Cleveland State Law Review

Volume 61 | Issue 4 Article 8

2013

Medicaid Expansion, the Patient Protection and Affordable Care Act, and the Supreme Court's Flawed Spending Clause Coercion Reasoning in National Federation of Independent Business v. Sebelius

L. Darnell Weeden
Thurgood Marshall School of Law, Texas Southern University

MEDICAID EXPANSION, THE PATIENT PROTECTION AND AFFORDABLE CARE ACT, AND THE SUPREME COURT'S FLAWED SPENDING CLAUSE COERCION REASONING IN *NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS*

L. DARNELL WEEDEN*

I. INTRODUCTION

The issue to be addressed is whether the Patient Protection and Affordable Care Act's (ACA or "Obamacare")[1] manifest goal of promoting the general welfare of the

* Professor, Thurgood Marshall School Of Law, Texas Southern University; B.A., J.D., University Of Mississippi. This Article was supported by a 2013 summer research grant from Texas Southern University Thurgood Marshall School of Law. I give a special word of thanks to my wife and children for their reliable encouragement. I would also like to thank my former Research Assistant, Attorney Brenda Dang, a member of the Texas Bar, J.D. 2012, for her helpful comments on an earlier draft of this Article.

[1] Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-

nation by encouraging states to expand their existing Medicaid plans[2] is a coercive use of Congress' power under the Spending Clause[3] if the federal government permanently picks up at least 90 percent of the cost of the expansion. The Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general Welfare of the United States."[4] To make certain that federal money given to the States is used to promote the general welfare of the people in a manner consistent with the intent of Congress, it is necessary for Congress to have the power to place restrictions on the States' expenditure of federal dollars.[5]

The Supreme Court's decision in *Sebelius* dramatically changed the Medicaid expansion authority of Congress and unnecessarily created a confusing spending power coercion landscape for courts and others trying to determine the impact of *Sebelius* for any future attempt by Congress to expand or otherwise modify existing Medicaid legislation.[6] The Supreme Court should reverse its Medicaid holding in *Sebelius* and return to the position it adopted more than seventy-five years ago: Refusing to place unreasonable limits on the use of the spending power by Congress.[7] Beginning in 1937, the Supreme Court moved away from placing Tenth Amendment restrictions on the Spending Clause Power granted to Congress, which had the practical effect of authorizing Congress to provide instructions on subjects traditionally managed by state governments, provided that Congress connected conformity with those federal instructions to the delivery of federal dollars.[8] Since the states have the ability to simply refuse federal dollars, states have a reasonable choice of whether or not to embrace the instructions intended by the conditions established for those federal dollars, and as a result, the states have not lost any of its sovereign authority.[9] In *Sebelius*, a state could avoid federal spending power coercion by not accepting the offer of federal dollars.[10] In *Sebelius*, the Court finally acted on its warnings in *South Dakota v. Dole* that legislation enacted by Congress under the Spending Clause from the 1930s to 2010 was subject to affirmative

---

152, 124 Stat. 1029 (2010). When mentioning the ACA, I write about the ACA as amended by Pub. L. No. 111-152.

[2] ACA § 2001(a)(1) (codified at 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII)).

[3] U.S. CONST. art. I, § 8, cl. 1.

[4] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2633 (2012) (Ginsburg, J., concurring).

[5] *Id.*; *see, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[6] Susan Feigin Harris, *Healthcare Reform, the Supreme Court, and the Election: Is it Over Yet?*, 50 HOUS. LAWYER 14, 17-18 (2013).

[7] Reeve T. Bull, *The Virtue of Vagueness: A Defense of* South Dakota v. Dole, 56 DUKE L.J. 279, 283 (2006).

[8] *Id.* at 283-84 (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 598 (1937)) (approving many sections of the Social Security Act that produced a very appealing enticement for states to set up their own unemployment compensation regulations).

[9] *Id.* at 284 (citing Steward Mach. Co., 301 U.S. at 596).

[10] *Id.* (citing Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 143-44 (1947)).

limits.[11] Because all modern Spending Clause decisions before *Sebelius* validated the conditioning of federal dollars, *Sebelius* gave Congress explicit notice that its excessively coercive conditioning of Medicaid funds did not pass constitutional muster.[12]

In *Sebelius,* one could simply conclude that Chief Justice Roberts provided notice to Congress that it may condition only a percentage of major federal funding upon compliance by a state without invading that states' right of sovereignty. Chief Justice Roberts' coercion notice to Congress in *Sebelius* is vague and flawed because it fails to provide an understandable constitutional line that Congress shall not cross.[13] In *Sebelius*, Chief Justice Roberts wrote what will no doubt be regarded as extremely confounding language for healthcare policy makers, lawyers, scholars, and other interested parties endeavoring to understand the implication of the Spending Clause coercion rationale for future amendments to the Medicaid law.[14] Unfortunately, Chief Justice Roberts articulated the belief that the Supreme Court did not need to fix a recognizable line for determining when Spending Clause coercion violation occurred.[15] Chief Justice Roberts appears to be approving arbitrary line-drawing on the Medicaid expansion issue by stating that, "[i]t is enough for today that wherever that line may be, this statute is surely beyond it."[16]

Justice Ginsburg's opinion concurring in *Sebelius* kept the Medicaid expansion provision from being held completely invalid. Justice Ginsburg posed an influential question regarding future Medicaid expansion: "When future Spending Clause challenges arrive, as they likely will in the wake of today's decision, how will litigants and judges assess whether 'a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds?"[17] Chief Justice Roberts' very confounding language forces litigants and judges to determine the meaning of future amendments to the Medicaid law without any meaningful coercion criteria guidelines. I do not believe judges or litigants have a reliable set of criteria from the Supreme Court for assessing whether a state has a non-coercive choice in accepting federal requirements in exchange for federal money.

Part II of this Article provides a concise contention from a historical perspective that the Supreme Court has consistently refused to apply the unconstitutional conditions theory to any actual case as a violation of the Spending Clause prior to *Sebelius*. Part III analyzes the implication of the political question doctrine and other universal jurisprudential values for avoiding the endless judicial difficulties of resolving the Medicaid and spending power coercion issue presented in *Sebelius*. Part IV contends the Court in *Sebelius* incorrectly refused to give deference to Congress by using a Tenth Amendment states' rights rationale to conclude the ACA's Medicaid expansion plan was an unconstitutional coercive exercise of the

---

[11] *Id.* at 303 (citing Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 652 (1996)).

[12] *See id.*

[13] *See id.* at 303-04.

[14] Feigin Harris, *supra* note 6, at 19.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 19-20.

spending power. Part V asserts that the Supreme Court should apply the rational basis test for deciding whether Congress creates an unconstitutional coercive condition in violation of the spending power by requiring a participating state to accept reasonable federal changes that promote the general welfare.

