Memorandum

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President
The Constitution Project

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Re: The Impact of the Supreme Court's Decision Regarding the Constitutionality of Health Care Reform

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This memorandum will assess the impact of the Supreme Court's decision in *National Federation of Independent Business v. Sebelius,* 132 S. Ct. 2566 (2012) (*"NFIB"),* upholding the Affordable Care Act (the "ACA" or "the Act"). While the impact of the decision on the legislative advocacy of nonprofits (and others) may be limited, it would be prudent, in advocating and drafting new legislation and in defending existing statutes, to take steps to minimize the risk of constitutional challenges. This memorandum suggests such measures and examines potential future risks.

The analysis will address two facets of the Court's highly fragmented decision: (1) the effect of the Justices' disparate pronouncements on the constitutionality of the minimum coverage provision of the ACA under the Commerce Clause and the taxing power, and (2) the unprecedented limits the Court placed on the spending power.

Two key conclusions, discussed in more detail below, warrant particular emphasis.

First, the Justices who found that the individual mandate fell outside Congress's commerce powers emphasized the novelty of the provision. It follows that no laws *on the books* have the same ostensibly unconstitutional feature. Whether Congress and the courts will find that *newly proposed* laws are similar to the individual mandate is discussed below

Second, there is a good argument that the size, longevity, and universal adoption of Medicaid distinguish it from every other federal grant program, making it far less likely that conditions on any such grants would be held to exceed Congress's spending power.

EXECUTIVE SUMMARY

- Although five Justices concluded in separate opinions that the minimum coverage provision of the ACA is unconstitutional under the Commerce Clause, in the absence of a majority opinion, their views do not have precedential force. The practical effect of these opinions also may be limited. **The tally of the votes, however, may signal increased hostility on the Court to federal regulation. There are steps that legislative drafters and advocates can take to minimize any constitutional risk to legislation.** (Pp. 4, 6-8).

- A **majority ruled that the minimum coverage provision is a constitutional exercise of Congress's taxing power.** Despite the provision's mandatory language, the only consequence of foregoing insurance is payment of a penalty. And that penalty, the majority found, is a tax because, among other reasons, it appears in the Tax Code, is calculated as a percentage of income, is collected by the IRS, cannot exceed the cost of complying with the mandate, and does not require scienter, among other things. **It is possible to extract from these and other factors guidelines for legislative advocacy and drafting.** (Pp. 5-8).

- **Although there was no majority opinion, a majority of the Justices found that ACA's expansion of Medicaid unconstitutionally *coerced* the States to participate.** However, the Court limited the remedy to a prohibition on threatening the States' current Medicaid funding to induce participation in the new program. The Chief Justice's opinion provides the narrowest grounds for the result, and thus is controlling. (Pp. 8).

    - The Chief Justice affirmed that, while Congress cannot place existing funding in jeopardy if doing so would be coercive, it can require participants in the new expansion to meet the requirements attached to that program, so long as the conditions are unambiguous. Treating the Medicaid expansion as "new," rather than as an amendment of an existing program, was determinative. That treatment turned on perceived differences between the original program and the expansion with regard to purpose, funding and benefits. The Chief Justice did not find it persuasive that Congress styled the expansion as an amendment of the current Medicaid program, or that the new program used the existing administrative structure. (Pp. 9-11).

    - The Chief Justice's finding that the threat to existing Medicaid funding was coercive turned on, among other things, the size of federal Medicaid funding as a percentage of the State budgets, the bureaucratic infrastructure the States had developed to administer the existing program, the reliance of State employees and Medicaid beneficiaries on the continuation of the program, and the universal participation of the States in Medicaid. (Pp. 11-14).

- Based on these and other factors in the various opinions, it is possible to identify potentially useful guidelines for advocating and drafting legislation, as well as regulatory interpretations of existing statutes. (Pp. 14-17).

I. BACKGROUND

State governments filed their challenge to the ACA seven minutes after the President signed it. A rush of other litigation followed. The principal focus was the individual mandate, which requires individuals to have a minimum level of health insurance or pay a penalty, the so-called "individual mandate." The plaintiffs argued that the Commerce Clause did not give Congress authority to require people to obtain insurance. "Not buying health insurance," they argued, is inactivity, and inactivity is not "commerce" subject to Congressional regulation. They contended further that the mandate was too far beyond the proper scope of federal authority to be sustained as "necessary and proper" to the other insurance reforms in the ACA.

