

THE SPENDING POWER AFTER *NFIB* V. *SEBELIUS*

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What is the challenge confronting modern spending power doctrine? And what *is* the Court's spending power doctrine after *National Federation of Independent Business v. Sebelius*¹ (*NFIB*)? This Essay takes up these questions, and concludes by posing two further questions.

Prior to the Supreme Court's 1992 decision in *New York v. United States*,² which kicked off the so-called federalist revival,³ there was not much reason to care about the spending power. In a world in which Congress had virtually plenary direct regulatory power over the States, there was little reason to worry

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1. 132 S. Ct. 2566 (2012) (hereinafter "*NFIB*").

2. *New York v. United States*, 505 U.S. 144, 149 (1992) (invalidating the Low-Level Radioactive Waste Policy Act's "take title" provision for exceeding Congress's enumerated powers, thereby violating the Tenth Amendment); *see also* *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that the Gun Free School Zones Act exceeded Congress's Commerce Clause authority); *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating provisions of Brady Act for being "fundamentally incompatible with our constitutional system of dual sovereignty").

3. *See, e.g.*, Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 195–96 (2001) (discussing the federalist revival); Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 460 (2003) (same); Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 433 & n.1 (2002) (same). *See also* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 429–430 (2002) ("Since the appointment of Clarence Thomas in 1991 . . . the [Supreme] Court has maintained a relatively stable five-justice majority . . . committed to enforcing limits on national power and to protecting the integrity of the states. Over that period, the Court has held at least ten federal statutes to be constitutionally invalid, either in whole or in part, on grounds involving federalism. By contrast, the Court had found only one federal statute to violate principles of constitutional federalism during the previous span of more than fifty years, and it actually reversed the single anomalous decision less than ten years later. Commentators unhesitatingly refer to a federalism 'revival.'").

about any limits that might exist on indirect federal regulation of the States via conditional spending.⁴

The task for a modern spending power doctrine, however, is not as simple as, for example, prohibiting any conditional offer of federal funds to the States that, if accepted, might regulate the States in a way that Congress could not directly mandate. Since at least 1936, in *United States v. Butler*, the Court has been clear that Congress's power to spend is greater and broader than its power to regulate the States.⁵

At the same time, however, our spending power doctrine cannot permit Congress to impose any conditions it chooses on its offers of federal funds to the States on the simplistic ground that a state that does not like the conditions can always decline the offer. Such a doctrine would strip all meaning from the Constitution's notion of a federal government of limited, enumerated powers.⁶

Simply put, the problem for modern spending power doctrine is this: How can the courts distinguish and invalidate those conditional offers of federal funds to the States that threaten to render meaningless the Tenth Amendment and its notion of a federal government of limited powers, while at the same time affording Congress a power to spend for the general welfare that is greater than its power to directly regulate the States?

In its 1987 decision in *South Dakota v. Dole*, the Court provided a controversial and highly imperfect doctrine as a response to this problem.⁷ Until the Court's 2012 decision in *NFIB*, the *Dole* doc-

4. Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1918–19 (1995) (“So long as the ‘front door’ of the commerce power was perpetually open, there was little reason to discuss the extent to which the ‘back door’ of the spending power should be kept closed.”) (citing Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1131 (1987)).

5. See *United States v. Butler*, 297 U.S. 1, 66 (1936) (“While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”). See also *South Dakota v. Dole*, 483 U.S. 203, 209 (1987) (“*United States v. Butler* . . . established that the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.”).

6. See Baker, *supra* note 4, at 1920.

7. See *Dole*, 483 U.S. at 207–11 (setting out five-step inquiry for determining the constitutionality of Congress's offers of federal funds to the States). For critiques of *Dole* and proposals to add “bite” to the doctrine see generally Baker, *supra* note 4; Baker & Berman, *supra* note 3.

trine was thought to be essentially toothless, particularly with regard to the coercion prong of its test.⁸ Never before had the Court invalidated any offer of federal funds to the States on the grounds that it was unconstitutionally coercive.⁹ It is also significant that the *NFIB* Court, while claiming to be applying the *Dole* doctrine and finally giving its “coercion” inquiry some bite, has unquestionably left us with a substantially altered doctrine.¹⁰

The spending power question raised in *NFIB* involved the “Medicaid expansion” provision of the Affordable Care Act (ACA), which would have increased the number and categories of individuals that participating states must cover.¹¹ The ACA would increase federal funding to cover some, but arguably not all, of the States’ cost of expanding Medicaid coverage in the specified ways.¹²

8. See, e.g., Baker, *supra* note 4, at 1928–31 (detailing lack of bite in *Dole* doctrine); Baker & Berman, *supra* note 3, at 462–69 (same and discussing lower federal courts’ largely toothless applications of *Dole* doctrine); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 355 (2008) (observing that “[n]one of [*Dole*’s] direct limitations on the spending power has had any real bite in the cases”); Nicole Huberfeld et. al., *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1, 2–3 (2013) (“Until the 2011 Term, no Supreme Court decision since the New Deal had struck down an act of Congress as exceeding the federal spending power . . . [And] no federal court had ever found any legislation to be an unconstitutionally coercive exercise of the spending power until the Court decided *NFIB v. Sebelius* . . .”).

9. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2630 (2012) (Ginsburg, J., concurring in part, and dissenting in part) (“THE CHIEF JUSTICE therefore—for the first time ever—finds an exercise of Congress’ spending power unconstitutionally coercive.”).

10. For other discussions of *NFIB*’s modification of the *Dole* test that diverge in important respects from the analysis presented in this Essay, see generally Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861 (2013); Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283 (2013); Huberfeld, *supra* note 8 at 46–76; Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 579–612 (2013).

11. See 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2013) (requiring the States to expand their Medicaid programs by January 1, 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line); 42 U.S.C. §§ 1396a(k)(1), 1396u-7(b)(5), 18022(b) (2013) (specifying new minimum coverage, which the States must provide to all new Medicaid recipients).

12. 42 U.S.C. § 1396d(y)(1) (2013) (stipulating that the federal government would pay one hundred percent of the costs of covering the newly eligible individuals through 2016; in the following years, the federal payment level gradually decreases, to a minimum of ninety percent in 2020).

If a state did not comply with the ACA's new coverage requirements, it would lose not only the federal funding for those new requirements but *all* of its federal Medicaid funds.¹³ The 26 states and others who challenged the ACA contended that this Medicaid expansion provision exceeded Congress's authority under the Spending Clause, and seven Justices across two opinions agreed.¹⁴

The two opinions were signed by the Roberts group, which includes Chief Justice Roberts and Justices Breyer and Kagan, and the so-called joint dissenters (who actually agree with the Roberts group on this issue), which include Justices Scalia, Kennedy, Thomas, and Alito.¹⁵

In reaching their decisions in *NFIB*, both groups of Justices claimed to be applying the test set out in the Court's 1987 decision in *Dole*.¹⁶ In fact, however, both opinions deviate significantly from that decision. At issue in *Dole* was a federal statute that famously withheld five percent of federal highway funds from any state that did not have a minimum drinking age of 21.¹⁷ In upholding the challenged statute, the *Dole* Court held that the spending power is not unlimited, and went on to set out five restrictions.¹⁸

Two of the five prongs of the *Dole* test played no role in the *NFIB* decision. The requirement that the spending power must be exercised "in pursuit of 'the general welfare'" has long been viewed by the Supreme Court as essentially nonjusticiable,¹⁹ and that did not change in *NFIB*.²⁰ Similarly, the independent

13. 42 U.S.C. § 1396c (2013).

14. See *NFIB*, 132 S. Ct. at 2603–04 (plurality opinion); *id.* at 2666 (Scalia, J., dissenting).

15. For the Roberts group's opinion, see *id.* at 2577–2609 (plurality opinion). Pages 2601–08 contain the group's treatment of the ACA's Medicaid expansion provision. For the joint dissenters' opinion, see *id.* at 2642–77 (Scalia, J., dissenting). Pages 2656–68 contain the joint dissenters' treatment of the ACA's Medicaid expansion provision.

16. *Id.* at 2604–07 (plurality opinion); *id.* at 2661–66 (Scalia, J., dissenting).

17. *South Dakota v. Dole*, 483 U.S. 203, 205 (1987).

18. *Id.* at 207–11.

19. In *Dole*, the Court acknowledged that the required level of deference to Congress on this issue is so great that it has "questioned whether 'general welfare' is a judicially enforceable restriction at all." *Id.* at 207 n.2 (citing *Buckley v. Valeo*, 424 U.S. 1, 90–91 (1976) (per curiam)).