II. FROM A HISTORICAL PERSPECTIVE PRIOR TO *SEBELIUS*, THE SUPREME COURT HAS CONSISTENTLY REFUSED TO APPLY THE UNCONSTITUTIONAL CONDITIONS THEORY TO ANY ACTUAL CASE AS A VIOLATION OF THE SPENDING CLAUSE

The Supreme Court has virtually without fail respected Congress' ability to provide instructions regarding spending conditions placed on federal grants, and the Court has insisted that States follow those instructions.[18] The Medicaid program was produced in 1965, after Congress included Title XIX in the Social Security Act with the goal of giving federal financial assistance to States that decided to reimburse particular expenses for medical treatment for needy people.[19] During the last fifty years, the Supreme Court has refused to place unnecessary restrictions on the ability of Congress to provide instructions for the Medicaid program, but the Court changed all that in a significant way in its June 28, 2012 *Sebelius* opinion.[20]

The Supreme Court's ruling in *Sebelius* rejects the Court's prior approach in approving the federal/state accommodating schemes for the Medicaid program.[21] The cornerstone of the federal/state Medicaid accommodating scheme is financial payment by both the Federal Government and the sharing State.[22] Nothing in Title XIX as originally enacted, or in its legislative history, suggests that Congress promised a participating State that subsequent legislation by Congress could not require a participating State to assume the responsibility of expanding the pool of needy individuals eligible for health services in its Medicaid plan.[23] It is very clear that the purpose of Congress in enacting Title XIX and the ACA was to give federal financial support for all legitimate state payments under an approved Medicaid plan.[24] Under the rationale adopted by the Supreme Court in *Harris v. McRae*, a participating State that fails to expand its Medicaid Plan as required under the ACA is no longer an approved Medicaid plan and therefore, is not entitled to any federal funding for any portion of its Medicaid plan.[25]

As a matter of judicial precedent, the Supreme Court has specifically established Congress' right to condition a State's acceptance of Medicaid dollars on submission

---

[18] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2633 (2012) (Ginsburg, J., concurring).

[19] Harris v. McRae, 448 U.S. 297, 301 (1980).

[20] Michael H. Cook & Jennifer L. Evans, National Federation of Independent Business v. Sebelius—*What Does it Mean to the Future of Medicaid and Healthcare Reform?,* 6 J. HEALTH & LIFE SCI. L. 88, 91 (2013) (citing *Sebelius*, 132 S. Ct. 2566).

[21] *Id.* at 92; *see also Sebelius*, 132 S. Ct. at 2634 (Ginsburg, J., concurring).

[22] *McRae*, 448 U.S. at 308.

[23] *Id.* (citing S. REP. NO. 89-404, pt. 1, at 83-85 (1965); H.R. REP. NO. 89-213, at 72-74 (1965); 1965 U.S.C.C.A.N. 1943).

[24] *Id.*

[25] *Id.* at 309.

to the requirements Congress created for involvement in the program.[26] While involvement in the Medicaid program is totally optional, once a State elects to play a part, it is obliged to comply with the terms of Title XIX or any other subsequent and reasonable amendment to the Medicaid law enacted by Congress while exercising its power under the Spending Clause.[27] The *Sebelius* decision adopted an unprecedented position by severely restricting the federal government's power to enforce an ACA provision that encourages states to expand its Medicaid plans to become more inclusive by enlarging the beneficiary population also in need of help.[28]

Before the 2011 Term, not a single Supreme Court judgment since the New Deal had invalidated any Congressional legislation as violating the spending clause.[29]More precisely, the specific issue of unconstitutionally coercive conditions analyzed by the Supreme Court in *Sebelius* was unusual as well. As a matter of fact, not a single federal court had ever concluded that any federal legislation created an unconstitutionally coercive use of the spending power[30] before the Court's pronouncement in *Sebelius*.[31] The only two Supreme Court cases discussing the spending power coercion policy concluded that it did not apply and held that the federal unemployment-compensation provisions of the Social Security Act of 1935 were valid in *Steward Machine Co. v. Davis*,[32] and the Court also validated the drinking-age condition imposed on highway funds in *South Dakota v. Dole*.[33] In those two cases, the Court accepted a hypothetical chance of a federal-spending plan to unconstitutionally coerce states. However, the court concluded that the factual evidence in the two cases demonstrated that actual coercion did not exist.[34] Before *Sebelius*, spending clause coercion had been properly downgraded to that branch of case law involving dicta and theory.[35]

---

[26] *Sebelius*, 132 S. Ct. at 2633 (Ginsburg, J., concurring); *see McRae,* 448 U.S. at 309.

[27] *Sebelius*, 132 S. Ct. at 2633; *see* 42 U.S.C. §§ 1396a-1396f (1976).

[28] Cook & Evans, *supra* note 20, at 91-92.

[29] Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging Into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Business v. Sebelius, 93 B.U. L. REV. 1, 2 (2013) (citing Va. Dep't of Educ. v. Riley, 86 F.3d 1337, 1355 (4th Cir. 1996) (Luttig, J., dissenting) ("I recognize that the Court has not invalidated an Act of Congress under the Spending Clause since *United States v. Butler*, over half a century ago."), *rev'd en banc*, 106 F.3d 559 (4th Cir. 1997)); *accord* Kansas v. United States, 214 F.3d 1196, 1202 (10th Cir. 2000) ("Most of the treatment given the [coercion] theory in the federal courts has been negative."); Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) ("The coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1430-32 (1989)).

[30] *Id.* at 3 (citing *Sebelius*, 132 S. Ct. 2566 (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.")).

[31] *Id.* (citing *Sebelius*, 132 S. Ct. at 2608 (plurality opinion)).

[32] *Id.* (citing Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 585-93 (1937)).

[33] *Id.* (citing South Dakota v. Dole, 483 U.S. 203, 212 (1987)).

[34] *Id.*

[35] *Id.*

III. THE IMPLICATION OF THE POLITICAL QUESTION DOCTRINE AND OTHER UNIVERSAL JURISPRUDENTIAL VALUES FOR AVOIDING THE ENDLESS JUDICIAL DIFFICULTIES OF RESOLVING THE MEDICAID AND SPENDING POWER COERCION ISSUE PRESENTED IN *SEBELIUS*

In *Sebelius*,[36] the US Supreme Court tackled a complex constitutional law case by unfortunately allowing different worlds to inhabit the opinion: "one legal, one imagined, and one based in concrete facts about the real world."[37] Following one of the most time-consuming oral arguments in current Supreme Court history,[38] the Supreme Court, in an opinion written by Chief Justice Roberts, concluded that the penalty sections of the Medicaid expansion sections were unacceptably coercive, and the penalty section of the Medicaid extension section of the act may be severed from the ACA.[39] Under the opinion written by Chief Justice Roberts, the Medicaid expansion requirement is a valid exercise of the spending power as long as Congress does not impose any penalty on any state currently participating in the Medicaid Program for rejecting the federal request for Medicaid expansion under the ACA.[40]

Chief Justice Roberts judicial behavior toward the Medicaid expansion penalty created a spending power coercion world that was disconnected from federalism reality.[41] The chief justice correctly concluded that the law involving federal grant-in-aid projects has constantly indicated that the federal government conceivably could exceed its spending power limits and coerce a state hooked on federal dollars to engage in an activity that it would not have otherwise engaged.[42] Because the intricacy of recognizing a difference between incentives and challenging arrangements from coercion is so problematic, the Supreme Court had never *ever* concluded that Congress had violated the coercion limit on the spending power.[43] Chief Justice Roberts' application of the coercion doctrine to limit the spending power of Congress in *Sebelius* is completely original and dangerous. For the first time in United States history, the Court concludes that spending power coercion exists in a mutually accommodating federal grant-in-aid venture but it does not realistically provide guidance on how to establish the difference between coercion and inducement or negotiation and duress.[44] The line of attack utilized by Chief Justice Roberts in avoiding these concerns strongly suggests that the Chief Justice has closed his eyes to the Medicaid statute, its ensuing enactment history, as well as

---

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

[37] Jerry L. Mashaw, *Legal, Imagined, and Real Worlds: Reflections on* National Federation of Independent Business v. Sebelius, 38 J. HEALTH POL. POL'Y & L. 255, 257 (2013).