The State plaintiffs also challenged the ACA's expansion of Medicaid to individuals and families with incomes below 133% of the federal poverty level. The States conceded that they had voluntarily chosen to accept federal funding for Medicaid, and that they had a legal right to opt out at any time. They conceded as well that Congress can properly attach conditions to Medicaid and other federal grants to States. But, they argued, prior Supreme Court cases, while validating conditions on federal grants, had left open the possibility that such conditions could be unconstitutionally coercive, and the Medicaid expansion realized that possibility. Participating in the expansion was a condition of federal Medicaid funding in general, and if the States did not satisfy that condition, the HHS Secretary had authority to terminate all their Medicaid funding — not only the funding they would collect under the Medicaid expansion, but also the billions of dollars they currently receive as well. Those federal Medicaid funds, they noted, account for a substantial percentage of State budgets, sustain large State-run bureaucracies to administer the programs, and pay for the health care of millions of their residents. Putting their entire Medicaid programs at risk by rejecting the expansion was not feasible. The threat to the States' Medicaid funding was a "gun to their heads," they claimed, forcing them to participate in the expansion.

The Government's defense of the ACA under the Commerce Clause in large part tracked the Congressional findings. The Act, the Government argued, regulates the economic choices people make regarding how to pay for health care, and it does so in order to address a problem — the widespread lack of insurance coverage — that substantially affects interstate commerce. The Government argued further that the mandate is essential — and hence Necessary and Proper — for the insurance reforms in the ACA to work. The Government contended in addition that the minimum coverage requirement also falls within Congress's taxing power, which Congress can employ for purposes beyond the scope of its enumerated powers.

With respect to the Medicaid expansion, the Government argued that the right to specify how recipients of federal funds spend them is the essence of Congress's spending power. The Government contended further that if there is a coerciveness test, it does not apply because State participation in Medicaid is voluntary. States chose to enlist in the program, and they can choose to withdraw if they do not like the conditions. The political discomfiture of State officials at the prospect of losing Medicaid funding cannot rise to the level of coercion.

By a vote of 5-4, the Supreme Court upheld the constitutionality of the minimum coverage provision as an exercise of Congress's taxing power. However, in a portion of his opinion joined by no other Justice, the Chief Justice argued that the minimum coverage provision is beyond Congress's commerce powers and cannot be salvaged by the Necessary and Proper Clause. Justices Scalia, Kennedy, Thomas and Alito jointly dissented, drawing the same conclusion. With regard to Medicaid, the Chief Justice, joined by Justices Breyer and Kagan, found it unconstitutionally coercive for Congress to put States' existing Medicaid funding at risk if they did not participate in the expansion. However, the Chief Justice's plurality opinion invalidated only the threat to existing Medicaid funds. The expansion could proceed, so long as a State refusing to participate in it risks forfeiture only of the funds for *that* program — in other words, so long as participation is voluntary.

II. THE COMMERCE CLAUSE AND THE TAXING POWER

A. The Court's "Non-Holding" on the Commerce Clause

Because the Chief Justice and the four dissenters agreed that the individual mandate exceeds Congress's commerce powers, some have treated that conclusion as the holding of the Court. It is not. The Court decided the case based on the taxing power, and the discussion of the Commerce Clause was not necessary to the result. Tallying the votes on such an issue, in particular votes of Justices who did not concur in the result, does not yield binding precedent. *Marks v. United States,* 430 U.S. 188, 193 (1977). The only authoritative ruling of the Court on the "individual mandate" is that it is a constitutional exercise of Congress's authority under Article I, Section 8, clause 1 of the Constitution to "lay and collect Taxes."

That said, the practical reality is that five Justices believed the individual mandate exceeds Congress's powers under the Commerce Clause. It is a fair assumption that judges in the lower courts can count. Nevertheless, the Commerce Clause principles the Chief Justice articulates will not likely jeopardize existing laws or limit Congress's flexibility in adopting new laws. First, both the Chief Justice's opinion and the joint dissent reaffirmed existing Commerce Clause jurisprudence. Second, both opinions emphasized the novelty of the individual mandate. In other words, there are no other Commerce Clause mandates on the statute books, which means that *no other statutes are in constitutional jeopardy on this basis*. Further, it means that

Congress has accomplished its objectives in the past without such mandates on individuals. Particularly given that the Court has now provided a roadmap on how to insulate regulatory legislation from constitutional infirmity by using the taxing power, there is little reason to resort to a mandate under the Commerce Clause.

