Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule

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I. Introduction and Background

The Supreme Court's recent decision in *NFIB v. Sebelius*[1]—the 26 states' constitutional challenge not only to the individual mandate but, as is the focus of this article, to the expanded Medicaid mandate contained in the Patient Protection and Affordable Care Act[2]—reinforces the somewhat remarkable point that, after over 200 years of American constitutionalism, we are still struggling to define federalism's boundaries and, more generally, understand the way or ways to think about relationships between the federal government and the states. *NFIB* went a long way toward clarifying how the federal-state relationship should be conceptualized and toward establishing that the power of the federal government under the Spending Clause is circumscribed in a judicially enforceable manner when that government substantially and unforeseeably modifies the terms and conditions of a major preexisting and ongoing spending program.

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[1] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) [hereinafter NFIB].

[2] Pub. L. No. 111-148, 124 Stat. 119 (2010).

Medicaid was enacted in 1965 under the Social Security Act to provide medical assistance for qualified low-income persons.[3] "Historically, medical support programs have tended to follow and to be built upon government's income maintenance initiatives."[4] That was the case with Medicaid and Medicare, both of which "built upon pre-existing programs of income support and, categorically, relied upon the definition of eligibility in those foundational income maintenance entitlements"—Social Security for Medicare and Aid to Families with Dependent Children (later Temporary Assistance for Needy Families) for Medicaid.[5] States have had flexibility to set income standards under TANF (and therefore for Medicaid);[6] not all persons (adults) with poverty-level incomes must be eligible for TANF or Medicaid.[7] As Chief Justice John Roberts noted in *NFIB*, "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."[8]

Under Medicaid, the nation's largest cooperative federalism program, federal dollars match qualified state expenditures based on a formula. That formula is open-ended in the sense that all qualified and approved state expenditures draw down federal matching funds without cap or limitation.

[3] See Robert Stevens & Rosemary Stevens, Welfare Medicine in America: A Case Study of Medicaid (1974) (describing early experience under Medicaid).

[4] Clark C. Havighurst et al., Strategies in Underwriting the Costs of Catastrophic Disease, 40 Law & Contemp. Probs. 122, 183 (1976).

[5] James F. Blumstein & Frank A. Sloan, Health Care Reform through Medicaid Managed Care: Tennessee (TennCare) as a Case Study and a Paradigm, 53 Vand. L. Rev. 125, 136–37 & n.32 (2000).

[6] See NFIB, 132 S. Ct. at 2601 (Roberts, C.J.) (noting that traditional Medicaid required coverage of "only certain discrete categories of needy individuals," that there was "no mandatory coverage for most childless adults," and that states "also enjoy considerable flexibility with respect to the coverage levels for parents of needy families").

[7] *Id*. at 2566 (Ginsburg, J.) (identifying notable subgroups singled out for mandatory coverage by previous statutory amendments to Medicaid: pregnant women and children aged 1–6 with family incomes up to 133 percent of poverty and children aged 6–18 with family incomes up to 100 percent of poverty). For a general discussion, see Nicole Huberfeld, Federalizing Medicaid, 14 U. Pa. J. Const. L. 431 (2011).

[8] NFIB, 132 S. Ct. at 2601 (Roberts, C.J.).

Traditionally, the federal government has set floors and ceilings on such matters as beneficiary eligibility and available services. States have had "the authority to add beneficiaries . . . and to add services, within program constraints imposed by the federal government."[9] All states have chosen to sign up for Medicaid,[10] which is a constitutionally protected voluntary choice by states[11] that must be made "voluntarily and knowingly."[12]

Typically, Medicaid constitutes one of a state's two most expensive programs—the other being K–12 education. In Tennessee, for example, the Medicaid budget nearly tripled from 1987 to 1993, expanding to over 25 percent of the state's budget and precipitating Tennessee's TennCare program in 1994 (a Medicaid managed-care program).[13] Nationwide, the federal government has estimated that it would spend about $3.3 trillion "between 2010 and 2019 in order to cover the costs of *pre*-expansion Medicaid."[14] For the average state, "Medicaid spending accounts for over 20 percent of [its] total budget, with federal funds covering 50 to 83 percent of those costs."[15]

The Affordable Care Act aimed to cover over 30 million previously medically uninsured persons. About half of these additional insureds were projected to come from the expanded Medicaid mandate imposed on states by the ACA: Effective January 1, 2014, the ACA mandated that states cover under Medicaid all persons under the age of 65 with incomes under 133 percent of the poverty line or take steps affirmatively to opt out of Medicaid entirely. For a state to retain its traditional Medicaid program, it must comply with the expanded coverage mandate of the ACA.[16] That is, state noncompliance with the ACA's expanded Medicaid mandate meant that states would lose

[9] Blumstein & Sloan, *supra* note 5, at 138 & n.38.

[10] *Id*. at n.37.

[11] Printz v. United States, 52 U.S. 898, 925 (1997).

[12] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[13] Blumstein & Sloan, *supra* note 5, at 150 & n.82. The portion of Tennessee's budget devoted to TennCare continued to rise, to over 30 percent when Gov. Philip Bredesen (D) took office in 2003. That triggered a major reform effort designed to bring TennCare expenditures back to the range of 26 percent of the state budget.

[14] NFIB, 132 S. Ct. at 2604 (Roberts, C.J.) (emphasis in original).

[15] *Id*.

[16] *Id*. at 2601.

their eligibility to participate in Medicaid in its entirety, effective January 1, 2014.

The result of the ACA's expanded Medicaid mandate is to force state action. A state must either act to accept the expanded Medicaid mandate and thereby remain eligible to participate in a pre-existing ongoing federal-state contractual relationship, or it may discontinue participation in traditional Medicaid by completely terminating its contractual and statutory obligations. If a state does not act as of January 1, 2014, then its ongoing obligations to Medicaid beneficiaries remain under state law, but those expenditures no longer qualify for federal matching funds. As a consequence, inaction brings about a true fiscal nightmare for states—a continued obligation to provide and pay for Medicaid services but without federal support and therefore entirely at the state's expense.

In short, states cannot remain passive in the face of the ACA's expanded Medicaid mandate without incurring huge new financial liabilities. In this sense, the paradigmatic default rule for cooperative federalism programs—that the absence of state action means no federal money but also no federally derived or imposed conditions or obligations—is quite foreign to an ongoing and preexisting program such as Medicaid. In this context, a state is not declining to apply for a federal grant, a form of inaction that triggers no federal support but also no state obligations. State inaction is not a realistic option in response to the ACA. The paradigmatic default rule—the consequences of state inaction—is turned on its head.

The matching terms of the ACA Medicaid mandate are favorable to states—90 percent of qualified expenditures for newly eligible beneficiaries, 50 percent for administrative costs—but the states could not evaluate the new terms independently, determining whether to accept or reject those purportedly favorable matching terms on their own. The new ACA terms were highly leveraged—linked to the retention of the states' preexisting Medicaid programs. Failure of states to accept the new ACA terms resulted in loss of all federal Medicaid matching funds, including matching funds for their preexisting Medicaid programs. The default of state inaction, therefore, was very different from situations in which a state simply does not apply for federal funds; in such circumstances, a state through inaction loses an opportunity for federal matching (loss of a carrot) but confronts no other adverse consequences compared to

the *status quo ante*. Under the highly leveraged ACA mandate, states through inaction face more of a stick—loss of all federal matching funds for preexisting and ongoing traditional Medicaid programs under which states developed reliance interests having "developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid."[17]

II. Cooperative Federalism Programs: The Contract Model

A. The Necessary Voluntariness of State Participation

For over 30 years, the Supreme Court has analyzed federal cooperative federalism spending programs through the lens of contract law,[18] which the Court has described as an "analogy."[19] The Court in *NFIB* reaffirmed the applicability of the contract model as the appropriate way of conceptualizing federal-state relationships under federal cooperative federalism programs.[20]

Contract law involves legal rules governing voluntary, consensual conduct among parties. Because states and local governments must, as a constitutional matter, enter into these federal-state spending relationships voluntarily and at their own initiative, contract law provides an apropos paradigm for thinking about cooperative federalism programs.

The contract framework provides a tool for protecting states' constitutionally based ability to refrain from participating in a federal state spending program and for governing the ground rules

[17] *Id*. at 2604.

[18] Pennhurst, 451 U.S. at 17 (Spending Clause legislation involving cooperative federalism is "much in the nature of a contract; in return for federal funds, the States agree to comply with federally imposed conditions").

[19] Barnes v. Gorman, 536 U.S. 181, 186 (2002). Not all contract law rules apply to Spending Clause legislation. *Id*. at 188 n.2.

[20] NFIB, 132 S. Ct. at 2602 (Roberts, C.J.) ("We have repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a *contract*.'" (emphasis in original) (internal quote citation omitted)); *id*. at 2659 (joint dissent of Scalia, Kennedy, Thomas, and Alito, J.J.) [hereinafter joint opinion] ("[T]he federal-state relationship is in the nature of a contractual relationship"). Cf. Brief of James F. Blumstein, as Amicus Curiae in Support of Petitioners (Medicaid Issue) at 7–12, Nat'l Fed'n of Indep. Bus., 132 S. Ct. 2566 (2012) (No. 11-400) (describing the contract paradigm in federal spending context).

associated with such participation. As demonstrated in *NFIB*, the contract framework also provides a legal, judicially-enforceable vehicle for constraining overreaching federal conduct that undermines states' constitutionally based authority to accept federal conditions on spending on an informed and voluntary basis. For example, contract rules place limits on bait-and-switch tactics, such as imposing retroactive conditions on states that accept federal funds; and they also place limits on excessive or predatory leveraging that relies on modifications of existing and ongoing programmatic and contractual relationships. These contractual principles of limitation found voice in the context of federal conditional spending programs in *NFIB*.

The contract model recognizes that states cannot be forced into participating in federal spending programs. States' participation in such programs must be "voluntar[y] and knowing[]."[21] The federal government can induce states to participate;[22] and, once they voluntarily and knowingly agree to accept federal support, states can be required to adhere to federally imposed conditions attached to federal funding.[23] But because such federal inducements and the attendant conditions "greatly increase[] federal power"[24] and can both intrude on state autonomy and undermine the integrity of states' political decisionmaking, the very "legitimacy" of such federal spending legislation "rests on" the states' voluntary and knowing acceptance of the conditions the federal government imposes.[25]

The analytical paradigm for typical cooperative federalism programs—captured in the contract model—is that states must act affirmatively to seek out or apply for federal funds, which they are not obliged (and cannot be obliged) to do. By the same token, there is no federal obligation to establish federal spending programs.[26] "[S]uch funds are gifts"[27] from the federal government to the states.