[38] *Id.* at 256.

[39] *Id.* at 257.

[40] *Id.* at 256-57.

[41] *Id.* at 262.

[42] *Id.* at 262-63.

[43] *Id.* at 263.

[44] *Id.*

earlier judgments rendered by the Supreme Court.[45] One commentator has correctly concluded that Chief Justice Roberts' rationale regarding the Medicaid expansion amendments and the coercion issue in *Sebelius* is extremely harmful and destructive.[46] The rationale articulated by Justice Roberts encourages lower courts to discover coercion in whichever of the hundreds of state and federal mutually-accommodating subsidized projects now in operation should Congress decide to adjust and make involvement in the adjusted program a condition of taking part in the program at all.[47] Under the position taken by the Chief Justice, programs with settled expectations and popularity with state citizens would appear to be beyond amendment by Congress.[48] "To be sure, lower courts will be able to avoid this silly result, if they want to do so. But the Supreme Court has given those courts no usable standard on which to distinguish coercion from bargain."[49]

I agree with the position that conflicting opinions of the Justices concerning Medicaid expansion and unconstitutional spending power coercion encourages a state to now presume that its programs with settled expectations and popularity with state citizens are now virtually beyond amendment by Congress. Since the Court failed to provide standards to distinguish coercion from bargain, any future warning from Congress advising a state that it does not intend to continue providing money for programs it previously funded may now give states a plausible basis to argue spending power coercion.[50] Justices Ginsburg and her group of justices argued that the Medicaid expansion is constitutional as enacted.[51] The Dissenting Justices contended that the entire Medicaid expansion section of the law was coercive and unconstitutional and could not be saved.[52] The Court held that it would save Medicaid by denying DHHS the authority to withhold all of the existing Medicaid money.[53] Under the Medicaid expansion approved by the Supreme Court those, states that choose not to participate in the expansion may be denied only the money intended to help them implement the expansion.[54] Justices Ginsburg and Sotomayor concurred with the prevailing position to save a version of the Medicaid Expansion that is not consistent with the intent of Congress.[55] The *Sebelius* decision prohibiting Congress from withholding existing Medicaid money as coercive declared the States as separate and independent sovereigns and is the most significant Supreme Court

---

[45] *Id.*

[46] *Id.* at 265.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] Maureen Mullen Dove, *The Obamacare Decision: Does Anyone Know What it Means?,* 46 MD. B.J. 28, 30 (2013).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

judgment up until now, describing the restrictive nature of Congress' spending power.[56]

Maureen Mullen Dove, a retired Deputy General of Maryland, provides an excellent, concise statement regarding the practical effect of the Court approving a limited version of the Medicaid expansion enacted by congress.[57]As a practical matter, the real impact of the *Sebelius* Medicaid expansion holding will be on State budgetary choices.[58] "The decision dramatically reduces the pressure for States to accept the Medicaid expansion or other federal grants. Its effect will also limit Congress' ability to direct State implementation of other jointly funded programs by threatening withdrawal of federal funds."[59] However, Justice Ginsburg believes Congress could severely limit the state budgetary choices by simply repealing the existing Medicaid project and establishing a new version to include new people in need.[60] If Justice Ginsburg's theory is correct, the petitioning States might be thwarted; however, it is not likely that Congress will be able to implement Justice Ginsburg's theory to create new health care legislation in the future to expand coverage for poor adults because of the harsh reality of partisan politics.[61]

Although I agree that Chief Justice Roberts' reasoning is not clear and provides no significant criteria by which to determine coerciveness, I believe the future impact of the opinion is fairly easy to predict.[62] As a result of Roberts' reasoning, everyone may easily predict that there will be many legal challenges to the Medicaid expansion analysis.[63] Chief Justice Roberts' Medicaid expansion coercion theory is seriously flawed because it is vague and fails to adequately identify either the total sum or proportion of federal money at risk of being denied or the standard to properly measure when substantive changes to the Medicaid program actually create unconstitutional coercion.[64] Chief Justice Roberts' coercion rationale in *Sebelius* demonstrates that he has joined those Circuit courts which have consistently demonstrated an inability to apply Spending Clause doctrine to the federal healthcare projects in a significant way.[65]

In the lower federal court cases, states claim that participation in Medicaid is involuntary coercion because a state's medical arrangement would collapse without federal Medicaid money are not new and have been consistently rejected[66] before *Sebelius*. A state's involuntary-participation coercion Medicaid theory that is based

---

[56] *Id.* at 32.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Contra id.*

[63] *Id.*

[64] *Id.*

[65] Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Healthcare Programs*, 86 N.C. L. REV. 441, 453 (2008).

[66] *Id.* at 457.

on the allegation that a state could simply not afford to lose its federally-funded Medicaid programs was consistently rejected by the lower federal courts,[67] but accepted by the Supreme Court in *Sebelius*. In *West Virginia v. U.S. Department of Health and Human Services*,[68] a Fourth Circuit decision concerning a Tenth Amendment dispute regarding the "estate recovery" conditions that were attached to the Medicaid plan in 1993 by Congress, the appellate court correctly acknowledged that the limit of the Spending Clause power does not allow Congress to manipulate pressure into compulsion.[69] However, the Fourth Circuit rejected West Virginia's claim that the estate recovery section was coercive and prohibited by the Tenth Amendment.[70] While recognizing that conjecture regarding spending power coercion existed because of dicta in *Dole*, the Fourth Circuit concluded in 2002 that the Supreme Court failed to give reliable direction on the boundary between influence and compulsion, thus several courts have demonstrated judicial restraint by treating spending power coercion as a political question.[71]

The political question doctrine involves an intermingling of conditions under which courts correctly consider whether a specific issue in litigation is justiciable—to be precise, whether the question is right and proper for judicial resolution by courts.[72] The purpose of the political question doctrine is to implement the separation of powers doctrine.[73] Because of Article III, the separation of powers doctrine requires courts to give relevant deference to the other co-equal branches of the federal government when exercising those constitutional powers assigned to the courts.[74] In *Baker,* the Supreme Court recognized six situations in which a question may put forward a political question:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[75]

---

[67] *Id.*

[68] West Virginia v. U.S. Dep't. Health & Human Servs., 289 F.3d 281 (4th Cir. 2002).