Still, caution is warranted in drafting, advocating, interpreting, and defending legislation. The four dissenting justices advocated a sweeping and radical position — invalidation of the entire 2,700 page statute, including provisions already in effect, from abstinence education to workplace accommodation of nursing mothers. That result would have precipitated untold chaos. Although the dissenters' views did not prevail, the Chief Justice — the fifth vote to uphold the Act — is hardly a reliable supporter of federal regulation. Thus, while the decision in *NFIB* may not have changed constitutional law, it suggests the possibility of transformational change in the future.

B. The Court's Holding on the Taxing Power

By contrast with the fragmented opinions on the Commerce Clause, the portion of the Chief Justice's opinion upholding the mandate under the taxing power did command five votes. Therefore, it is binding legal precedent.

The first issue the Court considered in its discussing the taxing power was whether the minimum coverage provision actually imposed a "mandate" to obtain insurance. The Court noted that the most natural reading of Section 5000A is as a mandate. *NFIB,* 132 S. Ct. at 2594-95. The provision states in one subsection that individuals "shall" maintain health insurance, and in a separate subsection, specifies the penalty for being uninsured. But, given the Court's duty to interpret statutes in a manner that preserves their constitutionality, the question was whether it was "fairly possible" to construe the provision as a tax. *Id.* (quoting *Crowell v. Benson,* 285 U.S. 22, 62 (1932)).

The Court noted at the outset of that assessment that, "[u]nder the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes." *NFIB*, 132 S. Ct. at 2594-95. On that basis, the Government had argued that the mandate merely "establish[es] a condition — not owning health insurance — that triggers a tax — the required payment to the IRS." *Id.* at 2595. The Court agreed that the mandate has no independent legal significance, *id.* and that the "exaction . . . on those without health insurance" "looks like a tax in many respects." *Id.* at 2594. It is paid to the Treasury by taxpayers when they file their returns. It does not apply to individuals who earn too little to file returns. It is calculated based on familiar tax concepts. It is found in the Internal Revenue Code and enforced by the IRS. And it has "the essential feature of any tax: it produces at least some revenue for the Government." *Id.* That Congress labeled the payment as a "penalty" is inconsequential because the payment does not have a "punitive" function. First, the amount due is less than the price of insurance and, by statute, can never be

more. *Id.* at 2595. Second, there is no *scienter* requirement. *Id.* at 2596. And third, the payment "is collected solely by the IRS through the normal means of taxation." *Id.* While conceding that the provision was intended to affect individual conduct, the Court noted, "taxes that seek to influence conduct are nothing new. . . . That § 5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power." *Id.*

Finally, the Court addressed why "[i]f it was troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, it [was not] equally troubling to permit Congress to impose a tax for not doing something." *Id.* at 2599. The Court cited three factors that allayed this concern. First, "Congress's use of the Taxing Clause to encourage buying something . . . is not new." *Id.* Second, the Court retains the power to strike down any unduly punitive exaction. *Id.* And third, Congress's authority "under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more." *Id.* By contrast, if the mandate were authorized by the Commerce Clause, the Government could bring the full weight of its authority to bear — including the criminal laws — to enforce it.

C. Guidelines for Legislative Advocacy and Drafting

It is possible to extract from the Court's discussion of the Commerce Clause and the taxing power some potentially useful principles to consider when advocating or drafting legislation or interpretative regulations:

- ***Avoid mandatory language in statutes regulating individuals (as opposed to businesses). If it is important to include some directive, do not separate the command from the consequence.*** The first part of the minimum coverage provision, 26 U.S.C. § 5000A(a), directed that individuals "shall" obtain health coverage, and the second part, 26 U.S.C. § 5000A(b), specified the penalty. A safer approach from a constitutional perspective (which might not have been consistent with other policy objectives), would have been simply to impose a penalty on uninsured individuals, without the mandate as a predicate. *See, e.g.,* 26 U.S.C. § 5881 ("There is hereby imposed on any person who receives greenmail a tax equal to 50% of gain or other income of such person by reason of such receipt"). *See generally* Ruth Mason, *Federalism and the Taxing Power,* 99 Cal. L. Rev. 975, 989-92 (2011) (citing other examples). Note that this guideline relates to regulation of individuals not currently engaged in commercial activity, not businesses engaged in activities in or affecting interstate commerce.