[21] Pennhurst, 451 U.S. at 17.

[22] New York v. United States, 505 U.S. 144, 166–67 (1992).

[23] Bennett v. Kentucky Dep't of Educ., 470 U.S. 656, 666 (1985).

[24] NFIB, 132 S. Ct. at 2659 (joint opinion).

[25] *Id.* at 2659–60 (joint opinion). Accord *id*. at 2602 (Roberts, C.J.).

[26] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999) ("Congress has no obligation to use its Spending Clause power to disburse funds to the States . . . .").

[27] *Id*. at 686–87.

A state's decision whether or not to participate in a federal cooperative federalism program like Medicaid is a constitutionally protected state choice that can be encouraged or influenced by federal financial incentives, but it may not be coerced,[28] as that would run afoul of an attribute of state sovereignty.[29] The federal government "may not simply 'commandeer the legislative process of the States by directly compelling them to enact and enforce' " a federal program.[30] For that reason, the Court has long noted (and *NFIB* has reaffirmed) that "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"[31]

States may "succumb to the blandishments offered by Congress"[32] in applying for and accepting federal funding, as well as assent to the conditions attached to receipt of that federal funding, but the act of seeking out federal funding is voluntary on the part of the states—in the nature of a contract—and at their initiative. State inaction means that states do not secure the financial benefits of federal-state spending programs; it also means that, through inaction, states can avoid imposition of federal conditions because, as Professor Lynn Baker has aptly observed, "[a]n offer is . . . different from a mandate."[33] The default rule is that state inaction means no state receipt of federal benefits and, correlatively, no imposition of federal or federally derived obligations on states. State inaction is constitutionally protected and cannot result in adverse consequences for states compared to the *status quo ante*.

[28] New York, 505 U.S. at 166–67.

[29] That states "remain independent and autonomous within their proper sphere of authority" is an "essential attribute of sovereignty." States cannot be "dragooned . . . into administering federal law," as that would not be "compatible" with sustaining states' "independence and autonomy." Printz, 521 U.S. at 928.

[30] New York, 505 U.S. at 161 (internal citation omitted). Congress may not "require the States to regulate," *id*. at 178, and "[t]hat is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory scheme as its own." NFIB, 132 S. Ct. at 2602 (Roberts, C.J.).

[31] Pennhurst, 451 U.S. at 17.

[32] Dole, 483 U.S. at 211.

[33] Lynn A. Baker, Conditional Federal Spending after Lopez, 95 Colum. L. Rev. 1911, 1934 (1995).

B. Contract Formation versus Contract Modification: The Leveraging Problem

The law of contract draws a critical distinction between contract formation and contract modification. Parties are subject to more restraints when they modify than when they form a contract.[34] For example, there is a duty of fair and equitable treatment at contract modification that does not have a counterpart at contract formation. And the notion of "fair and equitable" goes beyond the absence of adhesion or coercion.[35]

At contract modification, a major concern is excessive or predatory leveraging. Parties build up reliance and dependence based on an ongoing contractual relationship.[36] That can allow for opportunistic behavior that makes use of predatory leverage to bring about results that are beyond what was originally contemplated. Parties engaged in an ongoing contractual relationship are not in the same position that they were in when they initially decided to enter into the contract. They are susceptible to overreaching conduct that stems from the underlying contractual relationship itself—leverage that exists by virtue of action taken in performance of and reliance on the terms and conditions of the contract itself.[37]

The law of contract recognizes this risk of excessive leveraging and places limits on it. Consider the following illustration of the problem, which nicely allegorizes the excessive leveraging that characterizes the ACA's expanded Medicaid mandate:

> A fishing vessel goes out to sea. Once the ship is in fishing waters, the crew demands a substantial wage increase as a condition of performing its work. That is predatory leveraging as part of contract modification and unenforceable. In contrast, it is entirely permissible for

[34] Timothy J. Muris, Opportunistic Behavior and the Law of Contracts, 65 Minn. L. Rev. 521 (1981); 3 Williston on Contracts 695–719 (4th ed. 2008).

[35] Restatement (Second) of Contracts, § 89 cmt. b (1981).

[36] Chief Justice Roberts recognized this type of state interest. NFIB, 132 S. Ct. at 2604 (Roberts, C.J.) ("States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid.").

[37] See Robert W. Gordon, Macaulay, MacNeil, and the Discovery of Solidarity and Power in Contract Law, 1985 Wis. L. Rev. 565, 570 (1985) (noting that, over time, a power imbalance in the initial contract formation can "deepen[] into persistent domination on one side and dependence on the other").

> the crew to demand higher wages before the ship sets sail—*i.e.*, at the contract formation stage—when the vessel owner has more options available and is less vulnerable.[38]

C. Cooperative Federalism Contracts Reflect Ongoing Relationships

Cooperative federalism programs, such as Medicaid, have an ongoing character and "cannot be viewed in the same manner as a bilateral contract governing a discrete transaction."[39] In contractual terms, they are—or are analogous to—relational contracts.[40] The terms of relational contracts are not set in stone when the contract is formed. The parties are involved in a complex set of interactions that make it difficult to ascertain future contingencies or allocate risks at the time of contracting.[41] Relational contracts, therefore, assume that modifications to a contract may be made over time, as circumstances change.[42]

The federal-state contract in an ongoing program such as Medicaid is formed when states initially agree to participate in the program. Once they voluntarily enter into a cooperative federalism program, states are obliged to fulfill the conditions placed on the terms of the federal funding.[43] These conditions may "impose massive financial obligations on the States,"[44] and the Supreme Court has been aware of the constitutional importance of enabling states "to exercise their choice" of whether or not to sign up for a federal program "knowingly, cognizant of the consequences of their participation."[45] Importantly, the *NFIB* Court recognized and reinforced this point—that

[38] Alaska Packers Ass'n v. Domenico, 117 F. 99 (9th Cir. 1902).

[39] Kentucky, 470 U.S. at 669.

[40] For discussions of relational contracts in the commercial context, see Richard E. Speidel, The Characteristics and Challenges of Relational Contracts, 94 Nw. U. L. Rev. 823, 828 (2000); Ian R. MacNeil, Values in Contract: Internal and External, 78 Nw. U. L. Rev. 340, 361 (1983).

[41] Charles J. Goetz & Robert E. Scott, Principles of Relational Contracts, 67 Va. L. Rev. 1089, 1090 (1981).

[42] Gordon, *supra* note 37, at 569 (explaining that obligations in relational contracts "are not frozen at the initial moment of commitment, but change as circumstances change").

[43] Kentucky, 470 U.S. at 663.

[44] Pennhurst, 451 U.S. at 17.

[45] *Id*.

the pivotal time for states is when they sign up for a federal spending program—and its analytical significance.

At the same time, the ongoing nature of the federal-state relationship contemplates interpretation and "[g]iven the structure of the grant program, the federal government simply could not prospectively resolve every possible ambiguity concerning particular applications of [federal] requirements."[46] That is, the relational nature of the contract means that some ambiguity must be tolerated.

But in important ways the contract model, as applied by the Supreme Court before *NFIB*, constrained federal authority to interpret the post-acceptance terms of these relationship-driven contracts and thereby modify the contractual terms and conditions. The constraints on federal conditional-spending power adopted in *NFIB* build on these earlier cases.

In *Bennett v. Kentucky Department of Education*, for example, the Court refused to apply an arbitrariness standard to federal interpretations of conditions imposed on states in federal spending programs—the deferential standard normally applied in an administrative-law regulatory context. Instead, the federal interpretation must "be informed by the statutory provisions, regulations, and other guidelines provided by" the federal government "when the State agreed to comply" with federal terms and conditions—namely, at the time that the "grants were made." Thus, postacceptance federal interpretations of terms and conditions are constrained by the "legal requirements in place" at the contract-formation stage.[47]

NFIB embraces and reinforces these principles. It recognizes that the ACA's expanded Medicaid mandate cannot be defended as a reasonable, foreseeable implied term of the states' original decision to enter into Medicaid. The ACA's new terms and conditions did not comport with states' reasonable expectations when they signed up of how their obligations would evolve under Medicaid. And the balance of benefits and burdens is for states to decide in the first instance[48] when the new terms and conditions are not implied or

[46] Kentucky, 470 U.S. at 669.

[47] *Id*. at 670.

[48] Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (state's perspective and prerogative are key).

do not fall within the initial framework contemplated by states when they signed up for the spending program (contract formation).

The ACA modification of traditional Medicaid was a cram-down—so substantial, costly, and unforeseeable that it cannot be justified as a unilateral federal prerogative under the original Medicaid relational contract.[49] It must be viewed "in reality" as a "new program" and must comport with ordinary rules of contract formation, under which states must be able to determine knowingly and voluntarily whether to sign up, "cognizant of the consequences of their participation."[50] The ACA reflects the same problem of excessive or predatory leveraging the vessel owner faced when the sailors refused to honor their contracts and sought to modify them once the vessel reached the fishing waters.

In sum, the nature of an ongoing federal-state relational contract such as Medicaid allows some flexibility in the administration of that contract, but that flexibility does not allow the federal government to redo willy-nilly the terms of the contract when entered. The framework reflected by the terms at contract formation govern. Reasonable implied terms of the original contract are acceptable as binding,[51] but the rule is that states' "obligations generally should be determined by reference to the law in effect when the grants were made."[52]

Subsequently enacted legislative amendments "do not affect obligations under previously made grants."[53] If states must re-apply for funds through an affirmative application process—a contract-formation situation—then the obligations in effect at that point govern the new contract. But where the contract is ongoing, as in Medicaid, the states' obligations are governed by the framework of terms and conditions in effect at the time the state agreed to participate.

[49] NFIB, 132 S. Ct. at 2605 (Roberts, C.J.) (The existing Medicaid program and the ACA expansion are not "all one program" even if labeled that by Congress and cannot properly be considered an appropriate "modification of the existing Medicaid program.").

[50] Pennhurst, 451 U.S. at 17.

[51] Barnes, 536 U.S. at 188.

[52] Bennett v. New Jersey, 470 U.S. 632, 638 (1985).

[53] *Id*. at 637.

III. The Constitutional Framework of Federalism

A critical set of issues in the *NFIB* litigation turned on whether limitations on federal power to impose conditions were legal in character, and therefore judicially enforceable, or only political in nature, and therefore nonjusticiable. And if there were judicially enforceable limits on federal conditional spending, what were those limits?