20. See *NFIB*, 132 S. Ct. at 2601–04 (plurality opinion); *id.* at 2657–58 (Scalia, J., dissenting).

constitutional bar prong of the *Dole* test, which precludes Congress from using the spending power “to induce the States to engage in activities that would themselves be unconstitutional,”²¹ did not come into play in *NFIB*.²²

It is the third prong of the *Dole* test, the so-called “clear notice” or *Pennhurst* prong, where things begin to get interesting.²³ The Roberts group invoked this provision in reaching its result.²⁴ The joint dissenters did not.²⁵ More critically, the Roberts group significantly changed the meaning of this restriction.²⁶ Historically, this prong of the *Dole* test has been read as seeking to ensure that the terms of the conditions on the offer made to the state are clear at the time the offer is made so

21. *Dole*, 483 U.S. at 210. Here the *Dole* court gave as an example “a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment.” *Id.*

22. See *NFIB*, 132 S. Ct. at 2601–07 (plurality opinion); *id.* at 2657–58 (Scalia, J., dissenting).

23. The *Pennhurst* prong of the *Dole* test asserts that “[I]f Congress desires to condition the States’ receipt of federal funds, it must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.” *Id.* at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (internal quotation marks omitted). This clear notice requirement originates from the following discussion by the Court in *Pennhurst*:

[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepted the terms of the ‘contract.’ There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Pennhurst, 451 U.S. at 17 (internal citations omitted).

24. *NFIB*, 132 S. Ct. at 2605 (plurality opinion).

25. *Id.* at 2659–66 (Scalia, J., dissenting).

26. *Id.* at 2605–07 (plurality opinion). In her dissenting opinion, Justice Ginsburg laments the Roberts group’s interpretation of the *Pennhurst* prong, noting that, “The Chief Justice appears to find in *Pennhurst* a requirement that, when spending legislation is first passed, or when States first enlist in the federal program, Congress must provide clear notice of conditions it might later impose Our decisions do not support such a requirement.” *Id.* at 2637 (Ginsburg, J., concurring in part, and dissenting in part). Ginsburg discusses the *Pennhurst*-related cases of *Bennett v. New Jersey*, 470 U.S. 632 (1985), and *Bennett v. Kentucky Dept. of Ed.*, 470 U.S. 656 (1985), in working to the conclusion that “*Pennhurst*’s rule demands that conditions on federal funds be unambiguously clear at the time a State receives and uses the money—not at the time, perhaps years earlier, when Congress passed the law establishing the program.” *Id.* at 2638.

that the state can make an informed decision whether to accept the offer.²⁷ In *Pennhurst* itself, for example, the issue was whether the obligation of States to provide certain institutionalized persons “appropriate treatment in the least restrictive environment” or to be answerable in damages was stated clearly as a condition on the relevant federal funds at the time the States were deciding whether to accept the funds.²⁸

Under that traditional understanding of the *Pennhurst* prong, the Medicaid expansion provision of the ACA should pose no problem. The terms of the offer are clear.²⁹ No state has contended that it does not know what its obligations would be if it accepted the deal, nor what the implications would be if it turned it down.

The Roberts group, however, read the *Dole* test’s *Pennhurst* prong in an entirely new way, such that the question became whether the States could have known at the time they agreed to participate in the *original* Medicaid plan that those funds might later be at risk unless additional conditions—to be disclosed at some unknown point in the future—were met.³⁰ Thus stated, it seems clear that even the sort of obviously prospective condition presented by the Medicaid expansion provision could be construed to be oddly retroactive, and thus problematic. Interpreted in this way, the *Dole* test’s *Pennhurst* prong also seems to pose a significant threat to any new condition on previously available funds, even if the condition is both clear and entirely prospective in its application.

A fourth *Dole* restriction was also seemingly relevant to the Roberts group’s decision,³¹ but again, not to the decision of the joint dissenters.³² This is the so-called “germaneness” or “relat-

27. *Id.* at 2637–38 (Ginsburg, J., concurring in part and dissenting in part).

28. *Pennhurst*, 451 U.S. at 17–18 (internal quotation marks omitted).

29. As Justice Ginsburg notes in her dissent, the Medicaid expansion provision of the Act “does not take effect until 2014” and the Act “makes perfectly clear what will be required of States that accept Medicaid funding after that date: They must extend eligibility to adults with incomes no more than 133% of the federal poverty line.” *NFIB*, 132 S. Ct. at 2637 (Ginsburg, J., concurring in part and dissenting in part). Justice Ginsburg also observes that “from the start, the Medicaid Act put States on notice that the program could be changed: ‘The right to alter, amend, or repeal any provision of [Medicaid],’ the statute has read since 1965, ‘is hereby reserved to the Congress.’” *Id.* at 2638 (quoting 42 U.S.C. § 1304 (2013)).

30. *See id.* at 2605–06 (plurality opinion).