- ***Tie any mandate to specific, antecedent economic conduct—particularly conduct in or substantially affecting interstate commerce—by the regulated persons or entities.***

- ***Where appropriate, expressly invoke the taxing power as an alternative basis for regulatory impositions.*** This can be accomplished either by calling any monetary exaction a tax, by including findings that cite the taxing power as the source of Congressional authority, or— more obliquely but perhaps less effectively—by quantifying the revenue it is expected to generate. (If there is reason not to invoke the "taxing power" by name, the legislation could do so by citing Article I, Section 8, clause 1 of the Constitution.) Some statutes may not be susceptible to characterization as a tax. And even if they are, there could be political disadvantages to relying on the taxing power. But all things being equal, invoking an additional layer of constitutional authority could increase the chances that the measure will be upheld.
- ***In addition to the taxing power, expressly identify any other applicable sources of constitutional authority.***
- ***Limit the amount of any penalty to the cost of compliance.*** If the goal is to treat the penalty or other enforcement mechanism as a tax, make sure that the financial consequence of not meeting a regulatory obligation is no greater than the taxpayer's cost of complying with it.
- ***If appropriate, state explicitly that the financial imposition is the sole legal consequence of not complying with the regulatory obligation.***
- ***Avoid language that has punitive connotations, including words such as "violation," "punishment," "fine," "breach," and the like.***
- ***Do not require scienter.***
- ***Predict the effects of the penalty.*** Quantify the revenue expected to be generated by the penalty provision and estimate the number of individuals or businesses who will choose to incur it. (The CBO may do this in any event.)
- ***Place any penalties in the Internal Revenue Code.*** Placing a penalty provision in the Internal Revenue Code, with the IRS responsible for enforcing it, increases the prospects—but does not guarantee—that it will be treated as a tax. Conversely, administration of a requirement and the concomitant penalty through a separate agency that focuses substantively on the conduct being regulated decreases the prospects of the penalty being deemed a tax.
- ***Group the penalty with any revenue generating measures in the statute.*** The dissenters argued that the minimum coverage was not a tax because, among other things, it is "located in Title I of the Act, its operative core, rather than where a tax would be found—in Title IX, containing the Act's 'Revenue Provisions.'" *NFIB,* 132 S. Ct. at 2655. Co-locating any penalty with other revenue provisions in a statute will neutralize this line of attack.

- ***Consider the effect of the Anti-Injunction Act.*** Keep in mind whether the Anti-Injunction Act, 26 U.S.C. § 7421(a), applies to the penalty. If it does, paying the penalty and suing for a refund is the only avenue to challenge the provision. The desirability of limiting challenges in this manner is a policy judgment that may turn on the specific features of the legislation at issue. Either way, where the issue is not otherwise clear, it may make sense to state explicitly whether the Anti-Injunction Act applies.

II. MEDICAID AND THE SPENDING POWER

A. The Court's "Holding"

As with the Commerce Clause, none of the opinions on the Medicaid expansion commanded a majority. The Chief Justice, joined by Justices Breyer and Kagan, ruled that the Medicaid expansion program was unconstitutionally coercive because it threatened States with termination of existing Medicaid funds if they did not participate in the expansion. With the votes of the four dissenters, seven Justices agreed with this proposition. But the Chief Justice made clear that Congress *did* have authority to impose conditions on how States spend any new Medicaid funding they accept. Further, relying on a pre-existing severability provision in the Social Security Act, the Chief Justice stated that the unconstitutional aspect of the statute — the threat to cut off existing funds — could be severed, leaving the conditions on new Medicaid funding intact. States unwilling to comply with those conditions would not get the new money, effectively making the States' participation in the expansion voluntary (termed by some "the Red State Option"). This essentially constituted the ruling of the Court.

The Chief Justice's opinion stopped short of providing a template for future legislation involving the Spending Power, or articulating a clear standard for challenges to such legislation. It appears, though, that the Court left intact, and perhaps supplemented, the four factors set forth in *Dole v. South Dakota,* 483 U.S. 203 (1987) for analyzing conditions on federal grants. Two of those factors, as amplified in *NFIB,* are likely to be relevant in future litigation.