The Supreme Court had long stated that such limits existed and implied that they were judicially enforceable,[54] but it had never found that federal action had crossed the line from the permissible to the impermissible. The Court in *NFIB*, for the first time, held that legal, judicially enforceable limits on such federal power exist and applied those limits to invalidate the ACA's expanded Medicaid mandate. Disagreement on this issue is highlighted by Justice Ruth Bader Ginsburg's dissent in *NFIB* (joined only by Justice Sonia Sotomayor on this issue), in which she argued that setting legal, judicially-enforceable limitations on federal power to impose federal spending conditions on states are nonjusticiable—beyond the scope of judicial enforcement: Developing and applying such principles of limitation "appear[] to involve political judgments that defy judicial calculation."[55]

A. The Brooding Effect of the Garcia *Case*

The existence or nonexistence of affirmative limitations on federal power on grounds of federalism has been a conceptual roller coaster over the decades. The issue arises in the context of construing the Tenth Amendment, the Eleventh Amendment, and structural principles that "derive[] at least in part from the common-law tradition" and rest on the "structure and history of the Constitution" that establish the "constitutional design."[56]

[54] See Pennhurst, 451 U.S. at 17 n.12 (noting that "[t]here are limits on the power of Congress to impose conditions on the States pursuant to its spending power" and recognizing the "constitutional difficulties" with "imposing affirmative obligations on the States pursuant to the spending power").

[55] NFIB, 132 S. Ct. at 2641 (Ginsburg, J.).

[56] Alden v. Maine, 527 U.S. 706, 733 (1999). For a thoughtful discussion of some of this history, see Brief of Center for Constitutional Jurisprudence, et al., as Amici Curiae in Support of Petitioners (Medicaid Spending/Coercion Issue) at 16–26, NFIB, 132 S. Ct. 2566 (2012) (No. 11-400).

The Tenth Amendment, in general, provides that the states and the people are the residual possessors of all powers not prohibited to them and not conferred on the federal government by the Constitution—the political instrument that reconstituted the nation and allocated powers among the branches (separation of powers) and intergovernmentally between the federal government and the states (federalism). The critical battleground in Tenth Amendment cases has been whether or not that amendment has independent analytical force as a tool for judicially protecting states and restraining the encroachment on states by the federal government.

One side has contended that the Tenth Amendment or constitutional structure protects core state interests in sovereignty against intrusion by the federal government. The other side in this doctrinal yo-yo contest says that the Tenth Amendment states no more than a tautology—that what is not granted to the federal government is retained by the states.

The issue has been most salient in the context of laws for which the federal government has a source of authority—for example, the Commerce Clause. The Tenth Amendment, or constitutional structure claim, is that states are not subject to such federal legislation if it encroaches (or unduly encroaches) on amorphously defined state sovereignty interests, even if the federal legislation can be applied constitutionally to nongovernmental persons or entities. This is a contention that federal laws that are generally applicable to governmental and non-governmental parties alike cannot be applied so as to interfere with certain sovereign state functions. The answer to the question whether the federal government has a source of authority to enact the legislation is ''yes.'' But despite that source of authority, the Tenth Amendment imposes an affirmative and independent analytical force that shelters states from what would otherwise be constitutionally authorized federal legislation. One can appropriately call this purported role of the Tenth Amendment a state sovereignty ''safe harbor,'' protecting states against enforcement of generally applicable federal legislation for which a source of authority exists.

National League of Cities v. Usery,[57] which embraced this safe-harbor vision of the Tenth Amendment, barred application of the minimum-wage and maximum-hour provisions of the Fair Labor Standards

[57] 426 U.S. 833 (1976).

Act to state and local government employees, even though those labor provisions had been held by the New Deal Court to be clearly constitutional as applied to nongovernmental entities under *United States v. Darby*.[58]

The contrary understanding of the Tenth Amendment is that it does not serve as a judicially enforceable independent affirmative limitation on federal power. As famously stated in *Darby*, the Tenth Amendment is no more than a "truism":[59] Those powers that are not conferred on the federal government are retained by the states. The only analytical question to be addressed in such circumstances is whether the Constitution confers a source of authority on the federal government. If the answer is "yes," then that ends the matter. If the answer is "no," then the federal government cannot constitutionally enact the legislation in question, regardless of whether it applied to state governments or nongovernmental entities. No special affirmative protection for states is contemplated, and the Tenth Amendment has no independent analytical juice that shields states from otherwise valid, generally applicable federal action. In overruling *National League of Cities*, the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*[60] re-established the *Darby* "truism" vision of the Tenth Amendment.

To summarize, under *National League of Cities*, a court asks both source and limitation questions about state and federal authority. Initially, does the federal government have a source of authority to enact certain legislation? If so, is there an independent state sovereignty limitation that precludes application of a valid and generally applicable law so as to protect state sovereign prerogatives? Under the "truism" precept, a court asks only the source-of-authority question; there is no further inquiry into whether an affirmative, independent, analytical limitation grounded in the Tenth Amendment precludes application of the authorized federal action to sovereign functions of states. In short, state autonomy issues are framed solely on the basis of source-of-authority analysis—an analysis that, at least since the New Deal, extends federal power with very few limitations.

Viewed the *Garcia* way, federalism-based constraints on the federal spending power would be toothless or nonexistent, since the

[58] 312 U.S. 100 (1941).

[59] *Id.* at 124.

[60] 469 U.S. 528 (1985).

spending power clearly authorizes the federal government to impose conditions on federal spending. Application of *Garcia*'s "truism" precept would not seem to contemplate an affirmative analytical role for the Tenth Amendment or for federalism-based constitutional structure contentions to trump the exercise of authorized federal spending power. It is in that sense that *Garcia*'s analysis overhung the analysis of the ACA's expanded Medicaid mandate. And it is the reason that advocates for the expanded Medicaid mandate contended that federalism-based limitations on federal conditional spending did not or should not exist.

*B. Post-*Garcia *Developments: The Anti-Commandeering Doctrine*

Garcia evoked a stinging dissent—akin to irredentist claims that "the South will rise again" and that *Garcia* would be promptly overruled when more votes were added to bolster the dissent's position. In the past 25 years, that has not happened; revisiting the vitality of *Garcia* was an issue in *NFIB*, since states as employers were subject to the employer mandate of the ACA. In their petition for writ of certiorari, the challenging states asked the Court to take the question, but the Supreme Court expressly denied review on that issue.

Nevertheless, the existence of *Garcia* was an important part of—a brooding omnipresence over—the doctrinal setting in which *NFIB* was adjudicated. The claim that there are not judicially enforceable limits on conditions on federal spending elicited the response on the part of the state challengers that such a ruling would "*Garcia*ize" the Spending Clause—a powerful contention by opponents of *Garcia* that its analysis should not be extended to the spending power.

Although the Court has not revisited *Garcia* explicitly, some significant and important inroads on *Garcia* have been made, first in *New York v. United States*[61] and then in *Printz v. United States*.[62] To protect state autonomy and the integrity of states' political decisionmaking, those cases developed carefully constructed judicially enforceable affirmative limitations on federal power, whose constitutional roots go back 200 years.[63]

[61] 505 U.S. 144 (1992).

[62] 521 U.S. 898 (1997).

[63] In Martin v. Hunter's Lessee, 14 U.S. 304 (1816), the Virginia Supreme Court refused to acknowledge the authority of the United States Supreme Court to review a decision of the Virginia high court. The Virginia Supreme Court contended that the United States Supreme Court could not act directly on a state or its sovereign institutions.

New York involved federal legislation concerning the disposal of low-level radioactive waste. It was aimed exclusively at states. The federal legislation required states that did not provide for the disposal of radioactive waste within their borders to "take title" to the waste and accept liability for damages that resulted from a state's failure to take possession of the waste. Did the mandate that a state either provide for disposal of radioactive waste within its borders or take title and assume liability trench on state autonomy limitations imposed by the Tenth Amendment?

The issue in *New York* was tricky because *Garcia* had held that the Tenth Amendment has no independent analytical force; how could New York claim protection under the Tenth Amendment when that amendment was deemed to be just a "truism"? *New York* concluded that the Tenth Amendment in fact did have some analytical force, but not necessarily as a safe harbor. The Court used a Tenth Amendment

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In current terms (discussed below), Virginia challenged the ability of the federal government, acting through the U.S. Supreme Court, to direct or command the State (Commonwealth) of Virginia in its sovereign capacity (acting through the state supreme court). The U.S. Supreme Court in *Martin* rejected Virginia's position based on its interpretation of federal authority conferred by Article III of the U.S. Constitution. Article III contemplated U.S. Supreme Court jurisdiction over cases arising under federal law, even those decided by state courts.

Nearly 175 years later, in New York v. United States, 505 U.S. 144 (1992), the U.S. Supreme Court announced that, at least in the regulatory context, the position of the Virginia judges in *Martin* was essentially correct. As the Virginia Supreme Court had contended, federal power does not generally extend to commanding states as states, but only to the people. The federal government "lacks the power directly to compel the States to require or prohibit" acts designated by the federal government. *Id*. at 166. This is the anti-commandeering principle, applied and given effect in *NFIB*. *Martin* was correct because, in the specific context of U.S. Supreme Court review, Article III had authorized direct action by the one federal court specifically mandated by the Constitution—the Supreme Court.

Whether the anti-commandeering principle would apply outside the regulatory context to the Spending Clause power and provide a foundation for a judicially enforceable limit on that power was a pivotal issue in *NFIB*. Federal action under the spending power can induce state action even in ways that would otherwise go beyond the scope of federal power if exercised on its own. Dole, 483 U.S. at 207 ("[O]bjectives 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."). For an early critique of *Dole*, see Thomas R. McCoy & Barry Friedman, Conditional Spending: Federalism's Trojan Horse, 1988 Sup. Ct. Rev. 85 (1988). In terms of establishing legal and judicially enforceable limits on federal power, the question whether the anti-commandeering principle applied to federal conditional spending was of special and critical importance in *NFIB*.

analysis not to trump a valid exercise of federal power but to inform the analysis of the scope of federal authority under the Commerce Clause. That is, under the specific circumstances involved in the legislation challenged in *New York*, the Court was able to pour analytical content into the Tenth Amendment without having to confront or overrule *Garcia*.[64]

This is how the Court in *New York* was able to bring about a mild but important resurrection of the Tenth Amendment without having to undo *Garcia*.