[69] Huberfeld, *supra* note 65, at 459.

[70] *Id.*

[71] *Id.* at 459-60 (citing *West Virginia*, 289 F.3d at 289).

[72] Zivotofsky v. Clinton, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring).

[73] *Id.* (citing Baker v. Carr*,* 369 U.S. 186, 217 (1962)).

[74] *Id.*

[75] *Id.* (quoting *Baker*, 369 U.S. at 217).

Baker instituted the standard that if one of these factors is present, the case could be dismissed as a political question.[76] According to Justice Sotomayor, "*Baker* left unanswered when the presence of one or more factors warrants dismissal, as well as the interrelationship of the six factors and the relative importance of each in determining whether a case is suitable for adjudication."[77] I believe a functional application of the *Baker* factors to the Medicaid Expansion issue presented in *Sebelius* presents appropriate plausible justifications for refusing to give judgment on the merits of the spending power dispute between a state and the federal government. The utilization of one or more of the six Baker factors under the problematic political question doctrine in order to justify denying a state its requested remedy in *Sebelius* is not required and should not be required under the rationale of Professor Henkin.[78]

According to Professor Louis Henkin, "The 'political question' doctrine, . . . is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts."[79] Nevertheless, Professor Henkin contends the political question doctrine possessed some universal jurisprudential values, and only confusion is created by giving those universal values special treatment in preferred cases.[80] Professor Henkin argues that existing universal jurisprudential values contained in the following five suggestions renders the confusing political question doctrine unnecessary:

> 1. The courts are bound to accept decisions by the political branches within their constitutional authority.
> 2. The courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any.
> 3. Not all constitutional limitations or prohibitions imply rights and standing to object in favor of private parties.
> 4. The courts may refuse some (or all) remedies for want of equity.
> 5. In principle, finally, there might be constitutional provisions which can properly be interpreted as wholly or in part "self-monitoring" and not the subject of judicial review.[81]

Professor Henkin's five suggestions demonstrate how the court in *Sebelius* could have denied a state its requested remedy to be exempt from the Medicaid expansion requirement without suffering the penalty of losing all of its Medicaid funding without utilizing or recognizing the political question doctrine. First, in *Sebelius,* the Court could have refused to hear a state's Medicaid Expansion challenge because the Spending Clause grants Congress the power to provide for the general Welfare of the United States, and Art. I, § 8, cl. 1 allows Congress to use this power to establish the

---

[76] *Id.*

[77] *Id.*

[78] Louis Henkin, *Is there a "Political Question" Doctrine?*, 85 YALE L. J. 597, 621-22 (1976).

[79] *Id.*

[80] *Id.*

[81] *Id.* at 622-23.

type of cooperative state-federal agreement created under the ACA's Medicaid Expansion program.[82] Second, in *Sebelius,* the Court could have avoided hearing the ACA Medicaid challenge because the Constitution does not recognize a spending power violation by a Congressional mandate that a state which would like to continue receiving federal Medicaid dollars must now promote the general welfare of its poor citizens under the ACA by offering them an opportunity to receive healthcare coverage. Since the Spending Clause does not preclude the Secretary from withholding Medicaid funds as authorized by Congress based on a state's refusal to comply with the expanded Medicaid program, the Court has refused to grant a state its requested remedy. Third, in *Sebelius,* the Court could have refused to hear the ACA Medicaid challenge because the Constitution does not limit or prohibit Congress from offering an individual or a state a fair and reasonable opportunity to receive or reject all of its Medicaid Funds. Fourth, in *Sebelius,* the Court could have rejected the ACA Medicaid Expansion litigation because a state seeking a remedy has failed to make a case for equity in seeking to maintain its Medicaid dollars while not meeting the new reasonable and under-the-circumstances conditions for continuing federal dollars. The equity rationale for rejecting the Medicaid challenge by the states very strongly supports a denial of the opportunity to be heard on the merits by a participating state because since the beginning, the Medicaid Act gave states a warning that the program could be altered, amended, or repealed.[83] Ever since 1965, 42 U.S.C. § 1304 has continuously provided as follows: "The right to alter, amend, or repeal any provision of [Medicaid] . . . is hereby reserved to the Congress."[84] Because Congress gave the states fair warning that it was keeping the right to "alter, amend, or repeal" a spending program, Congress provided full notice of its plan to keep comprehensive and complete power to modify the program as a proper exercise of its legislative power over the states challenging the ACA Medicaid expansion and therefore, should be denied an opportunity to be heard in court under the equity rationale.[85]

The Supreme Court's judgment and rationale in *Bowen v. Public Agencies Opposed to Social Security Entrapment* could serve as persuasive justification for applying the equity concept to deny the States an opportunity to a full hearing on the merits of the Medicaid expansion challenge based on spending power coercion.[86] When authorized in 1935, the Social Security Act did not include state employees.[87] Reacting to coercion from States seeking to include its employees, Congress, in 1950, changed the Act to permit States to choose to participate in the program.[88] The federal law granting States this initial freedom of choice deliberately allowed States

---

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

[83] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2638 (2012) (Ginsburg, J., concurring).

[84] *Id.*

[85] *See id.*

[86] *See id.* (citing Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 51-52 (1986)).

[87] *See id.* (citing *Bowen*, 477 U.S. at 44).

[88] *See id.* (citing *Bowen*, 477 U.S. at 45).

the right to leave the program.[89] Starting in the 1970s, an expanding number of States used the option to depart.[90]

Troubled by the fact that departures were maltreating Social Security, Congress repealed the termination stipulation in the law.[91] Congress, by exercising its repeal power, changed Social Security from a voluntary plan for the States to one from which the States could not run away from or avoid.[92] California challenged the repeal, claiming that the alteration was not valid because it denied California the right to leave the Social Security program.[93] The Supreme Court unanimously refused to accept California's line of reasoning.[94] Because Congress incorporated in the Social Security Act "a clause expressly reserving to it '[t]he right to alter, amend, or repeal any provision' of the Act," the Supreme Court appropriately concluded that Congress gave the States adequate notice that the Social Security Act did not establish any contractual rights for the State of California or any other state.[95] As a result, the States did not have any legal basis on which to challenge the Social Security amendment, even with the considerable nature of the change.[96]

Fifth, in *Sebelius,* the Court could reject the ACA Medicaid Expansion lawsuits filed by the States because spending money to provide for the general welfare is part of the cooperative political responsibility federalism existing between Congress and the States. Cooperative political responsibility federalism should be construed as a "self-monitoring"[97] process that does not truly involve economic coercion because no one actually forces a state to accept free money, to provide or improve healthcare to eligible people living in the state. While rejecting the political question doctrine, Professor Hinkle correctly concludes that the Court has a duty to accept the constitutional reality that there are political responsibilities rooted in the political branches—and whether and how these political duties are implemented typically does not present an issue for review by the courts.[98] Since cooperative political responsibilities to promote the general welfare are a self-monitoring process, it should be exempt from judicial review.[99]When a state accepts money from the federal government under a Medicaid federal cooperative program, spending power economic coercion does not exist because a State volunteers to accept free money to improve the healthcare of its residents.