1. Conditions on Federal Grants Must Be Unambiguous

The Chief Justice reiterated the *Dole* requirement that Congressional conditions on grants to States be unambiguous, so that States "can knowingly decide whether or not to accept those funds." *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 24 (1981). However, it is unclear *when* this notice must be provided. Justice Ginsburg argued that clarity is required *at the time States accept the federal funding.* The requirement is met here, she contended, because the Medicaid expansion "does not take effect until 2014," and "the ACA makes perfectly clear what will be required of States that accept Medicaid funding after that date." *NFIB*, 132 S. Ct. at 2637. The Chief Justice, by contrast, focused on the notice provided at the inception of Medicaid nearly 50

years ago. There is a good argument that Justice Ginsburg's focus is appropriate in the ordinary case, and that the Chief Justice focused on the inception of Medicaid only because he found the State's initial decision to participate irrevocable.

Even on the Chief Justice's historical approach, the Government argued, the States were on notice of the possibility of new conditions on Medicaid because the Social Security Act, of which Medicaid is a part, from the outset has expressly reserved Congress's right to "alter, amend, or repeal any provision" of the Act. 42 U.S.C. § 1304. The Chief Justice disagreed that this provision provided adequate notice. Although "a State confronted with statutory language reserving the right to 'alter' or 'amend' the pertinent provisions of the Social Security Act might reasonably assume that Congress was entitled to make adjustments to the Medicaid program as it developed," the Chief Justice stated, the Medicaid expansion here "accomplished a shift in kind, not merely degree." *Id.* States could "hardly anticipate" that the reservation in § 1304 "included the power to transform [Medicaid] so dramatically." *Id.* at 2606.

Two points follow. First, the language of § 1304 is unequivocal. The Court simply did not give effect to it. This refusal suggests that such general reservations or caveats, however unambiguous, may not satisfy the standard of clarity *Dole* imposes, if the spectrum encompassed by the general language is too broad to alert States to significant new requirements. Second, reserving the right to change a grant program will not necessarily bind participants to a program that the Court determines is "new."

2. Creating a New Program versus Amending an Old One

The Chief Justice's opinion turned on the determination that the Medicaid expansion is a new program rather than a modification of the existing one. Thus, it may be necessary going forward to differentiate between changes that "amend" a program and changes that create a new, independent one. The Chief Justice's opinion, however, identifies no principled standards to make that assessment. Here, for example, the "new" expansion, like the original Medicaid program, was still called Medicaid, still funded medical care to poor people, and still operated within the current regulatory framework. Further, Congress enacted the expansion as an amendment of the Medicaid law. And the amendment was just the latest — albeit the largest — of many extensions of the program to new populations. The determination of "newness" appears to be largely, if not entirely, subjective.

Nonetheless, it may be possible to extrapolate a few factors that influenced the Chief Justice's assessment. A key focus was whether the new statute materially altered the original purpose of the program, as opposed to, for example, increasing its size. This factor, however, is somewhat manipulable. Here, for example, the Chief Justice defined the original purpose of Medicaid narrowly and the purpose of the expansion broadly, while Justice Ginsburg, citing the same legislative history in dissent, argued that the expansion served the same broad purpose that has always guided the Medicaid program.

The Chief Justice also listed other aspects of the Medicaid expansion that justified its treatment as new and independent. These may provide some guideposts to Congress, advocates and courts in assessing this issue:

- ***Differences in funding for the existing and amended programs may indicate that the latter is a new program***. The Chief Justice viewed it as significant that the percentage of federal funding for existing Medicaid beneficiaries is lower than for the newly-eligible Medicaid population. *Id*. at 2606.
- ***Differences in the benefits for the existing and amended programs indicate that the latter is a new program***. The Chief Justice noted (incorrectly) that enrollees in the expansion program will receive less comprehensive coverage than the existing enrollees in the Medicaid program receive. *Id.*
- ***How Congress labels the programs is not determinative***. The Chief Justice did not defer to Congress's characterization of the program as an expansion of Medicaid rather than a new program. *Id.* at 2605.
- ***The word count of the amendment and the extent to which the expansion preserves and works within the existing program are not dispositive.*** The Chief Justice noted that the number of pages the amendment occupies and the use of current administrative structures also did not affect his conclusion.

One issue the decision left unclear is whether a State that decides to participate in a "new" program, here the Medicaid expansion, and then withdraws several years later, risks losing the funding only for the expansion or for the entire program. There is an argument that, however much the expansion changed the nature of Medicaid, once the State agrees to participate, there are no longer two differentiated programs, but only one integrated Medicaid program. There are counterarguments, however, and it is difficult at this stage to predict the Court's reaction. As to other spending programs, resolution of the issue would depend on the individual facts and circumstances presented.