The federal legislation in *New York* was targeted exclusively at states, imposing obligations on state governments to provide for disposal of radioactive wastes within their own borders. In that sense, the law was not generally applicable to state governments and nongovernmental entities alike. Accordingly, the Court could clothe the question in *Garcia*-like garb—as a source-of-authority issue. Analysis could proceed under the Tenth Amendment, consistent with the "truism" vision, because "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power that the Constitution has not conferred on Congress."[65]

Where a federal law exclusively targets and imposes obligations on state governments, analysis of that law (consistent with the "truism" approach) can proceed initially along either of two pathways. A court can ask the source-of-authority question first and directly: Does the federal government have authority under the Constitution to enact the challenged legislation? In the alternative, the court can focus on the Tenth Amendment as a basis for informing the question of whether the federal government has a source of authority. That source-of-authority question is then addressed indirectly and is informed by considerations of states' reserved powers. If "an incident of state sovereignty is protected" under the Constitution, that protection constitutes a "limitation on Article I power."[66] A court can infer an answer to the source-of-authority question by determining whether "an incident of state sovereignty is protected" under

[64] New York, 505 U.S. at 160 ("This litigation presents no occasion to apply or revisit the holdings" of Tenth Amendment cases such as *Garcia* because it "is not a case in which Congress has subjected a State to the same legislation applicable to private parties.").

[65] *Id*. at 156.

[66] *Id*. at 157.

the Constitution and whether a particular intrusion on state power runs afoul of that protection. If it does, then Congress has no source of authority to legislate in such a manner.

The Court in *New York* aptly described the two types of analytical inquiries—the source-of-authority question and the affirmative-limitation-on-an-incident-of-state-sovereignty question—to be "mirror images of each other."[67] Once a court examined the state sovereignty question and concluded that a federal law intruded on an attribute of such sovereignty, it followed *a fortiori* that no source of authority existed for the challenged federal legislation. The state sovereignty analysis informed the source-of-authority inquiry; it did not trump it.

In *Garcia*, a source of authority for the minimum-wage and maximum-hour provisions of the Fair Labor Standards Act existed under the Commerce Clause as decided in *Darby*. The *Garcia* Court held that that generally applicable law also applied to state governments, and no safe harbor protected states against or trumped federal legislation for which a proper source of authority exists. In *New York*, the Court focused on whether an incident of state sovereignty was infringed and concluded that it was. As a result, under the "truism" approach, no federal source of authority could exist. When a power is granted to the federal government, "the Tenth Amendment expressly disclaims any reservation of that power to the States." However, when, as in *New York*, a "power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."[68]

In sum, "Congress exercises its conferred powers subject to the limitations contained in the Constitution."[69] In *New York*, the Court determined that an attribute of sovereignty protected under the Constitution was a prohibition on the federal government's "commandeer[ing] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[70]

Under the "take title" provision of the federal legislation under challenge in *New York*, a "State may not decline to administer the

[67] *Id*. at 156.

[68] *Id*.

[69] *Id*.

[70] *Id*. at 161 (internal quote omitted).

federal program."[71] Rather, "it must follow the direction of Congress."[72] That was commandeering and violated the precept that "the Constitution simply does not give Congress the authority to require the States to regulate."[73] Because the "Federal Government may not compel the States to enact or administer a federal regulatory program,"[74] the "take title" provision (as a form of commandeering) was not authorized. Congress had no source of authority in the Constitution "simply to direct the States to provide for the disposal of radioactive waste generated within their borders."[75]

In the context of federal laws directed at states, and not generally applicable to nongovernmental entities as well, *New York* established the anti-commandeering principle as an attribute of state sovereignty. That attribute of sovereignty—an affirmative limitation on the scope of federal power—limits the nature and scope of authorized federal power. It is also not subject to waiver by the states, a particularly important characteristic in the context of limiting federal leveraging of cooperative federalism programs at contract modification.[76]

One case alone is a dot; ordinarily, one needs at least two cases to formulate doctrine (just as a straight line can only be drawn between a minimum of two points). The doctrinal consummation of the anti-commandeering principle arose in *Printz v. United States*,[77] in which the Court held invalid a federal requirement (the Brady Act) that state and local law enforcement officials perform background checks on gun purchasers. The anti-commandeering principle extends to conduct of state and local executive branch enforcement officials, not just state legislatures. And, in the context of federal laws targeted at state or local government, the anti-commandeering principle is a *per se* rule, with no allowance for balancing federal against state interests. "It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect."[78]

[71] *Id*. at 177.

[72] *Id*.

[73] *Id*. at 178.

[74] *Id*. at 188.

[75] *Id*.

[76] *Id*. at 181–82. See notes 84–90, *infra*, and accompanying text.

[77] 521 U.S. 898 (1997).

[78] *Id*. at 932 (emphasis in original).

Even more than *New York*, *Printz* treats principles of state sovereignty as affirmative limitations on federal power. *Printz* rejected the contention that the Necessary and Proper Clause, linked with federal power to regulate the sale of handguns under the Commerce Clause, justified the mandate on background checks contained in the Brady Act. The argument was that the Commerce Clause and the implementation of Commerce Clause power through the Necessary and Proper Clause meant that the Constitution had delegated authority to enact the Brady Act to the federal government. And the Tenth Amendment prohibits the exercise only of powers not delegated to the federal government.[79]

In response, the *Printz* Court reasoned that it was not "proper" for a law implementing legislation under the Commerce Clause to "violate[] the principle of state sovereignty."[80] To reach this conclusion, the Court more robustly recognized a constitutionally based principle of sovereignty—the anti-commandeering principle—that is rooted in "various constitutional provisions" and that limits certain strategies of implementing federally authorized power. Even if the Commerce Clause authorizes the federal government to regulate gun sales, the means afforded by the Necessary and Proper Clause for implementing that power are constrained by the anti-commandeering principle of state sovereignty. This analysis seems to extend beyond the "mirror image" approach in *New York*, giving even more definitive effect to a constitutionally based affirmative limitation on federal power. *Printz* applies the state sovereignty doctrine, as manifested in the anti-commandeering principle, to the sweeping provisions of the Necessary and Proper Clause, forcing an interpretation of what is "proper" under that clause to be determined in consideration of the constraints imposed on federal power by the anti-commandeering doctrine.

New York and *Printz* illustrate the analytical potency of a doctrine based on affirmative limits, rather than a doctrine based solely on an absence of a source of authority.

The state sovereignty principle recognized in *New York* and *Printz* does not arise from the Tenth Amendment, but from an "essential

[79] *Id*. at 923.

[80] *Id*. at 924.

postulate[]" that stems from the "structure of the Constitution."[81] The principle is "not derived from the text of the Tenth Amendment itself,"[82] but the Tenth Amendment protects, against federal intrusion, attributes of state sovereignty derived from structural principles. The Tenth Amendment reserves such attributes of state sovereignty for the states.[83]

One other characteristic of this affirmative protection of state authority warrants further note because of its application to the federal reservation-of-powers claim in *NFIB*—that the federal government reserved its right to make unfettered and unilateral changes in the terms of Medicaid. The type of state sovereignty recognized by the anti-commandeering principle is not only structural but also nonwaivable. Such a federal reservation of powers cannot trump state sovereign interests reflected in the anti-commandeering principle.

A state may not waive the bar against federal commandeering by consent.[84] The diffusion of power contemplated by federalism is not "for the benefit of the States or state governments as abstract political entities," but for "the protection of individuals."[85] Accordingly, "departure from the constitutional plan cannot be ratified by the 'consent' of state officials."[86] That means that the "constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed."[87]

In other, related contexts (such as the Contract Clause), the Supreme Court has recognized that state sovereign powers are reserved and cannot be abrogated. Thus, "the legislature cannot bargain away the police power of a State,"[88] and "one legislature

[81] *Id*. at 918.

[82] New York, 505 U.S. at 156.

[83] *Id*. at 155–56.

[84] *Id.* at 182 ("Where Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").

[85] *Id*. at 181. Cf. NFIB, 132 S. Ct. at 2578 (Roberts, C.J.) ("[F]ederalism protects the liberty of the individual from arbitrary power." (quoting Bond v. United States, 131 S. Ct. 2355, 2364 (2011))).

[86] New York, 505 U.S. at 182.

[87] *Id*.

[88] Stone v. Mississippi, 101 U.S. 814, 817 (1880) (sustaining Mississippi's revocation of a 25-year charter to operate a lottery).

cannot abridge the powers of a succeeding legislature."[89] That is, "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty."[90] Under these principles, a state cannot bind itself, when it signs up for Medicaid, to a contractual concession that has the federal government retaining binding, unilateral, and unfettered authority to modify willy-nilly the terms of the initial Medicaid contract.

In the context of *NFIB*, the nonwaivability characteristic of the anti-commandeering principle would rebut the federal claim that it can—in broad, all-encompassing terms—reserve the right unilaterally and without limit to alter the terms of Medicaid and to impose those altered terms on states, even after the states have knowingly and voluntarily accepted specified terms at the contract formation stage and have implemented those terms over a period of years.

C. Anti-Commandeering, State Inaction, and Coercion

Anti-commandeering principles protect state sovereignty interests against the "compelled exercise of . . . sovereign powers."[91] Such sovereign powers include "promulgat[ing] and enforc[ing] laws and regulations."[92] An inference from the anti-commandeering principle is that, since states cannot be compelled to exercise their sovereign powers, they retain the sovereign right not to act without suffering adverse consequences as compared with the status quo. That is, a right not to be compelled to act, as recognized in *New York* and *Printz*, is a right of state inaction without adverse consequences compared to the *status quo ante*.[93]

[89] Fletcher v. Peck, 10 U.S. 87, 135 (1810).

[90] United States Trust Co. v. New Jersey, 431 U.S. 1, 23 (1977). The Clear Notice Rule is another constitutionally based protection of state sovereign interests in this regard. The reservation of unfettered federal power to impose post-acceptance conditions on cooperative federalism contracts violates states' nonwaivable sovereign interests and is rendered unenforceable by the Clear Notice Rule. For further discussion of the Clear Notice Rule and its application in *NFIB*, see Section IV, *infra*.

[91] FERC v. Mississippi, 456 U.S. 742, 769 (1982).

[92] *Id*. at 762.

[93] See New York, 505 U.S. at 175 (states' right of inaction regarding federally imposed take-title provision is constitutionally protected against coercion under anti-commandeering principle).