31. *See id.*

32. *See id.* at 2659–66 (Scalia, J., dissenting).

edness” requirement that conditions on federal funds offered to the States must be related to “the federal interest in particular national projects or programs.”³³

Read most restrictively, this prong of the *Dole* test historically has required, for example, that a condition on the receipt of federal highway funds be related in some fashion to a state’s other decisions regarding highways and not, say, to whether a state chooses to include the death penalty as an available sanction under its criminal laws.³⁴

The conditions imposed by the Medicaid expansion provision of the ACA are imposed on a state’s receipt of Medicaid funds,³⁵ and therefore seem quite clearly to be related to Medicaid and to the federal interest underlying that larger program. The Roberts group, however, appeared to read this *Dole* requirement to permit only “modification[s] of Medicaid,” defined somehow, and deemed the Medicaid expansion “an attempt [by Congress] to foist an entirely new health care system upon the States.”³⁶

It is the final requirement set out in *Dole*, the so-called “anti-coercion” prong,³⁷ that is at the center of the *NFIB* decision, primarily because this is the only prong of the *Dole* test that both the joint dissenters and the Roberts group explicitly agreed was not satisfied by the Medicaid expansion provision of the ACA.³⁸ In setting out this requirement, the *Dole* Court noted that in some circumstances the inducement offered by Congress through the conditional offer of federal funds “might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”³⁹

The *Dole* Court concluded that a threatened loss to the States of five percent of their otherwise obtainable allotment of federal highway funds did not cross this line between “pressure” and “compulsion,” but did not suggest what percentage of

33. *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987).

34. See, e.g., *id.* at 207–09; Baker & Berman, *supra* note 3, at 465–67 (discussing the lower federal courts’ interpretations and applications of this prong of the *Dole* test).

35. See 42 U.S.C. §§ 1396-1, 1396a (2013).

36. *NFIB*, 132 S. Ct. at 2605 n.13 (plurality opinion).

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

38. *NFIB*, 132 S. Ct. at 2604–05 (plurality opinion); *id.* at 2662 (Scalia, J., dissenting).

39. *Dole*, 483 U.S. at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

these or any other funds so conditioned might, in the future, be found to do so.⁴⁰

In *NFIB*, the Roberts group determined that the Medicaid expansion provision of the ACA did not cross that line, and they termed this offer of federal funds “a gun to the head.”⁴¹ They noted that if a state did not comply with the ACA’s new Medicaid expansion conditions, it would “lose not merely a relatively small percentage of its existing Medicaid funding, but *all* of it.”⁴² They further observed that the Medicaid funds at issue amounted to “over 10 percent of a State’s overall budget.”⁴³ The Roberts group explicitly declined to fix the precise line where they believed persuasion gives way to impermissible coercion, but they concluded that wherever that line might be, the Medicaid expansion provision of the ACA was surely beyond it.⁴⁴

The joint dissenters agreed with the Roberts group on all these points.⁴⁵ Significantly, they noted that the federal Medicaid expenditures at risk under the ACA are “21.86% of all state expenditures combined,” whereas the funds at issue in *Dole* amounted to only about two-tenths of one percent of all state expenditures.⁴⁶

A problematic and critical difference between the Roberts group and the joint dissenters, however, is that the entire analysis of the joint dissenters focused on this anti-coercion principle.⁴⁷ The joint dissenters paid lip service to the other four requirements of the *Dole* test, but did not invoke any of them en route to invalidating the Medicaid expansion provision of the ACA.⁴⁸

It is not clear that *Dole* can sensibly be read to invalidate legislation that fails only the anti-coercion prong of the five-pronged test.⁴⁹ In any event, the opinion offered by the joint dissenters standing alone does not provide a judicially man-

40. *Id.*

41. *NFIB*, 132 S. Ct. at 2604 (plurality opinion).

42. *Id.* (internal quotation marks omitted).

43. *Id.* at 2605.

44. *Id.* at 2606–07; *see also id.* at 2605 (“The threatened loss of over 10 percent of a State’s overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”).

45. *Id.* at 2662, 2664, 2666 (Scalia, J., dissenting).

46. *Id.* at 2664 (Scalia, J., dissenting).

47. *Id.* at 2659–68 (Scalia, J., dissenting).

48. *Id.* at 2959 (Scalia, J., dissenting).

49. *Dole*, 483 U.S. at 207–08.

ageable reading of *Dole*.⁵⁰ Presumably, the joint dissenters do not mean to say that it is problematic if the federal government offers the States a great deal of money with any conditions at all attached. It must matter to the joint dissenters what those conditions are. Surely, they would agree that Congress must be allowed to fix at least some of the conditions on federal money that it offers the States. But the joint dissenters provide no particular elaboration on that point.⁵¹

At the end of their opinion, we are left with the possibility that the best way to understand the joint dissenters' portion of the *NFIB* decision on the spending power is that they have begun crafting, along with the Roberts group perhaps, a free-standing fiscal anti-commandeering principle whose critical details remain to be worked out in future cases.⁵²

Here, then, are two questions to ponder going forward. First, does the spending power doctrine after *NFIB*, as interpreted by the Roberts group and, in particular, by the joint dissenters, prohibit Congress from hypothetically offering each state federal funds in an amount equal to that state's current annual K through 12 education expenditures, subject to the sole condition that the money be spent only on primary and secondary education?

