged in combating HIV/AIDS overseas. . . . Respondents fear that adopting a policy explicitly opposing prostitution may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS. They are also concerned that the Policy Requirement may require them to censor their privately funded discussions in publications, at conferences, and in other forums about how best to prevent the spread of HIV/AIDS among prostitutes.

. . .

III

The Policy Requirement mandates that recipients of Leadership Act funds explicitly agree with the Government’s policy to oppose prostitution and sex trafficking. It is, however, a basic First Amendment principle that “freedom of speech prohibits the government from telling people what they must say.” Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 61 (2006). . . . Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.

As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient’s exercise of its First Amendment rights. See, e.g., United States v. American Library Assn., Inc., 539 U. S. 194, 212 (2003) (plurality opinion) (rejecting a claim by public libraries that conditioning funds for Internet access on the libraries’ installing filtering software violated their First Amendment rights, explaining that “[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance”); . . .

At the same time, however, we have held that the Government “may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” Forum for Academic and Institutional Rights, supra, at 59 (quoting American Library Assn., supra, at 210).

. . . In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself. The line is hardly clear, in part because the definition of a particular
program can always be manipulated to subsume the challenged condition. We have held, however, that “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.” Legal Services Corporation v. Velázquez, 531 U.S. 533, 547 (2001).

... In Rust, ... [w]e explained that Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem. In Title X, Congress had defined the federal program to encourage only particular family planning methods. The challenged regulations were simply “designed to ensure that the limits of the federal program are observed,” and “that public funds [are] spent for the purposes for which they were authorized.”

In making this determination, the Court stressed that “Title X expressly distinguishes between a Title X grantee and a Title X project.” The regulations governed only the scope of the grantee’s Title X projects, leaving it “unfettered in its other activities.” “The Title X grantee can continue to ... engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.” Because the regulations did not “prohibit the recipient from engaging in the protected conduct outside the scope of the federally funded program,” they did not run afoul of the First Amendment.

As noted, the distinction drawn in these cases—between conditions that define the federal program and those that reach outside it—is not always self-evident... Here, however, we are confident that the Policy Requirement falls on the unconstitutional side of the line.

The dissent views the Requirement as simply a selection criterion by which the Government identifies organizations “who believe in its ideas to carry them to fruition.” As an initial matter, whatever purpose the Policy Requirement serves in selecting funding recipients, its effects go beyond selection. The Policy Requirement is an ongoing condition on recipients’ speech and activities, a ground for terminating a grant after selection is complete. In any event, as the Government acknowledges, it is not simply seeking organizations that oppose prostitution. Rather, it explains, “Congress has expressed its purpose ‘to eradicate’ prostitution and sex trafficking, and it wants recipients to adopt a similar stance.” This case is not about the Government’s ability to enlist the assistance of those with whom it already agrees. It is about compelling a grant recipient to adopt a particular belief as a condition of funding.

By demanding that funding recipients adopt—as their own—the Government’s view on an issue of public concern, the condition by its very nature affects “protected conduct outside the scope of the federally funded program.” A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining
the limits of the federally funded program to defining the recipient. See [Rust, 500 U. S., at 197] ("our 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program").

The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained.

Justice Scalia dissented, joined by Justice Thomas. Justice Kagan took no part in consideration or decision of this case.

**Notes and Questions**

5. **Private entities versus states as grant recipients.** Unlike the programs at issue in *Dole* and *NFIB*, which placed conditions on federal funds offered to states, grants to private entities do not raise federalism concerns because no state is involved. Instead, Congress, or a federal agency acting pursuant to a federal statute, imposes a spending condition directly on private parties that seek the federal funding. For example, the National Institutes of Health requires recipients of its grants for clinical research to post information about their studies on a federal website, www.clinicaltrials.gov. Some conditions on federal funding, however, are more demanding. *Rust v. Sullivan* and *USAID v. Alliance for Open Society International* offer examples with different outcomes. Which of the four *Dole* factors are most important in these two cases? Do you think the Court was more or less protective of private entities than it was of states accepting federal funding? Are the cases consistent on this point? What exactly constitutes an “independent constitutional bar?”