One important reason to protect state inaction against federal encroachment is to ensure the proper political accountability within the federal-state framework. If the federal government can "force the States to implement a federal program," that "would threaten the political accountability key to our federal system"[94] because state officials may "bear the brunt of public disapproval, while federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[95]

This paradigm of accountability works well in the spending-power context as applied to contract formation. A state's refusal to sign up for a federal spending program is consistent with state sovereign interests in nonaction. A state, fully informed in advance of the conditions attached to a federal program, can make a choice: participate, enjoy the benefits of the program, and endure the costs; or not participate with no adverse effects as compared to the *status quo ante*. In such circumstances, state action is a choice—"whether to accept the federal conditions in exchange for federal funds "[96]—and "state officials can fairly be held politically accountable for choosing" to act and thereby "to accept" the "federal offer" or not to act and thereby to "refuse the federal offer."[97] At contract formation, the default rule of nonaction leading to no adverse consequences compared to the *status quo ante* is preserved; the federal inducement is an offer whose rejection by the states triggers only the forgoing of federal benefits, not the imposition of federally induced costs or programmatic obligations.

Contract modification is an altogether different circumstance. States already have ongoing, preexisting contractual relationships with the federal government with the attendant reliance that attaches to those relationships.[98] In such contexts, there are significant risks of excessive/predatory leveraging, opportunistic behavior that can threaten to undermine the basis of the initial contracts and, in the context of federalism, undermine states' sovereign interests in nonaction without adverse consequences. Contract law dictates careful

[94] NFIB, 132 S. Ct. at 2602 (Roberts, C.J.).

[95] New York, 505 U.S. at 169.

[96] NFIB, 132 S. Ct. at 2602–03 (Roberts, C.J.).

[97] *Id*. at 2603.

[98] *Id*. at 2604 ("States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid.").

scrutiny of contract modifications because of this risk of excessive/predatory leveraging—the precise problem presented by the ACA's expanded Medicaid mandate.

The issue confronted in *NFIB* was whether the attribute of state sovereignty embodied in the anti-commandeering principle applied in the context of federal conditional-spending programs like Medicaid, and, if so, how.

New York and *Printz* had gone a long way toward establishing the anti-commandeering doctrine as an affirmative, nonwaivable limitation on federal power. Neither case, however, had expressly overruled *Garcia*. So it was still unclear whether the anti-commandeering principle would operate as a safe harbor, allowing state autonomy interests to trump otherwise-existing federal power.

In this regard, *Printz* had come close to achieving the objective of recognizing anti-commandeering as a principle of limitation, even when a source of federal power arguably existed. *Printz* rejected a Necessary and Proper Clause contention in support of the Brady Act on the ground that it was not "proper" to commandeer states because that means of enforcing the federal will was barred. The anti-commandeering doctrine was given trumping power in this part of *Printz* in a way that a broad reading of *Garcia* would seem to disallow and in a way that went beyond what *New York* had held. But as described in *New York* and *Printz*, the anti-commandeering doctrine was a principle of formal commandeering under the Commerce Clause. New York was forced to take title to radioactive waste; local Arizona officials were forced to perform background checks on gun purchasers. The issues in *NFIB* were (1) whether the anti-commandeering doctrine could serve as a safe harbor to trump a recognized federal power—placing conditions on federal *spending*; and (2) whether "anti-commandeering has a functional dimension in conditional-spending cases that is a counterpart to its more formalistic sibling in the regulatory context."[99]

NFIB answered both questions affirmatively.

(1)

The joint opinion in *NFIB* recognized that the "practice of attaching conditions to federal funds greatly increases federal power."[100]

[99] Brief of James F. Blumstein, Amicus Curiae, *supra* note 20, at 21.

[100] NFIB, 132 S. Ct. at 2659 (joint opinion).

The conditional spending power, "if not checked in any way, would present a grave threat to the system of federalism created by our Constitution."[101] Therefore, judicially enforceable limits must be applied to federal conditional spending, including the limits imposed by the anti-commandeering principle.[102] Failure to adhere to the anti-commandeering principle when "Congress compels the States to do its bidding . . . blurs the lines of political accountability."[103]

Chief Justice Roberts also found that the anti-commandeering principle limited federal power to place conditions on federal spending programs. States have a constitutionally protected right not to participate in federal spending programs. The "legitimacy of Congress's exercise of the spending power"[104] turns on respect for that state autonomy—states' right of inaction without adverse consequences—and "rests on whether the State voluntarily and knowingly accepts the terms" established under the federal spending program.[105] Excessive leveraging by the federal government can "undermine the status of the States as independent sovereigns in our federal system."[106] *NFIB* unambiguously applies the anti-commandeering principle to the conditional spending context as an affirmative limitation on an enumerated federal power (spending).

Justice Ginsburg's dissent makes this point clear: *NFIB* is "so unsettling" because it places affirmative limits on the spending of "appropriated federal money to subsidize state health insurance programs that meet federal standards."[107] Justice Ginsburg's position, in essence, was that no legal, judicially enforceable limitations should apply so as to constrain federal conditions on the expenditure of federal funds since the issues "involve political judgments that

[101] *Id*.

[102] *Id*. at 2660 (recognizing that under the anti-commandeering principle Congress cannot "require the States to govern according to Congress' instructions" and that Congress "may not 'simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'") (internal citation omitted).

[103] *Id*.

[104] *Id*. at 2602 (Roberts, C.J.) (quoting Pennhurst, 451 U.S. at 17).

[105] *Id*.

[106] *Id*.

[107] *Id*. at 2635 (Ginsburg, J.).

defy judicial calculation.''[108] That is, the principles undergirding *Garcia* should govern spending-power cases, and the principles for the protection of state autonomy and sovereignty developed in *New York* and *Printz* should not apply. *NFIB* does not accept that position and does apply the anti-commandeering principle to vouchsafe state autonomy and to protect states from federal overreaching and excessive leveraging under its spending power.

(2)

For decades, the Supreme Court had stated that, while federal inducements to encourage state conduct under federal spending programs were permissible, a federal financial inducement could be ''so coercive as to pass the point at which 'pressure turns into compulsion.' ''[109] As Justice Ginsburg observed in *NFIB*, the category of impermissible coercion or compulsion in federal spending cases had long existed, but the Court had ''never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.''[110]

The Court in *NFIB* linked the long-standing category of impermissible coercion or compulsion in spending cases—a functional concept—to the anti-commandeering principle, which was a formal concept that had been developed in the context of federal regulatory conduct.

The contention, adopted in *NFIB*, was that ''[t]he limit against 'coercion' in federal spending cases indicates that anti-commandeering has a functional dimension in conditional spending cases that is a counterpart to its more formalistic sibling in the regulatory context.''[111] Linking the concept of coercion to the anti-commandeering principle allowed the Court to place the concept in a category of protection of states' autonomy that both provided analytical structure—recognizing that states' interest in nonaction was implicated and that contract formation and contract modification contexts were very different in terms of the potential for excessive/predatory federal leveraging — and focused the analytical inquiry: Were the

[108] *Id*. at 2641.

[109] Dole, 483 U.S. at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

[110] NFIB, 132 S. Ct. at 2634 (Ginsburg, J.).

[111] Brief of James F. Blumstein, Amicus Curiae, *supra* note 20, at 21.

ACA Medicaid provisions, in functional terms, tantamount to the same lack of choice and displacement of political accountability that states faced in commandeering situations?

The *NFIB* Court embraced the anti-commandeering framework, finding that it did indeed have a functional role to play in spending-power cases. The threat to state autonomy and to political accountability that concerned the Court in its adoption of the anti-commandeering doctrine applied as well in the spending context, even though in the spending context the general propriety of federal conditions on federal spending was accepted. The chief justice concluded that respecting state autonomy and the integrity of states' political decisionmaking processes—ensuring that states knowingly and voluntarily agreed to accept the terms of federal programs—was "critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."[112] As applied to the spending context, the restraint on federal power was "akin to" guarding against "undue influence,"[113] clearly a functional precept. In short, coercion or compulsion in the spending context was indeed analogous to commandeering in the regulatory context and protected comparable values of not "undermin[ing] the status of the States as independent sovereigns in our federal system." These principles apply "whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own"[114] as under the ACA's mandated Medicaid expansion.

IV. State Autonomy, the Clear Notice Doctrine, and Political Acountability

Under *NFIB*, state autonomy interests are protected in federal conditional-spending situations in two ways: (1) As just discussed, *NFIB* applied a functional version of the anti-commandeering principle— unforeseeable and substantial new conditions imposed on states through contract modification that are coercive, in design or

[112] NFIB, 132 S. Ct. at 2602 (Roberts, C.J.).

[113] *Id*. (internal citation omitted).

[114] *Id*.

practical effect, are unenforceable. They are coercive[115] when they "bring[] federal economic might to bear on a State's own choices of public policy"[116] so that state legislative decisionmaking no longer "remains the prerogative of the States not merely in theory but in fact."[117] (2) To protect state decisionmaking autonomy and integrity, *NFIB* also applied a Clear Notice Rule at the operationally relevant time of state decisionmaking—when states sign up for a federal spending program if that program is unforeseeably and substantially modified by new terms and conditions.

A. Pennhurst *and the Clear Notice Rule*

Pennhurst State School & Hospital v. Halderman[118] requires that, when states choose to participate in a federal program, they do so fully informed of the fiscal consequences. Under the anti-commandeering principle, states are (and constitutionally must be) free to determine whether or not to enter into a contract with the federal government to receive federal funds. They have a constitutionally protected right not to join or be coerced to join federal spending programs; if they choose to relinquish that right and decide to participate in such a program, "accept[ing] the terms of the [federal-state] 'contract,' " they must do so "voluntarily and knowingly" so that they are "cognizant of the consequences of their participation."[119] This formulation is the *Pennhurst* Clear Notice Rule.

Under *Pennhurst*, federal adherence to the Clear Notice Rule provides "legitimacy"[120] to the federal government's imposition of conditions on states through the federal spending power.

A critical component of the Court's decision in *NFIB* was its recognition of the importance of the Clear Notice Rule as acknowledgment that principles of state autonomy—the protection of state inaction—

[115] See Dole, 483 U.S. at 211 ("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.' " (internal citation omitted)).

[116] Sabri v. United States, 541 U.S. 600, 608 (2004).

[117] Dole, 483 U.S. at 211–12.

[118] 451 U.S. 1 (1981).

[119] *Id*. at 17.

[120] *Id*.

both applied in the federal conditional-spending context[121] and applied at a meaningful time (at contract formation). Thus, the federal government had an obligation, when states voluntarily signed up to participate in Medicaid (the contract-formation stage), to put states on notice unambiguously of the nature, scope, and magnitude of their potential financial obligations under the program.[122] When, as in the case of the ACA, the original terms of Medicaid are substantially and unforeseeably changed — a "shift in kind, not merely degree"[123] —then providing notice of those changes to Medicaid under the ACA does not satisfy the federal government's clear-notice obligation under *Pennhurst*.[124]

Providing states with notice of their right of "exit" from an ongoing relationship that has already been formed—mandating affirmative enactment of state legislation to exit the federal program—is not a substitute for enabling states to "exercise their choice" of entering into a federal-state contract "cognizant of the consequences of their participation"[125] and thereby "knowingly undertak[ing]" an obligation based on an "informed choice."[126]

1. The Constitutional Foundation of the Clear Notice Rule

Pennhurst's Clear Notice Rule is of constitutional dimension. It must be understood in the context of the nonwaivable attribute of state sovereignty embodied in the anti-commandeering principle.