The Constitution has simply not ordained judges and courts as an "ombudsmen for all legislative inadequacies" because the judicial resolution is not to provide a

---

[89] *Id.* at 2638 (citing *Bowen*, 477 U.S. at 45).

[90] *See id*. (citing *Bowen*, 477 U.S. at 46).

[91] *See id.*

[92] *See id.* (citing *Bowen*, 477 U.S. at 48).

[93] *See id.* at 2638-39 (citing *Bowen*, 477 U.S. at 49-50).

[94] *See id.* at 2639 (citing *Bowen*, 477 U.S. at 51-53).

[95] *Id.* (quoting *Bowen*, 477 U.S. at 51-52).

[96] *Id.*

[97] Henkin, *supra* note 78, at 623.

[98] *Id.* at 624.

[99] *See id.* at 622-23.

helpful remedy for every injury.[100] The restraint on judicial involvement does not depend on an unnecessary political question doctrine to withdraw from a particular group of cases because the separation of powers doctrine assigned political duties to the federal legislative and executive branches.[101] The political question doctrine realized its glory days during the New Deal Court by Justices who were chosen to bring back judicial self-restraint and let those elected to Congress make the rules.[102] The issues which those New Deal Justices addressed "seemed particularly fitting for legislative rather than judicial rule and particularly fitting occasions to build fences against future judicial incursions."[103] As asserted by Justice Ginsburg in *Sebelius*, the dividing line between spending power coercion is more appropriate for legislative, rather than judicial, problem solving. "The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation."[104] Selected commentators supportive of a vigorous application of *Dole*'s spending power restrictions presume that a theory of "impermissible coercion" based on the belief that a State apparently lacks the ability to turn down federal money is really and truly too extremely vague and unstructured to be judicially supervised.[105]

The position that the States' overdependence on federal dollars restricts Congress' power to amend or expand the Medicaid program under the Spending Clause is wrong because it is the constitutional responsibility of Congress and not the States to spend federal money to provide for the general welfare of the people.[106] Each succeeding Congress is authorized to disperse money as it considers necessary or proper.[107] The 110th Congress was free to make a decision regarding Medicaid finances that modified the product produced by a prior Congress. In fact a succeeding Congress could deny the States money they were hopeful of receiving based on the action of a past Congress without violating the spending power coercion theory.[108] To allow the States to restrict Congress' ability to make subsequent changes to a conditional Medicaid grant encourages the states to collectively or individually use the Spending Clause to coerce Congress into economic submission to the States. When Congress is required by the courts to continue granting money to the States based on the original terms of the conditional grants without the ability to subsequently change the terms of the original conditional grant, Congress has been coerced by the States receiving the money on their own terms rather than the terms set by Congress.

---

[100] *Id.* at 624-25

[101] *Id.* at 625.

[102] *Id.*

[103] *Id.*

[104] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2641 (2012) (Ginsburg, J., concurring) (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

[105] *Id.* (citing Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole,* 78 IND. L. J. 459, 521-22, n.307 (2003)).

[106] *Id.*

[107] *Id.*

[108] *Id.*

In *West Virginia ex rel. McGraw v. United States Department of Health and Human Services*, the federal district court abided by the Supreme Court advice to lower courts to maneuver away from issues asking courts to determine when federal encouragement to meet the terms of a condition in a grant produces unacceptable coercion.[109] Although Justice Roberts concluded in *Sebelius* that the States had suffered Spending Clause coercion, he also failed, like all of the other judges, to identify a single court that had discovered the time in which encouragement became coercion. [110] It is not surprising that not a single judge has been able to actually identify when spending power coercion has occurred because according to Professor Kathleen Sullivan, an empirical explanation of when coercion occurs is virtually impossible to ascertain.[111] The federal district court appropriately refused to accept West Virginia's self-serving contention that its statutory choice of participating in the federal estate recovery plan was unconstitutionally coerced.[112] The district court held that the execution of an estate recovery plan as a condition of getting federal Medicaid dollars is permitted by the spending power.[113] In *Sebelius,* spending power jurisprudence would have been well served if the Supreme Court had simply rejected the States' self-serving contention that its statutory choice of participating in the ACA federal Medicaid expansion plan created unconstitutional coercion. The Supreme Court should have followed the rationale of the federal district in West Virginia and held that participation in the Medicaid expansion plan as a condition of continuing to receive federal Medicaid dollars is permitted by the spending power.

IV. THE COURT IN *SEBELIUS* INCORRECTLY REFUSED TO GIVE DEFERENCE TO CONGRESS BY USING A TENTH AMENDMENT STATES' RIGHTS RATIONALE TO CONCLUDE THE ACA'S MEDICAID EXPANSION PLAN WAS AN UNCONSTITUTIONAL COERCIVE EXERCISE OF THE SPENDING POWER

Public servants on behalf of twenty-six states, two non-public plaintiffs, as well as the National Federation of Independent Business, challenged the Medicaid expansion as a violation of the Tenth Amendment right of a state to be free of spending power coercion.[114] The state plaintiffs made the claim that the Medicaid expansion violated both the spending power and the Tenth Amendment's reservation of definite powers to the states.[115] Congress is not authorized to use its spending power to "coerce" the states into submission with the federal objective.[116] Under the

[109] West Virginia v. U.S. Dep't. Health & Human Servs., 132 F. Supp. 2d 437, 444 (S.D. W. Va. 2001).

[110] *See id.*

[111] *Id.* (citing Sullivan, *supra* note 29, at 1428).

[112] *Id.*

[113] *Id.*

[114] Florida v. U.S. Dep't Health & Human Servs., 648 F.3d 1235, 1240 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[115] *Id.* at 1264 (citing U.S. CONST. amend. X; Charles C. Steward Mach. Co. v. Davis*,* 301 U.S. 548, 585 (1937); West Virginia v. U.S. Dep't Health & Human Servs., 289 F.3d 281, 286-87 (4th Cir. 2002)).