3. Germaneness to the Purpose of the Program

The Chief Justice's plurality opinion appears implicitly to incorporate germaneness, the third *Dole* factor, as a predicate to the coercion inquiry. The plurality's analysis (*id*. at 2603) presupposes three types of federal grant conditions, only one of which is subject to the coercion analysis:

- ***Restrictions that relate directly and exclusively to the disposition of new funding are not likely coercive***. As the Chief Justice noted, "Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds." *Id*. The question, of course, is what constitutes "appropriate conditions." Where the restrictions on funds relate only to the program being funded, with no connection to how the

State handles other, independent programs, those restrictions are not likely to be deemed coercive. For examples of such direct conditions, *see* 42 U.S.C. § 13925(b) (conditions on grants under the Violence Against Women Act) and 42 U.S.C. § 3297m (conditions on funding for forensic labs). Moreover, most of the new provisions in the ACA governing Medicaid were not even challenged.

- ***Conditions that are not germane to the purpose of the funding grant may be impermissible, even if they are not coercive***. As noted, *Dole* indicated that "conditions in federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)). That requirement appears to remain in effect.

- ***Conditions involving related but independent programs are permissible, but must not be coercive***. If funding for a program is conditioned on the State's taking action with regard to an independent program, the Court will first inquire whether the condition is related to the purpose of the funds being granted. If so, then the inquiry proceeds to whether the "'financial inducement offered by Congress' was 'so coercive as to pass the point at which pressure turns into compulsion.'" *NFIB*, 132 S. Ct. at 2604 (quoting *Dole*, 483 U.S. at 211).

4. Analysis of Coerciveness

a. Amount of Funding at Risk

Based on the Chief Justice's opinion, the first and most important factor in determining whether a condition is coercive is the amount of existing funding that the States stand to lose if they do not comply with the condition. The Chief Justice was clear that this inquiry was the appropriate one, as opposed to the amount of funds a State would have to spend to comply with the condition, or the amount of new funds the State would forego by not accepting the condition. *Id.* at 2605 n.12.

As noted, the Chief Justice did not specify how much money must be at risk for a condition to be coercive, but he does provide some data from which to triangulate:

First, the Chief Justice noted the finding in *Dole* that Congress there "offer[ed] only 'relatively mild encouragement to the States.'" *Id.* at 2604 (quoting *Dole,* 483 U.S. at 211). Failure to raise the minimum drinking age put only five percent of the State's highway funds at risk. In fact, the Chief Justice noted, the federal funds at stake were less than half of one percent of South Dakota's budget at the time. *Id.* Thus, "[w]hether to accept the drinking age change 'remain[ed] the prerogative of the States not merely in theory but in fact." *Id.* (citing *Dole,* 483 U.S. at 211-12). In *NFIB*, by contrast, an average of 10% of the States' budgets was at risk. "The threatened loss of over 10% of a

State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." *Id.* at 2605; *see also id.* at 2604 (noting that, "[i]n this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement' — it is a gun to the head."). Whether a condition threatening 0.5% of a State's budget can *never* be coercive or whether one threatening 10% or more of its budget will *always* be coercive is not clear. But future battles on this issue will likely be fought between these two goalposts. The larger the program or programs jeopardized by federal conditions, the more likely it is that those conditions will face an anti-coercion challenge.

Second, the Chief Justice stated that "the size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden." *Id*. at 2605 n.12. Stated differently, "'Your money or your life' is a coercive proposition, whether you have a single dollar in your pocket or $500." *Id.*

Third, the Chief Justice noted that, "Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use." *Id.* at 2607. It follows that, contrary to the position of the four dissenters, the "sweetness of the deal" offered by the Government is not a factor in analyzing coercion.

Fourth, the relevant metric should not be the absolute value of funds involved in a program, but rather the funds as a percentage of State expenditures. In theory, this assessment should be different for each State, but the Chief Justice's plurality opinion was not so precise. It focused primarily on the percentage of an average State's expenditures, while the joint dissent used the percentage of federal funds relative to all of the States' expenditures. *Id.* at 2604-05. Either way, the seven justices who found the Medicaid expansion coercive did not undertake a state-by-state analysis, which perhaps is not surprising given that 13 States, appearing as *amici,* denied the program was coercive.