The Clear Notice Rule protects a state's decisionmaking autonomy and integrity—its ability to refrain from participating in cooperative federalism programs. It protects a state's autonomy to determine, voluntarily and knowingly, whether or not to agree to receive federal financial benefits in exchange for relinquishing its sovereign power to resist mandatory imposition of federal authority.

[121] NFIB, 132 S. Ct. at 2601–02 (Roberts, C.J.) (relying on "legitimacy" language of *Pennhurst*); *id*. at 2659–60 (joint opinion) (also relying on *Pennhurst's* "legitimacy" language).

[122] *Id*. at 2605–06 (Roberts, C.J.) (rejecting the argument that the federal government could reserve its power to alter or amend Medicaid unilaterally and without limitation as violative of *Pennhurst's* Clear Notice Rule).

[123] *Id*. at 2605.

[124] *Id*. at 2605–06.

[125] Pennhurst, 451 U.S. at 17.

[126] *Id*. at 25.

The Clear Notice Rule is analogous to other constitutional doctrines that protect core constitutional rights. It is part of the constitutional tapestry that is being woven to develop principles of state sovereignty and to protect those principles through legal/judicial enforcement. The Supreme Court has labeled these "peripheral" rights.[127] Perhaps the most noteworthy of analogous federalism-based constitutional doctrines is the Court's development, in *Alden v. Maine*,[128] of structural principles of state sovereign immunity to protect states from suits for damages in state courts. In crafting these federalism-based constitutional structural principles and doctrines, the Supreme Court has developed a gloss on core principles of state sovereignty that is akin to the kind of gloss, or peripheral rights, that the Court has developed to protect other types of core or fundamental rights.[129]

2. The Positive and Negative Components of the Clear Notice Rule

The *Pennhurst* Clear Notice Rule has both positive and negative characteristics.

Positive. The Clear Notice Rule postively protects the integrity of state political decisionmaking by guaranteeing that states have full and unambiguous disclosure of what is expected of them, of what burdens they are undertaking, at the relevant time in the decisionmaking process—before they embark on the slippery slope by committing to participation in a cooperative federalism program.

In this role, the Clear Notice Rule safeguards a state's interest in "ascertain[ing] what is expected of it" and guarantees a state's "knowing acceptance" of the terms of the federal-state contract by ensuring that a state is not "unaware of the conditions" being

[127] The term was used in Griswold v. Connecticut, 381 U.S. 479 (1965), to describe how certain constitutional principles evolve to protect underlying constitutional norms. "Peripheral" rights are developed to protect underlying constitutional principles and are distinguishable from now-discredited "penumbral" rights, which evolve from but are distinct and freestanding from the underlying constitutional norms.

[128] 527 U.S. 706 (1999).

[129] Other examples of the evolution of such doctrines are freedom of association, NAACP v. Alabama, 357 U.S. 449 (1958); criminal-defendant warnings, Dickerson v. United States, 530 U.S. 428 (2000); and campaign spending, Citizens United v. FEC, 130 S. Ct. 876 (2010).

imposed.[130] For conditions on federal spending to be binding on a state, the federal government must "impose a condition" on federal spending "unambiguously."[131] The Clear Notice Rule obligates the federal government to speak "so clearly that we can fairly say that the State could make an informed choice."[132]

The essence of the *Pennhurst* Clear Notice Rule is advance notice[133] —allowing states and their decisionmakers to make informed choices about accepting conditions on federal funding that states cannot otherwise be compelled to accept. Thus, the Supreme Court has viewed the issue "from the perspective of a state official who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that go with those funds."[134] That is, does the federal program provide "clear notice" regarding the scope of a state's obligations, and would the state and its officials "clearly understand" the conditions that attach to a state's decision to enter into a cooperative federalism contract?[135]

Negative. The Clear Notice Rule negatively guards against *ex post* blind-siding, actions such as "surprising participating States with postacceptance or 'retroactive' conditions."[136] It recognizes the risk of federal overreaching when states are not fully informed of the

[130] Pennhurst, 451 U.S. at 17.

[131] *Id*.

[132] *Id*. at 25.

[133] Cf. Bennett v. New Jersey, 470 U.S. 632, 638 (1985) (In light of the contractual nature of a cooperative federalism program, a state's obligation under such a program "generally should be determined by reference to the law in effect when the grants were made" and "changes in substantive requirements for federal grants should not be presumed to operate retroactively.").

[134] Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006).

[135] *Id*. See also Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 641 (1999) (The scope of liability for violation of a condition on spending turns on whether recipients of funding "have notice of their potential liability."). The "clear notice" obligation applies not only to issues of states' liability under a federal spending program but also to the nature and scope of a remedy for breach of a duty. See, e.g., Barnes, 536 U.S. at 187 (A remedy for violation of a condition on federal spending is appropriate "only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature.") (emphasis in original); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998) (The "central concern" in determining the propriety of a remedy for "noncompliance with the condition" in a federal spending program is whether the recipient of funds has "notice" of its potential liability.).

[136] Pennhurst, 451 U.S. at 25.

potential fiscal consequences of their entry into a federal program. And it protects states against federal bait-and-switch tactics—after-the-fact imposition of conditions on federal spending programs. Conditions in effect at the time of a grant—not subsequently enacted rules— apply so as to spare states from unclear obligations assumed at the time that states choose to participate in a cooperative federalism program. Conditions and obligations imposed on states must be disclosed clearly and unambiguously in advance in order to allow states to make informed, constitutionally safeguarded decisions that can have significant financial consequences—outcomes that the federal government may not impose on states by regulatory fiat.

Pennhurst set out both the positive and negative components of the Clear Notice Rule. *NFIB* followed *Pennhurst*'s lead in this regard. *NFIB* recognized the critical nature of states' knowing and voluntary decision to enter into cooperative federalism programs and the critical role of full disclosure at contract formation. Some ambiguity must be tolerated in an ongoing relational contract such as Medicaid, and states are expected to anticipate such modifications that are reasonable and foreseeable within the contours of the original contract-formation transaction. But the negative component of the Clear Notice Rule—the protection of states against federal after-the-fact bait-and-switch tactics—safeguards states against enforcement of new terms and conditions such as those in the ACA when states "could hardly anticipate" them at contract formation and when those changes are not only unforeseeable but also so substantial as to "transform" Medicaid "so dramatically."[137]

In such circumstances, *NFIB* held, states can only be bound by the conditions to which they received advance notice at contract formation and not by the conditions to which they received notice at contract modification through the ACA. The *NFIB* majority remedied the constitutional flaw by treating the ACA's terms and conditions as a new program—a new contract. It allowed the states to opt in to that contract, or not, without threat of loss of preexisting Medicaid matching funds. The Court's remedy leaves states in the position of having full notice about the terms and conditions of the ACA's new Medicaid opportunity. The states' autonomy interest in nonaction is

[137] NFIB, 132 S. Ct. at 2606 (2012) (Roberts, C.J.).

protected, as states confront only the loss of the federal carrot—the ACA's new Medicaid. But states do not face the stick of added fiscal burdens as a result of inaction. Their traditional Medicaid programs persist as before, retaining preexisting Medicaid on preexisting terms as the default rule of state inaction.

The federal government remains free to terminate Medicaid formally (presumably with a transition period) and, if it wishes, to reformulate Medicaid into Medicaid II, but it would have to accept political accountability for that action and place elements of the program at risk politically. In such a situation, states would not have to opt out of traditional Medicaid because no such program would exist by virtue of federal action. States would not face the political heartburn of opting out; the federal government would have achieved that outcome and the attendant political responsibility. States would not be part of traditional Medicaid and could not be because the program and state obligations thereunder would have been abrogated by dint of federal action. If the federal government did terminate Medicaid or reformulate it into Medicaid II, states would be able to choose whether to opt in to the new program, or not, but inaction would lead only to loss of a federal opportunity, not, as under the ACA, to a fiscal burden neither the federal nor state governments had ever contemplated.

B. Political Accountability Considerations

One of the fundamental concerns that undergirds the anti-commandeering principle is political accountability. "Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system."[138] Similar considerations underlie *Pennhurst*'s Clear Notice Rule.

In effect, the federal government under the ACA terminated traditional Medicaid, since the states under the ACA could not keep their existing Medicaid programs. Retention of traditional Medicaid in accordance with the preexisting terms was not an option for the states. But that legal reality and the identification of political responsibility for that legal reality with the federal government were

[138] *Id.* at 2602.

blurred by the structuring of the ACA. If they did not want to accept the new ACA terms, states were required to act affirmatively to "opt out" of Medicaid entirely. The political onus (and the political heartburn) for loss of traditional Medicaid were thereby thrust on states who chose to opt out of Medicaid, even though it was the federal government through the ACA that had changed the terms of traditional Medicaid and had eliminated retention of traditional Medicaid as an option for states.

This structural approach sought to avoid assigning political accountability for the elimination of traditional Medicaid where it belonged—with the federal government per the ACA. Chief Justice Roberts saw this for what it was, a new program that was an unforeseeable change from original Medicaid. The original Medicaid program tracked federal welfare or income-support programs; it was poverty medicine. The ACA's Medicaid II "transformed" the original "into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level" and was "an element of a comprehensive national plan to provide universal health insurance coverage."[139] Such a transformation ran afoul of the negative component of the Clear Notice Rule. States "could hardly anticipate" that Medicaid would be "transform[ed] . . . so dramatically."[140] The ACA's new terms and conditions were beyond federal power to impose because the negative component of the Clear Notice Rule precludes "surprising participating States with postacceptance or 'retroactive' conditions."[141]

1. Structural Considerations Regarding Cooperative Federalism Programs

This type of excessive or predatory federal leveraging at contract modification in federal spending cases is endemic, with the accompanying displacement of political accountability.[142] This experience

[139] *Id*. at 2606.

[140] *Id*.

[141] *Id*. (quoting Pennhurst, 451 U.S. at 25).