[116] *Id.*

Spending Clause, the coercion test raises an issue of whether the federal plan denies a state a choice about meeting the conditions for receiving federal dollars and induces the state to take action because the state, in effect, has no other choice.[117]

Initially, the coercion doctrine received significant analysis by the Supreme Court in *Charles C. Steward Machine Co. v. Davis*.[118] In that case, a corporation disputed the obligation to pay an employment tax required by the recently approved Social Security Act.[119] The corporation contended that the federal government inappropriately coerced states into making a contribution to the Social Security program.[120] The Supreme Court appropriately rejected the corporation's challenge to the employment tax because the corporation failed to make a distinction between motive and coercion.[121] Every condition placed on the receipt of money is analogous to a tax because to some degree, it is regulatory.[122] To some extent, receiving federal dollars is similar to paying a tax because taxes place an economic burden on the activity that is taxed as compared with a similar activity that is not taxed, and state activity receiving federal funds may have regulatory burdens that do not apply to another state activity.[123] Every reimbursement from a tax when based upon conduct is comparatively an enticement.[124] However, to claim that purpose or enticement is equal to spending power coercion is to unnecessarily create a spending clause jurisprudence that is an unconstitutional stumbling block that restricts the power of Congress.[125] Asserting that lawful purpose and enticement equals spending power coercion is too much a fatalistic view toward the freedom of choice in making policy determinations about adopting public policy to promote the general welfare.[126] The law should be directed by a common sense understanding which presupposes that a freedom of choice exists between the federal government and the states on solving problems that are an impediment to promoting the general welfare.[127] Nothing in the *Sebelius* case supports the conclusion that the federal government had exercised power over the states similar to undue influence. It is indeed fair to assume that the undue influence concept should rarely, if ever, be applied to the interaction between the state and federal bodies.[128] "Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact."[129] What is truly an amazing fact regarding *Sebelius* is the Supreme Court's unilateral decision to address the ACA

---

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.* (citing Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 589-90 (1937)).

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* (quoting Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 589-90 (1937)).

Medicaid expansion requirement as a spending power coercion issue because all the federal circuits came to the same conclusion that the Medicaid expansion was a valid exercise of the power of Congress.[130] Although no single inferior court had proclaimed that the Medicaid expansion violated the constitution, the Supreme Court mysteriously created the spending power Medicaid expansion coercion issue and then approved the petition for certiorari on the Medicaid issue.[131]

In *Sebelius,* the Court held that the Tenth Amendment functions as a check on Congress' authority to spend for the general welfare once objectionable conditions are placed on states' receipt of those federal payments.[132] Although *Sebelius* will encourage many more novel coercion objections to federal conditional spending plans, the Supreme Court has left the lower courts with very little direction and judicially manageable standards to address future spending power litigation by basing coercion on a vague standard.[133] The Court's flawed spending power coercion theory has unnecessarily created "difficulties for lower courts attempting to decide coercion challenges, legislators drafting new conditional spending programs, and federal agencies administering existing Spending Clause programs [that] are profound. For every federal spending program since the Great Society, this case signals the beginning of a new era of litigation challenges."[134]

In *Sebelius,* the expanded Medicaid mandate was considered coercive because the Court implemented its lack of judicial deference to Congress rationale as applied to the Commerce Clause regulation in 1995 in *United States v. Lopez*[135] to the federal spending power under the Spending Clause.[136] Connecting the spending power coercion theory to the lack of deference to Congress' use of its commerce clause power in *Lopez* provides a basis for understanding the lack of judicial deference to the power of Congress to promote cooperative federalism spending power projects. In *Lopez,* the Court believed if it were to accept the Government's point of view regarding the possession of guns at school, it would be very difficult for the Court to conceive of any undertaking by a person that Congress does not have the power to regulate under its commerce power.[137] In *Sebelius,* the Court refused to accept the Government's point of view regarding the Medicaid Expansion.[138] Because of a lack of judicial respect for Congress, it was very easy for the Court to conceive of Medicaid Expansion by Congress as a pragmatic coercive effort by the federal government to demand considerable and unforeseeable expenditures from the states that are currently involved in a continuing federal spending plan as a violation of the

[130] Huberfeld, Weeks Leonard & Outterson, *supra* note 29, at 30.

[131] *Id.*

[132] *Id.* at 6.

[133] *Id.*

[134] *Id.*

[135] United States v. Lopez, 514 U.S. 549 (1995).

[136] *See id.* at 549.

[137] *Id.* at 564.

[138] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2605 (2012).

spending power.[139] The *Sebelius* coercion occurs even if the states were presented with the option to accept the ACA's additional terms and conditions or leave Medicaid completely.[140] The states, in effect, were coerced by lack of a sensible choice.[141] In *Sebelius,* the Court's conclusion that the States suffered spending power coercion under the Medicaid expansion exists because of the *Lopez* lack of judicial deference reality. In *Lopez,* the Court demonstrated a lack of judicial deference to a Congressional exercise of its commerce clause power.[142] While in *Sebelius,* the Court followed the line of reasoning established in *Lopez* and did not give any deference to Congressional use of the spending clause power.[143]

The Supreme Court's decisions in *Lopez* and *Sebelius* was a return to the rationale utilized in *National League of Cities v. Usery* because in those three judicial opinions, the Supreme Court gave the States a constitutional shield against specific types of federal requirements that were clearly within the reasonable scope of the enumerated power of Congress.[144] Throughout *Sebelius,* the Court simply utilized the Tenth Amendment to justify imposing a judicially created affirmative restriction on the scope of the national spending power of Congress.[145] In *Sebelius,* the Supreme Court took the position that the Tenth Amendment operated as a substantive tool to place affirmative limits on the federal spending power, even in the Medicaid Expansion field to which a non-coercive federal constitutional spending power was presumed to be real and available to Congress.[146]

If the Court in *Sebelius* had followed Justice Blackmun's rationale in *Garcia v. San Antonio Metropolitan Transit Authority,*[147] which overruled *National League of Cities'* approach of rejecting the "traditional governmental functions" doctrine, it would have concluded the spending power coercion theory did not prohibit Congress from giving states a choice to adopt Medicaid expansion to avoid losing its Medicaid funds. Professor James F. Blumstein acknowledges that Justice Blackmun recognized in *Garcia* that the traditional governmental function approach was inherently flawed because it failed to serve as an informative principle of Tenth Amendment limitations on the enumerated powers of Congress.[148] Similar to the traditional governmental functions restriction on the Tenth Amendment States' rights issue, the spending power coercion prohibition is also fatally flawed because it

---

[139] James F. Blumstein, NFIB v. Sebelius *and Enforceable Limits on Federal Leveraging: The Contract Paradigm, the Clear Notice Rule, and the Coercion Principle*, 6 J. HEALTH & LIFE SCI. L. 123, 135 (2013).

[140] *See id.* at 129.

[141] *Id.* at 137-38.

[142] United States v. Lopez, 514 U.S. 549 (1995).

[143] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2606 (2012).

[144] *See* James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1283 (1994) [hereinafter Blumstein*, Federalism*] (citing Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)).

[145] *See id.*

[146] *See id.*

[147] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).

[148] Blumstein*, Federalism*, *supra* note 144, at 1283-84.

is too vague to provide an informative principle of Tenth Amendment limitations on the enumerated Spending Clause power of Congress.