Recall that the *Dole* test's second prong requires that conditions on funding be unambiguous. How would you interpret the meaning of the prohibition against using federal funds in “programs where abortion is a method of family planning” in Title X? In *Rust*, the Court was deferential to HHS’s interpretation, even though it reversed a long-standing policy permitting family planning programs to provide neutral, non-directive counseling that included the subject of abortion. That policy was reversed and reinstated by subsequent administrations and will be subject to repeated reversals as long as the Title X statute remains open to interpretation. Are the conditions on this federal spending clear and unambiguous if their interpretation can fluctuate so wildly?

6. **Unconstitutional conditions.** The Court accepted the federal government’s use of funding to promote the government’s point of view on abortion in *Rust* but not its point of view on prostitution in *USAID*. Are you persuaded by the Court’s analysis and the resulting difference in its conclusions?
In arguing the fourth Dole test prong, the challengers in Rust maintained that the new Title X regulations violated the First Amendment's protection of freedom of speech (both physicians' freedom to discuss abortion with their patients and patients' freedom to hear about abortion) and the Fifth Amendment's due process protection of patients' liberty to make reproductive decisions. The majority of justices, however, viewed the Title X condition as a valid congressional decision to fund one activity but not another. Individuals working within a Title X funded program could discuss only what the program paid for; elsewhere, they remained free to discuss any reproductive service.

Another, rare, example of the Court finding a condition unconstitutional is Legal Services Corporation v. Velasquez, 531 U.S. 533 (2001). Congress created the Legal Services Corporation (LSC) to distribute grants to hundreds of local organizations to provide legal services to the indigent, including litigation concerning eligibility for welfare benefits but not criminal defense services. Legal Services Corporation Act, 42 U.S.C. §§ 2996 et seq. Congress enacted annual appropriations bills that prohibited LSC from funding any organization "that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." Omnibus Consolidated Rescissions and Appropriations Act of 1996 (1996 Act), § 504(a) (16) (emphasis added). The Supreme Court, in a five-to-four decision, struck down the italicized language. The dissenting justices would have followed Rust in concluding that the condition did not discriminate on the basis of viewpoint but merely ensured that the limits of the program's scope were observed by refusing to subsidize a certain class of litigation. Unlike the condition at issue in Rust, however, the LSC condition applied to all of the grantees' activities, including those paid for by nonfederal sources.

Justice Kennedy's opinion for the Court reasoned that the limitation on LSC grants "forecloses advice or legal assistance to question the validity of statutes under the Constitution" or federal statutes. The Court emphasized the primary mission of the judiciary to interpret the law under the Constitution and the importance to the judiciary of an "informed, independent bar." Prohibiting lawyers from even raising constitutional questions in court was viewed as threatening the judicial function—in other words, a violation of the principle of separation of powers. Welfare recipients could not be expected to obtain private attorneys, so the LSC-funded legal services attorneys would be the only ones likely to bring constitutional questions before a court:

The effect of the restriction . . . is to prohibit advice or argumentation that existing welfare laws are unconstitutional or unlawful. Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.
The attempted restriction is designed to insulate the Government’s interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner.

531 U.S. at 547, 548.

Recall how the Court characterized the physician-patient relationship in Rust. Physicians, nurses, and counselors in Title X family planning programs often are full-time employees who do not see patients otherwise, and for many patients the program is their primary source of medical care, at least for reproductive health. Should either fact matter to the rights or responsibilities of providers and patients within the program? Compare the Court’s characterization of the role of LSC attorneys with its characterization of physicians in Title X family planning programs. Is one more crucial to its low-income clientele than the other? Can Rust and Velazquez be reconciled?