[142] For a general discussion, see Blumstein & Sloan, *supra* note 5, at 136–49; David Freeman Engstrom, Drawing Lines between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State, 82 Tex. L. Rev. 1197, 1239–52 (2004).

with cooperative federalism programs, and the very structure of those programs, strongly support the *NFIB* conclusion that the Clear Notice Rule must apply at contract formation, not just contract modification, when the mid-course changes to ongoing programs are both substantial and unforeseeable. This is necessary to protect against federal bait-and-switch tactics such as the ACA. It ensures that a state and its officials "clearly understand"[143] the conditions that attach to a state's decision to enter into a cooperative federalism contract at contract formation.

Because of Medicaid's automatic federal matching feature, state decisionmaking drives the federal budget when states expand program expenditures (which are matched with federal dollars). Once states enter a service-benefit program like Medicaid and become locked-in, the federal government can and does use its intense leverage to drive state budgets by mandatorily increasing states' expenditures. This is the ACA scenario and strategy.[144] The Court in *NFIB* understood this functional reality, applying the Clear Notice Rule at contract formation and disallowing the ACA's new terms to govern Medicaid's traditional terms and conditions. As a result, the default rule—the result of state inaction—is the states' retention of preexisting Medicaid on the preexisting terms and states' non-receipt of ACA funding (and avoidance of the ACA's fiscal obligations).

2. Political Moral Hazard

The very design of federal matching programs provides "a powerful incentive for States to expand their Medicaid programs, possibly at the expense of programs that might have a higher state or local priority but that would have to be funded entirely by state or local funds—programs that therefore get 'crowded out.' "[145] Through a form of fiscal novocaine, federal matching anesthetizes political constraints that restrain growth of state spending/benefits programs,

[143] Arlington Cent., 548 U.S. at 296.

[144] For a general discussion, see Blumstein & Sloan, *supra* note 5, at 136–49; Engstrom, *supra* note 142, at 1239–52.

[145] Blumstein & Sloan, *supra* note 5, at 139.

creating a form of political "moral hazard" that "encourag[es] states to adopt and finance programs . . . that are 'worth' (depending on the applicable matching rate) $.17–$.50 on the dollar to the politically accountable decisionmaking entity—the state."[146] It is "economically and politically rational to spend state funds that, were the state paying the full bill, might not comport with state priorities."[147]

Sometimes, a good deal may be good but unaffordable. Consider whether to accept a gift from Bill Gates—a $30 million home with 25,000 square feet—on condition that the recipient pay property taxes, insurance, and general upkeep expenses. Sounds like a good deal, but it may be unaffordable because of the fiscal "co-pay."

The Clear Notice Rule protects the integrity of a state's political process. "[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process."[148] Excessive federal leverage over states may threaten states' financial integrity, creating "staggering burdens" on them and giving the federal government "leverage" over the states that is "not contemplated by our constitutional design."[149]

Requiring that state decisionmakers be told unambiguously and in advance what fiscal consequences stem from assuming an obligation in a cooperative federalism program protects state autonomy by ensuring informed decisionmaking. By analogy to procedural due process, notice or disclosure must come "at a meaningful time and in a meaningful manner."[150] To fulfill that goal, notice or disclosure must be provided unambiguously and must come at contract formation.

3. Lock-In

The leveraging from federal matching creates a strong incentive for program expenditure expansion. This creates political dependence—a "political addiction" that locks in cooperative federalism

[146] *Id*. at 139–40 & n.45.

[147] *Id*. at 140.

[148] Alden, 527 U.S. at 751.

[149] *Id*. at 750 (discussing abrogation of states' sovereign immunity).

[150] Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (internal citation omitted).

programs and makes cutbacks painful. "To save a state-generated Medicaid dollar, a state must reduce program expenditures by any where from two to six dollars (depending on the federal matching formula for a given state)."[151]

The lock in phenomenon—the fishing vessel out at sea—is exacerbated by (1) state investments in administrative infrastructure,[152] which build in costs and generate reliance[153] and (2) the nurturance of political constituencies—beneficiaries and providers[154]—that resist

[151] Blumstein & Sloan, *supra* note 5, at 142. Political moral hazard has much in common with the problem of slippery-slope decisionmaking. A slippery slope is a situation "where decision A, which you might find appealing, ends up materially increasing the probability that others will bring about decision B, which you oppose." Eugene Volokh, The Mechanisms of the Slippery Slope, 116 Harv. L. Rev. 1026, 1030 (2003). To be effective, the clear-notice duty in the context of cooperative federalism programs must attach prior to a state's "decision A"—that is at contract formation—not at its "decision B" (whether to opt out of substantial and unforeseeable midstream contract modifications).

[152] Chief Justice Roberts expressly recognizes the significance, from the states' perspective, of having "developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid." NFIB, 132 S. Ct. at 2604 (Roberts, C.J.).

[153] The kind of state reliance that accrues from ongoing participation in cooperative federalism programs is analogous to the life-choice reliance regarding abortion described in Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992) (plurality): "[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Reliance can stem from decisions that are based on a certain set of expectations that influence how people "order[] their thinking and living." This explains that states' decisionmaking processes are affected differently by a decision to participate in a federal-state program (contract formation) and a decision to act affirmatively to exit from that program in the face of the imposition of additional fiscal conditions (contract modification as under ACA). Analogy of state autonomy interests, such as the anti-commandeering principle, to similar individual-oriented rights is appropriate. For example, in Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999), the Court rejected a claim of implied waiver of a state's sovereign immunity, noting that "'[c]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights" (internal citation omitted). The analogy to waiver of individual constitutional rights was explicit: "State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected." *Id*.

[154] Support for provider infrastructure is an important goal of Medicare and Medicaid. See Fischer v. United States, 529 U.S. 667, 679–80 (2000) (Medicare payments are made "not simply to reimburse for treatment of qualifying patients but to assist the hospital in making available and maintaining a certain level and quality of medical care, all in the interest of both the hospital and the greater community.").

program cutbacks or elimination.[155] This threat of lock-in and the impact of reliance suggest that federal imposition of additional substantial, unforeseeable, and onerous conditions provides excessive or predatory leveraging.[156]

In contract terms, deference to the use of contract modification of an ongoing contractual relationship is unwarranted, unlike deference shown at the contract formation stage. If "lock-in effects are substantial," then the federal government can "enter into broad agreements with states, wait for lock-in, and then . . . extract more onerous conditions than could have been imposed at the moment the deal was struck."[157]

The *Pennhurst* Clear Notice Rule protects states from these *ex post* federal leveraging strategies. Its application at contract formation enables states to make their "choice [not to participate in a federal-state spending program] knowingly, cognizant of the consequences of their participation."[158] Constitutionally, the states' choice to participate must be an "informed choice" that provides "clear notice" of what is expected. What is not permitted is "surprising participating States with postacceptance or 'retroactive' conditions."[159] States must be "*on notice*"[160] of what is expected of them when they agree to participate in a federal spending program, with the relevant perspective that of a state official "engaged in the process of deciding" whether to enter into a federal-state contract with its attendant conditions.[161] To achieve these goals, the clear notice obligation must

[155] Engstrom, *supra* note 142, at 1243–44.

[156] *Id*.

[157] *Id*. at 1244.

[158] Pennhurst, 451 U.S. at 17.

[159] *Id*. at 25.

[160] Barnes, 536 U.S. at 187 (emphasis in original).

[161] Arlington Cent., 548 U.S. at 296.

apply at the contract-formation,[162] not at the contract-modification, stage.[163]

V. Coercion

Before *NFIB*, the lower courts had had a hard time applying the functional anti-commandeering principle of coercion in the conditional-spending context. The reason is they had misperceived the nature of the inquiry.

A. Choice-Set Coercion

A common view of coercion is process-focused—a police officer beating a confession from a criminal defendant. That process-focused model does not transfer easily to the context of conditional spending, even though the *NFIB* Court did use a process-focused metaphor ("a gun to the head")[164] to describe the effect of the ACA's Medicaid provisions.

But there is a different model that does apply—"choice-set" coercion.

[162] This applies in cases such as *NFIB*, where the changed terms and conditions were not implied in the original Medicaid program, and were substantial and unforeseeable. Not all contract modifications are problematic, but modifications such as the ACA—that rely on excessive/predatory leveraging—are. See Muris, *supra* note 34, at 538 (The issue is "whether the modification was extorted."). In other circumstances, relational contract doctrine would tolerate some ambiguity in the give-and-take of reasonable adjustments within the framework of the original program. That is, the ongoing nature of the Medicaid relationship contemplates contract interpretation. The relational nature of the contract means that some ambiguity must be tolerated. That does not conflict with *Pennhurst's* Clear Notice Rule. Kentucky, 470 U.S. at 669.

[163] The implications of earlier decisions in influencing subsequent decisions are recognized in the literature of "path dependence." For a general discussion, albeit in a different context, see Oona A. Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, 86 Iowa L. Rev. 601 (2001). This concept, too, suggests that, in order to make informed choices that knowingly accept federally-imposed conditions, states must be clearly informed at the initial decision-making stage (contract formation), not when a subsequent, substantial and unforeseeable change of conditions is made (contract modification) that allows for excessive leveraging by the federal government regarding state decisionmaking and that requires states to act affirmatively to undo past legislative action.

[164] NFIB, 132 S. Ct. at 2604 (Roberts, C.J.).

Lee v. Weisman,[165] an Establishment Clause case, exemplifies "choice-set" coercion. A student objected to a religious message at her graduation, claiming it to be coercive. The government defended on the ground that attendance at graduation was voluntary; no coercion existed because the student could stay home without penalty.

The Supreme Court disagreed, holding that government could not force a choice between voluntary non-attendance at graduation so as to avoid a religious message and "forfeiture" of the intangible benefits from attending graduation.[166] The choices imposed on states by the ACA are coercive, as the Court held in *NFIB*.

1. The Context: Contract Modification

Under the ACA, the context is contract modification, not formation. The new Medicaid terms and conditions imposed by the ACA are linked to loss of a preexisting and ongoing program. At contract modification, the opportunity for excessive or predatory leverage exists, and exists regarding the ACA. The ACA's terms and conditions reflect an unforeseeable and substantial change from preexisting Medicaid—so substantial as to be in effect a new program. States can accept the ACA's new conditions along with the accompanying fiscal obligations. Such a choice is acceptable at contract formation, when states could knowingly and voluntarily choose to secure the benefits of the ACA and absorb the costs. It is inappropriately coercive at contract modification, when failure to act is not status-quo neutral but has drastic and impermissible financial consequences. This is what *NFIB* held. The majority, in effect, created a contract-formation situation. The ACA's terms could not be imposed on states by virtue of states' having signed up for traditional Medicaid. The ACA's contract-modification approach provided predatory or excessive leveraging and was unenforceable as coercive. Allowing states, at contract formation, to choose to accept the ACA's terms and conditions, knowingly and voluntarily and fully informed in advance of the conditions, was appropriate and was the remedy that the *NFIB* majority embraced.