To get a sense of the enormity of the funds at issue under this hypothetical, consider that primary and secondary schools in Texas during the 2010–11 biennium received “about 43.7 percent of Texas's general revenue, twice the share of Medicaid, which accounts for 21.6 percent of all general revenue appropriations.”⁵³ It is not at all certain that the joint dissenters would find coercive or otherwise problematic an offer of federal “education” funds to cover these Texas expenditures.⁵⁴ The joint dissenters' own example along these lines included a variety of conditions on the offer of federal education funds, such as conditions governing curricula, the hiring and firing of teachers, and the like.⁵⁵ Their express concern was that they did

50. *NFIB*, 132 S. Ct. at 2661, 2662 (Scalia, J., dissenting).

51. *Id.*

52. *Id.*

53. See SUSAN COMBS, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, FAST FINANCIAL ALLOCATION STUDY FOR TEXAS: EXECUTIVE SUMMARY 8, <http://www.fastexas.org/study/exec/spending.php> (last visited Dec. 2, 2013).

54. *NFIB*, 132 S. Ct. at 2661, 2662 (Scalia, J., dissenting).

55. *Id.* at 2662 (Scalia, J., dissenting):

not want Congress to be left “to dictate policy in areas traditionally governed primarily at the state or local level.”⁵⁶ Thus, it was arguably those conditions, together with the size of the offer, which rendered the hypothetical conditional grant problematic for the joint dissenters.⁵⁷

My second question is this: Could Congress in the future simply take the repeal-and-reenact route? In other words, could Congress avoid a concern that federal funding of an existing program will be impermissibly conditioned on participation by the state in a second new program, simply by simultaneously repealing the old program and reenacting (perhaps even in the same bill) the new, combined program?

In the case of the ACA, the repeal-and-reenact process would create a single Medicaid program that would combine the new Medicaid expansion provisions with the old Medicaid components. Would the offer of federal funds to the States under that seemingly brand new Medicaid statute exceed Congress’ spending power as understood by the joint dissenters and the Roberts group?

Justice Ginsburg posed this question in her *NFIB* dissent,⁵⁸ but the joint dissenters ignored it.⁵⁹ The Roberts group at least of-

Suppose, for example, that Congress enacted legislation offering each State a grant equal to the State’s entire annual expenditures for primary and secondary education. Suppose also that this funding came with conditions governing such things as school curriculum, the hiring and tenure of teachers, the drawing of school districts, the length and hours of the school day, the school calendar, a dress code for students, and rules for student discipline. *As a matter of law*, a State could turn down that offer, but if it did so, its residents would not only be required to pay the federal taxes needed to support this expensive new program, but they would also be forced to pay an equivalent amount in state taxes. And if the State gave in to the federal law, the State and its subdivisions would surrender their traditional authority in the field of education.

56. *Id.* (Scalia, J., dissenting).

57. At least one commentator suggests that the joint dissenters would not find permissible even my hypothetical grant with no condition other than that the money be spent on “K-12 education.” See Bagenstos, *supra* note 10 at 871–74 (reading the joint dissenters to imply that “creation of a brand new program . . . that offered states a sufficiently large amount of money, would be coercive simply because the federal taxes used to pay for that program might crowd out state revenue sources. In contrast to Chief Roberts’s opinion, then, the rationale of the joint dissent would therefore invalidate far more conditional offers of federal funds.”).

58. *Id.* at 2636 (Ginsburg, J., dissenting) (“Consider also that Congress could have repealed Medicaid Thereafter, Congress could have enacted Medicaid II, a new program combining the pre-2010 coverage with the expanded coverage

ferred the following (non-responsive) reply: “Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration.”⁶⁰

In conclusion, until the Court takes up my final two questions in future cases, we cannot fully understand the effect of the *NFIB* decision on spending power doctrine. The Court’s 1987 five-pronged *Dole* test seems no longer to be the governing doctrine, but it is far from clear what has replaced it.

required by the ACA. By what right does a court stop Congress from building up without first tearing down?”).

59. *Id.* at 2656–68 (Scalia, J. dissenting).

60. *Id.* at 2606 n.14 (plurality opinion).