As noted, the joint dissent advocated a much farther-reaching standard. In its view, a condition on federal spending can be coercive based on the amount of money offered in a new program, not just the amount of existing expenditures at risk. Thus, the dissenters' contended, "When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative." *Id.* at 2661. This standard is extreme, and arguably would have invalidated Medicaid in its entirety. It is also inconsistent with the decision of five Justices to preserve the Medicaid expansion insofar as existing funds are not at risk.

b. Reliance Interests

A second factor in the Chief Justice's analysis was the extent of the States' reliance interests. The Chief Justice noted that the States have "developed intricate

statutory and administrative regimes over the course of many decades to implement their objectives under" the existing program. *Id.* at 2604. State employees, contractors, or vendors who make their livelihoods administering such programs shape their careers and their finances on the expectation that they will continue. And citizens who receive the benefits of the programs also make decisions on the expectation that those benefits will be available. Thus, the more extensively a State has invested in participating in a federal program, the longer such programs have operated, and the more entrenched they have become, the more likely it is that a condition jeopardizing the program's funding would be considered coercive. *Id.*; *see also* ACSBlog, Erin Ryan, *Spending Power After Obamacare* (July 11, 2012), *available at* http://www.acslaw.org/acsblog/spending-power-bargaining-after-obamacare (discussing role of reliance interests in potential for coercion in Spending Power programs).

c. Other Coerciveness Standards

Other related or subsidiary factors also emerge from the Chief Justice's evaluation of coerciveness. These factors illuminate elements that might make conditions on federal grants to States more or less susceptible to constitutional challenge.

(i) Scope of the threat

In assessing the magnitude of a threatened cutoff of funds for a program and its impact on reliance interests, it is important to consider how much of the funding for the program is *at risk*. In the nearly 50-year history of Medicaid, the Secretary of HHS had never exercised the authority granted by 42 U.S.C. § 1396c, to cut off all Medicaid funding of a State that violated the statutory conditions. That history did not appear to affect the Court's decision, because the threat of the cutoff, rather than the imposition of it, represented the coercive effect.

(ii) Congressional assumption of universal compliance

In *NFIB*, the Chief Justice and the joint dissenters found it significant that the ACA assumed universal participation by States in the Medicaid expansion. This assumption, they reasoned, reflected an implicit assessment that the coercive mechanisms of the Medicaid statute were unerringly effective. *NFIB*, 132 S. Ct. at 2608 ("It is fair to say that Congress assumed that every State would participate in the Medicaid expansion, given that States had no real choice but to do so); *see also id.* at 2665-66 (joint dissent) (discussing how the lack of an alternative mechanism was evidence of Congress's intent to coerce the States). It therefore would be prudent, in future legislation, for Congress to address what happens if States opt out of the program. The legislation, for example, might provide an alternative mechanism to achieve the statutory goals, or it might provide for some proportional reduction of the program. To the extent feasible under existing statutes, agencies might address this issue in regulations.

(iii) Universal State participation

The Court may be more likely to find that a program in which every State participates is critical to the State governments, and that a threat to defund such programs is coercive. Moreover, if the threat to cut off funding has previously secured universal compliance with the federal conditions, that compliance might be used as evidence that the threat is coercive. The converse may also be true. The existence of opt-outs could be evidence that a threat is not coercive.

(iv) Conditions without an independent source of federal authority

NFIB assessed whether the Medicaid expansion reflected an unconstitutionally coercive exercise of the *Spending Power*. The same factors might not apply if there were an independent source of Congressional authority to impose conditions on a federal program. For example, the Solomon Amendment, requiring universities that receive federal funding to give military recruiters equal access on campus, may appear to rest on the Spending Power, as it attaches obligations to federal funding. But Congress has independent authority under the Constitution to raise armies, which, the Court found, empowers Congress to require universities to provide access to military recruiters. *Cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006). Likewise, Section 5 of the Fourteenth Amendment might afford an independent source of authority for conditions on federal funding such as prohibitions on discrimination based on race, religion, gender or other grounds. That said, it remains possible that the Court could find reasons inherent in the "federal structure" to invalidate grant conditions it deems unduly coercive, whatever the source of Congressional authority.