[165] 505 U.S. 577, 594–96 (1992).

[166] Accord Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000) (same regarding the choice not to attend high school football games or be subject to religious message).

2. The Inaction Problem

Under the ACA, states cannot retain their sovereign right of nonaction free from adverse consequences compared to the *status quo ante*; respecting such inaction is a part of the protection of state autonomy under the anti-commandeering principle. When the modifications of ongoing cooperative federalism programs are implied by states' initial acceptance of the program's conditions or where the new conditions are otherwise not substantial and are foreseeable as within the program's original framework, states must anticipate and accept the consequences of those modifications. Such is not the case with the ACA.

State inaction under the ACA would mean staggering fiscal effects. States would retain their obligations to preexisting Medicaid beneficiaries but would lose federal Medicaid matching funds for all Medicaid beneficiaries. Without some affirmative conduct on the part of the state, that would entail 100 percent state funding for preexisting Medicaid beneficiaries—a circumstance never contemplated when states signed up for Medicaid. That outcome coerces state action in a way that is barred by the anti-commandeering principle.

To avoid the expanded Medicaid obligations of the ACA, a state must act affirmatively—to opt out of and exit Medicaid entirely. A duty for states to opt out at contract modification of substantial and unforeseeable changes to a program breaches the reserved sovereign rights of states not to act without adverse consequences compared to the *status quo ante*. The coercive effect of a duty to opt out, in contrast to an opportunity to opt in to a contract-formation situation, has recently been recognized in the First Amendment area regarding public employee expenditure of funds for political purposes.[167] Similar considerations apply in the context of the ACA, which effectively forces states to undo an existing contract and absorb the political heartburn for actions they did not initiate or control. It is the federal government that has in effect undone that contract by modifying its terms in ways that were unforeseeable when entered into. And it is the federal government that made that political heartburn more painful because the ACA is so harsh and irrational—providing near-poor persons with incomes in the 100–400 percent of the poverty range with federal subsidies while leaving unsubsidized the

[167] Knox v. Serv. Employees Int'l Union, 132 S. Ct. 2277, 2290–93 (2012).

most needy and vulnerable (those with incomes under 100 percent of poverty).

B. Structural Characteristics

As the *NFIB* Court found, there are important size and structural characteristics of the ACA that help to illuminate the coercion inquiry.

Size. As previously noted, the ACA makes the choice it imposes on states politically poisonous by linking the new conditions to states' retention of preexisting contractual Medicaid benefits. Preexisting Medicaid spending reflected over 20 percent of the average state budget. The only state expenditure that typically comes close to Medicaid expenditures in state budgets is that for K–12 education. Federal Medicaid expenditures far exceed any other federal cooperative federalism program. The sheer magnitude of Medicaid for both the federal and state governments makes the stakes enormous and the threat of loss of preexisting federal funding for states akin to a gun at the head. The size of the program also makes the problem of interstate equity more acute; states that do not accept the ACA's terms face massive loss of federal opportunity and disadvantage in the distribution of federal funds. By itself, this type of disadvantage may not be of constitutional import; but it strengthens the structural coercion argument when the other structural elements of the ACA are present.

Structure and Purpose. A critical and telling design characteristic of the ACA is its structure of subsidy, which demonstrates that the ACA's architects did not contemplate that states would or could withdraw from preexisting Medicaid programs. Persons with incomes in the 100–400 percent of poverty range—the near-poor—are federally subsidized; the neediest and most vulnerable—persons with incomes under 100 percent of poverty—are not subsidized. There is no backup plan for subsidy of those with poverty-level incomes, in case states actually opt out of Medicaid as a result of the ACA.

In a law designed to provide near-universal health care coverage, this institutional design demonstrates that there is no federal contemplation that states have or are intended to have a realistic ability to opt out of and thereby exit Medicaid entirely. That opt-out would leave uncovered the poorest and most vulnerable persons, at the same time that the near-poor in states that opt *in* would receive newly-enacted federal subsidies. Leveraging of an already-existing

Medicaid relationship as part of contract modification is what the ACA is about—belt and suspenders. States that are coerced into accepting the ACA's new terms and conditions are treated as cash cows, with state funds offsetting what would otherwise be federal obligations to achieve the ACA's access objectives (and from a Congressional Budget Office scoring perspective reducing the federal programmatic cost, a highly charged political issue that also raises concerns of political accountability).

In short, leveraging existing contractual relationships is built into the DNA of the ACA. As the Internal Revenue Service has acknowledged, the very architecture of the ACA, which is designed to achieve near-universal medical insurance coverage, contemplates that states have no choice but to embrace Medicaid II: "Taxpayers with household incomes below 100 percent" of poverty "are not eligible for the premium tax credit" (the federal subsidy) provided to persons with incomes in the 100–400 percent range "*because* they are eligible to receive assistance through Medicaid."[168] That outcome is not happenstance but part of the very design of the ACA. And that architecture of the ACA would be unthinkable to its architects if a real choice for states to exit altogether from Medicaid existed. Such an outcome would be utterly irrational—federally subsidizing those with incomes in the 100–400 percent of poverty range but not subsidizing, at all, those in the below-poverty income range.

The *NFIB* Court recognized all this, and that strongly influenced its decision. The ACA did not treat its new terms as the formation of a new contract, which in reality it was.[169] Instead, it sought to leverage the ACA by linking it to states' preexisting Medicaid programs. The ACA does not allow states to refuse the ACA terms on their own (contract formation), with inaction in such circumstances resulting in the typical default rule: states that do not agree to federal terms do not receive federal funds, but no adverse financial consequences flow from inaction compared to the *status quo ante*. Instead of contract formation, the ACA operates as predatory and excessive leveraging at contract modification by threatening "to withhold . . . States'

[168] I.R.S., Prop. Treas. Reg. Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,934 (Aug. 17, 2011) (emphasis added).

[169] NFIB, 132 S. Ct. at 2605 (Roberts, C.J.) (concluding that PPACA's new terms and traditional Medicaid are not in reality "all one program" and that functional reality governed the analysis).

existing Medicaid funds."[170] As the chief justice concluded, "this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act."[171] That financial structure, "given the nature of the threat" and the magnitude of the Medicaid program,[172] led the Court to find the ACA's coercive structure impermissible.

Political Accountability. The ACA's structure, the not-subtle objective of that structure, and the magnitude of the ACA's consequences on states[173] were important components of the *NFIB* Court's coercion analysis. The political accountability issue—a cornerstone of anti-commandeering analysis—is also an important consideration.

The choices foisted off on states by the ACA deflected the political accountability for the termination of traditional Medicaid. The option for states to remain in traditional Medicaid was stripped away by the ACA, which in effect terminated the traditional Medicaid program. But the design and structure of the ACA camouflaged political accountability for such a transformation of Medicaid. It imposed on states the duty to act affirmatively to exit Medicaid—a politically odious act—with the result that states would be perceived as having terminated their traditional preexisting Medicaid programs when and if they opted out. And the ACA made that choice as politically odious as possible by not providing a backup plan for subsidizing those with below-poverty incomes if states should exit Medicaid. This concern about the proper alignment of political accountability is an important value underlying the anti-commandeering principle. The misalignment of political accountability is another element in the coercion analysis—why the functional anti-commandeering principle applicable in conditional-spending cases is violated by the ACA.

[170] *Id*. at 2603.

[171] *Id*.

[172] *Id*. at 2603–04.

[173] The consequences that count are the magnitude of the threat of loss of *preexisting* Medicaid matching funds. *Id*. at 2605 n.12 ("[T]he size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden. 'Your money or your life' is a coercive proposition, whether you have a single dollar in your pocket or $500.").

Conclusion

Cooperative federalism programs such as Medicaid create risks to important values of federalism. Restraints on the federal spending power have been underdeveloped because, at least since the New Deal, there is clearly a source of authority for federal spending programs. Accordingly, serious restraints on cooperative federalism programs have awaited the evolution of affirmative protections on state autonomy and, based on those affirmative protections, the *NFIB* Court inferred limitations on the scope of federal power under the Spending Clause. *NFIB* is pathbreaking in this regard, as it applies two limitations to federal authority to impose conditions on federal spending programs. First, it applies a functional version of the anti-commandeering principle in the conditional-spending context—guarding against coercion (excessive and predatory leveraging at contract modification). Second, it applies the *Pennhurst* Clear Notice Rule in both its positive and negative dimensions as constraints on federal power—ensuring, positively, that state decisions to participate in a federal spending program are made knowingly and voluntarily and, negatively, guarding against federal after-the-fact bait-and-switch blind-siding tactics.

By reaffirming that cooperative federalism programs should be understood through the lens of contract law, *NFIB* acknowledges the important difference between conditions imposed at contract formation and at contract modification and recognizes the dangers to state autonomy and to the integrity of states' decisionmaking processes of predatory/excessive leverage that can arise at contract modification. Similarly, *NFIB* clarifies an issue not previously addressed head-on: when does the *Pennhurst* Clear Notice Rule apply. In the context of contract modification, *NFIB* requires that the Clear Notice Rule apply at contract formation when the new terms are not implied under the original contract and when the new terms reflect a substantial and unforeseeable departure from the framework of the original contract's terms. In such circumstances, federal open-ended reservations of power to alter or amend conditions on spending programs are unenforceable, and states may not be stripped of preexisting program benefits unless the federal government affirmatively terminates the preexisting program and takes political responsibility for doing so. It cannot camouflage such political accountability by making substantial and unforeseeable modifications of preexisting programs and thrusting the political onus on states to opt out.

More specifically, the ACA is a form of contract modification, using leverage coercively from an already-existing relationship to add more onerous terms and conditions to that preexisting relationship. State noncompliance with the ACA could not be achieved by inaction—for example, by not applying for funds at the contract-formation stage. State noncompliance with the ACA required states to act affirmatively to undo an existing and ongoing relationship. Notice to states at the ACA's contract-modification stage does not protect states' autonomy interests in making an informed choice to determine whether or not to enter into the Medicaid contract at the outset. That autonomy interest is vindicated under *NFIB* as states may opt in or not to the ACA's new terms without fear of loss of preexisting Medicaid funds. Under the ACA, states are only provided notice of the opportunity to act affirmatively to exit the traditional Medicaid program. That notice does not substitute for a requirement that state decisionmaking be unambiguously informed at the time that states determine to accept the terms and conditions of Medicaid at the contract-formation stage. And it does not protect states against *ex post* blind-siding—against federal bait-and-switch tactics. *NFIB* provides such protections.