In *Garcia,* Justice Blackmun, who had concurred and supplied the necessary fifth vote in *National League of Cities,* abandoned the traditional governmental function paradigm of *National League of Cities* as unreasonable and impractical, as well as incompatible with the customary doctrine of federalism.[149] In my view, the Supreme Court should abandon the spending power paradigm approved in *Sebelius* as also unreasonable and impractical, as well as incompatible with the customary doctrine of cooperative spending power federalism as applied to Medicaid. Because the traditional governmental functions theory did not provide much analytical guidance in determining which state functions were traditional and beyond the reach of federal power and which state functions were not traditional and within the reach of the federal power, the theory was properly rejected in *Garcia*.[150] Since the spending power theory in *Sebelius* does not provide any meaningful analytical direction in determining which federal expenditures for Medicaid are coercive, it fails to meet the criteria articulated by the Court in *Dole*.[151] Justice Ginsburg correctly states that *Sebelius* "does not present the concerns that led the Court in *Dole* even to consider the prospect of coercion."[152] Because *Sebelius* is a simple case, the Court's analysis is very troubling and disturbing. Congress, endeavoring to help the disadvantaged, has distributed federal money to financially support state health-insurance plans that comply with federal standards.[153] The major requirement that the ACA establishes is that the state plan expands to include adults earning no more than 133% of the federal poverty level.[154] Imposing that requirement guarantees that federal dollars will be spent on health care for the economically disadvantaged in order to advance Congress' contemporary observation of the general welfare.[155]

V. THE SUPREME COURT SHOULD APPLY THE RATIONAL BASIS TEST FOR DECIDING WHETHER CONGRESS CREATED AN UNCONSTITUTIONAL COERCIVE CONDITION IN VIOLATION OF THE SPENDING POWER BY REQUIRING A PARTICIPATING STATE TO ACCEPT REASONABLE FEDERAL CHANGES THAT PROMOTE THE GENERAL WELFARE

A simple application of the rational basis test to determine if spending power coercion exists would presume that it is generally conceivable that a State would voluntarily accept federal dollars to advance or promote the general welfare of its citizens and that the State's acceptance of conditional federal Medicaid grants is entitled to a strong presumption that its acceptance of the grant does not produce spending power coercion or a violation of States' rights. In my opinion, the rationale articulated by Justice Souter to support the application of the rational basis theory in

---

[149] *Id.*

[150] *Id.* at 1284-85.

[151] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2634-35 (2012) (Ginsburg, J., concurring).

[152] *Id.* at 2634.

[153] *Id.*

[154] *Id.* at 2634-35.

[155] *Id.*

the context of the enumerated commerce clause power is equally applicable to a Spending Clause analysis.[156] In reviewing congressional legislation under either the Commerce Clause or the Spending Clause, the Court should defer to an express or implicit congressional finding that its law focuses on a topic substantially promoting the general welfare or affecting interstate commerce if providing any rational basis to support such a finding by Congress.[157] The tradition of deferring to rationally established legislative reasoning "is a paradigm of judicial restraint."[158] In *Sebelius,* judicial review as a tool of judicial restraint under the Spending Clause would have demonstrated the Court's "respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress' political accountability in dealing with matters open to a wide range of possible choices."[159] In *Sebelius,* Chief Justice Roberts' refusal to apply the rational basis test to Congress' exercise of its spending power demonstrated a lack of "respect for the competence and primacy of Congress in matters" promoting the nation's general welfare in the area of healthcare by unsustainably increasing its theory of judicial review while disparaging a proper exercise of the congressional spending power.[160] Since before *Sebelius,* the Supreme Court had never held that coercion actually violated the spending clause, demonstrating how *Sebelius* dangerously rolled back the enumerated power of Congress.[161] The *Sebelius* spending power rationale suggests that the Court has an excessive judicial appetite for expanding a style of judicial review that undermines judicial deference because it invites future litigants to challenge the spending power of Congress unless Congress can at least demonstrate a substantial justification for its exercise of the spending power.[162]

In *Sebelius,* Chief Justice Roberts energized and expanded the Rehnquist Court's federalism, with its central goal of rolling back of national power of Congress while simultaneously expanding state's rights.[163] Under the rationale of *Sebelius,* the Rehnquist Court's goal of reducing national power has been expanded to include the spending power.[164] Before *Sebelius,* the spending power was generally recognized as

---

[156] United States v. Lopez, 514 U.S. 549, 603 (1995) (Souter, J., dissenting).

[157] *Id.* (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981); Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 17 (1990); *see* Maryland v. Wirtz, 392 U.S. 183, 190 (1968) (quoting Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964))).

[158] *Id.* at 604 (quoting Fed. Commc'ns Comm'n v. Beach Commc'n, Inc., 508 U.S. 307, 314 (1993).

[159] *Id.* (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981); United States v. Carolene Prods. Co., 304 U.S. 144, 147, 151-54 (1938); *cf.* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955)).

[160] *See id.*

[161] *See id.*

[162] *See id.*

[163] *See* 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).

[164] *See id.*

the notable exception to the Supreme Court's rollback of the national power by Congress because of the Court's decision in *Dole*.[165] As a result of *Dole,* several analysts and pundits advanced the political and constitutional theory that spending power legislation would roll back a states' rights federalism that actually compromises the power of Congress.[166]

Those analysts and pundits who believed that Congress could enact legislation under *Dole* without committing spending power coercion reasonably relied on the fact that the majority of the lower courts had concluded that spending coercion under *Dole* could occur only if a state could demonstrate it had "no practical choice."[167] If a state could refuse the condition and nevertheless carry on in actual fact as a state, then receiving the condition creates a freedom of choice, and the condition should not be treated as unacceptably coercive.[168] The view that a state demonstrate that it cannot survive as a state in order for spending power coercion to exist is very consistent with the precedents that are the basis for the decision in *Dole*.[169] In *Sebelius,* the Court energized enumerated power rollback supporters by applying a vague spending coercion theory that gave considerably less deference to Congress than *Dole.*[170] In order to aggressively implement its enumerated powers rollback in favor of the states and at the expense of Congress, the Court in *Sebelius* implicitly adopted the position that a spending condition is improperly coercive if it is conceivable that a state could believe it had either no rational choice or no fair choice but to accept the money.[171] By not applying the rational basis standard, the Supreme Court in *Sebelius* adopted the rationale that the spending condition which placed a state at risk of losing all of its Medicaid money if it refused to participate in Medicaid expansion created spending coercion because it was conceivable that the state had no practical choice.[172] However, since it was conceivable in *Sebelius* that a

---

[165] *See id.* (citing South Dakota v. Dole, 483 U.S. 203 (1987)).

[166] *See id.* (citing Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 51-52 (2003)).

[167] *Id.* at 520.

[168] *See id.* at 520 n.302 (citing Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1998) ("According to the coercion theory, the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions.")).

[169] *Id.* at 520 (citing Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 586 (1937) ("There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states." After concluding that the tax was not coercive, the court stated, "[t]he statute does not call for a surrender by the states of powers essential to their quasi sovereign existence.")).

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

[171] *See id.* at 2604-07.

[172] *See* Baker & Berman, *supra* note 163, at 520-21 n.305 ("A decade prior to *Dole*, one scholar objected that '[d]ebating whether conditions on federal grants . . . 'coerce' the state is an unhelpful anthropomorphism. . . . The question . . . is not whether federal requirements overbear on a hypostasized state 'free will,' but whether they unduly compromise a normative political conception of state autonomy.'" (quoting Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandatory State Implementation of National Environmental Policy*, 86 YALE L. J. 1196, 1254 (1977))).

State had a practical, but hard, choice not to expand Medicaid as required under the ACA and lose all of its other Medicaid funding under the rational basis test, the Supreme Court should have deferred to Congress under the rational basis standard and upheld the ACA's Medicaid expansion requirement.

In *Sebelius,* the Court abandoned the rational basis standard of review in order to limit the reach of the federal spending power based on a spending power coercion rationale that is so vague that it is impractical.[173] Because the Roberts Court is committed to a rollback of the enumerated powers of Congress, the Court no longer applies the rational basis standard to either the commerce power or spending power when a State challenges legislation enacted by Congress.[174] The Court in *Sebelius* resolved the Medicaid Expansion issue by abandoning the rationality rule in order to support its spending power coercion theory.[175] The intended enumerated power rollback effect of the vague *Sebelius* coercion theory is to deny deference to Congress. Even if it is conceivable that a state could make a hard choice to lose all of its Medicaid funding and reasonably believe that a total loss of its Medicaid money does not equal a total coercive destruction of the state by the federal government, the Supreme Court's conclusory coercion analysis in *Sebelius* unreasonably suggests that Congress has robbed the state of its right to continue to exist.[176]

When the issue of how to adjust the standard of judicial review occurred during the 2012 challenges by states to the Medicaid Expansion, the Roberts Court invalidated the expansion under a vague Spending Clause coercion theory. [177] In the process of treating the Medicaid expansion as an act of spending power coercion, the Roberts' Court repudiated Court precedent by refusing to defer to Congress' judgment on how to use its spending power to promote the general welfare.[178] The judicial "matching" of the permissible conditions that Congress may place on federal grants is the functional equivalent of elevating the degree of formal judicial scrutiny required by the Court for its approval of spending power legislation.[179] The Court utilized an incomprehensibly vague spending power coercion theory in *Sebelius*. The vague spending power theory implemented by the Court in *Sebelius* ignores the rational basis standard and arbitrarily places a "direct" limit on a reasonable use of the spending power by Congress to promote the general welfare.[180]

In an unsuccessful 1937 lawsuit filed by the Charles C. Steward Machine Company against Harwell G. Davis, individually and as a Collector of Internal Revenue for the District of Alabama challenging the validity of the tax imposed by the Social Security Act of 1935 on employers of eight or more, the Court gave

---

[173] *See* Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U CHI. L. REV. 575, 594 (2013).

[174] *Id.*

[175] *See id.* at 594-95.

[176] *Id.*

[177] *Id.* at 595, 597.

[178] *Id.* at 597.

[179] *Id.* at 599.

[180] *Id.*

deference to Congress under the rational basis standard.[181] The Social Security Act of August 14, 1935 is separated into eleven distinct titles.[182] The heading for Title IX is "Tax on Employers of Eight or More."[183] Each employer (with indicated exclusions) is to pay every calendar year "an excise tax, with respect to having individuals in his employ," the tax is to be calculated by prearranged percentages of the sum of the wages payable by the employer throughout the calendar year in the course of said employment.[184]

Unlike Chief Justice Roberts' treatment of the Medicaid Expansion in *Sebelius,* Justice Cardozo rejected the coercion-theory attack on the Social Security Act of 1935.[185] Justice Cardozo correctly concluded that "[t]he excise tax is not void as involving the coercion of the states in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government."[186] The states failed to demonstrate that the Medicaid Expansion was being utilized as "weapons of coercion, destroying or impairing the autonomy of the states."[187] Justice Cardozo, unlike Chief Justice Roberts, would likely not have found a spending power coercion violation in *Sebelius*. Justice Cardozo believed in order to intelligently distinguish between coercion and encouragement, courts would be wise to defer to Congress when using the spending power to rationally establish fiscal and economic policy to promote the general welfare of the American people.[188] In the presence of an urgent need for a remedial measure to help the nation control healthcare cost while simultaneously expanding Medicaid coverage to the economically-challenged, the question to be answered is whether the Medicaid Expansion measure adopted by Congress exceeded the scope of the spending power. Justice Cardozo rejected the argument that the1935 Social Security Act placed "the state Legislatures under the whip of economic pressure" that was so great that the state had no practical choice but to ratify the unemployment compensation laws directed by the federal government.[189] Justice Cardozo correctly concluded that the federal unemployment compensation laws did not create an unconstitutional coercion that violated the Tenth Amendment's implicit limits on coercive federalism.[190] If Chief Justice Roberts in *Sebelius* had followed the early logic used by Justice Cardozo, he would have rejected the contention that because the ACA was designed to force the state Legislatures under the whip of economic pressure to adopt Medicaid Expansion as commanded by Congress, the expansion created unconstitutional spending power

[181] Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 574 (1937) (citing 42 U.S.C. §§ 301-1305).

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.* at 585.

[186] *Id.*

[187] *Id.* at 586.

[188] *Id.* 586-87.

[189] *Id.* at 587.

[190] *Id.* at 585.

coercion.[191] In rejecting the approach taken by Justice Cardozo, Chief Justice Roberts apparently believes that the Medicaid Expansion provision is also a violation of the Tenth Amendment or other limitations implicit in the his rollback model of federalism.[192] Supporters of the Medicaid Expansion rightfully contend that its operation is not a constraint because like the Social Security Act of 1935 that was found valid by the Court, it expands the freedom of both the states and the nation by allowing them to join in a co-operative endeavor to solve shared problems.[193]

VI. CONCLUSION

The Supreme Court's decision in *Sebelius* dramatically changed the Medicaid expansion authority of Congress and unnecessarily created a confusing spending power coercion landscape for courts and others trying to determine the impact of *Sebelius* on any future attempt by Congress to expand or otherwise modify existing Medicaid Legislation. The Supreme Court should reverse its Medicaid expansion holding in *Sebelius* and return to the rationale it adopted more than seventy-five years ago when it refused to limit congressional spending power based on a slippery slope coercion theory.

Since Chief Justice Roberts' reasoning is not clear and provides no significant criteria by which to determine coerciveness, I believe the future impact of the opinion is fairly easy to predict. In view of the fact that Roberts' reasoning is not clear and provides no criteria by which to determine coerciveness, everyone may easily predict that there will be many legal challenges to the Medicaid expansion analysis provided by Chief Justice Roberts. Chief Justice Roberts' Medicaid expansion coercion theory is seriously flawed because it is vague and fails to adequately identify either the total sum or proportion of federal money at risk of being denied or fails to properly measure when substantive changes to the Medicaid program actually create unconstitutional coercion. Chief Justice Roberts' coercion rationale in *Sebelius* demonstrates that he has joined those who support a hostile brand of federalism that is designed to roll back the power of Congress to promote the general welfare of all Americans, including adults without any healthcare care coverage.

---

[191] *See id.* at 587.

[192] See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604-05 (2012).

[193] *See id.*