B. Guidelines for Legislative Advocacy and Drafting

The principles discussed above can be restated as guidelines that may mitigate the risk of anti-coercion challenges to future legislation, or that may inform the drafting of regulations designed to mitigate any risks to statutes currently on the books. A few caveats are appropriate. These guidelines are predicated on the prevailing view in *NFIB*. It is possible in the future that the four dissenting justices will find a fifth vote for their broader restrictions on the Spending Power. That result would overtake the guidelines offered here. Conversely, it is also possible that the Medicaid ruling in *NFIB* was *sui generis*, in that (a) the funds at risk were far greater than any other federal grants; (b) the dependency of the States on those funds was far more entrenched than for any other federal moneys; and (c) the States' reliance interests were far more compelling than in any other context. Finally, the opacity of the Court's decision is a bit of a wild card. By failing to articulate a clear test for coercion, the decision creates a level of uncertainty that could discourage States from taking on the burdens of litigating against the Federal Government. Alternatively, it could afford States room to challenge an array of new and old programs.

While these guidelines may not be necessary in some scenarios, and may not be sufficient in others, they provide an arsenal of defensive instruments that drafters can deploy in appropriate situations:

- ***Impose direct restrictions applicable to new funds granted, as opposed to conditions implicating existing, independent programs.***
- ***Be cautious in placing large programs at risk.*** As noted, the larger the program, the greater the risk posed by anti-coercion challenges.
- ***Be cautious in placing established programs at risk.*** Assess the reliance interests the State may be able to cite.
- ***If a large or established program is implicated, try to delineate clearly the portion of its funding that is in jeopardy.*** As the condition at issue in *Dole* shows, even when the penalty is quite small, such as losing 0.5% of the State budget, States are still likely to feel significant pressure to comply with a condition. The goal should be to apply just enough pressure to ensure full compliance, without overshooting the mark and threatening the States with draconian funding withdrawals.
- ***For existing laws that provide discretionary authority to terminate grants for violation of federal conditions, consider regulations or other guidance to provide greater specificity as to potential sanctions.*** A number of statutes accord agencies general authority to terminate grants for violation of conditions. Regulations implementing those provisions generally address procedural issues. Depending on the agencies, programs and statutes involved, it might be advantageous to spell out the potential sanctions in foreseeable scenarios.
- ***Make incremental changes to existing grant programs, rather than dramatic changes.*** The legality, administrative workability, and political feasibility of applying this guideline will vary from case to case, but as the history of prior Medicaid expansions shows, incremental changes to a program over time are more likely to survive scrutiny than are more dramatic changes. *See* N. Huberfeld, *et al.*, *Plunging Into Endless Difficulties: Medicaid and Coercion in the* Healthcare Cases 12, Boston University School of Law Working Paper No. 12-40 (Aug, 14, 2012) (listing history of expansions to Medicaid). That said, the dearth of challenges before *NFIB* may reflect the state of the law at the time. *NFIB* may encourage future challenges that would not have been thought winnable at the time of earlier modifications.
- ***Include a severability clause.*** Given the far-reaching position taken by the four justices in the joint dissent, it would be prudent in future legislation to

state explicitly what the result should be in the event a condition is struck down. Even if a court follows the approach that the majority took in *NFIB* and only strikes down one specific portion of a law, the uncertainty that may prevail while the decision is pending could be harmful. *Cf. National Health Law Program, Fact Sheet: The Supreme Court's ACA Decision & Its Implications 8-10* (July 2012), *available at* http://www.healthlaw.org/images/stories/ACA_July_2012_Fact_Sheet.pdf (analyzing which specific provisions of the ACA continue to apply and which do not).

- ***Be cautious when dealing with entitlement programs.*** The plurality's focus on reliance interests may apply with particular force to entitlement programs. States could assert more of a vested interest in programs like Medicaid that are ongoing and funded automatically, in contrast to programs for which Congress must affirmatively renew the funding annually. *See* Wonkblog, Brad Plumer, *How the Supreme Court's Health Care Ruling Could Weaken the Clean Air Act* (July 27, 2012, 1:36 PM), *available at* http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/07/27/how-the-supreme-courts-health-care-ruling-could-weaken-the-clean-air-act.

- ***Specifically reserve the right to amend the program or repurpose the funding.*** Although the Court did not give effect to such a reservation in 42 U.S.C. § 1304, the provision predated the ACA and applied to the entire Social Security Act. With regard to new programs, a statutory (or perhaps regulatory) reservation specific to that program might fare better.

- ***Make clear, if possible, that the new program is a modification of an existing one, not an independent initiative.*** Articulate the purpose of the new legislation in a manner consistent with the purpose of the existing program. Agencies, in regulations, preambles, or other regulatory pronouncements, also can address the continuity between new and amended programs. This characterization may not bind the Court, but it could help.

- ***Insofar as possible, structure and administer the amended program in the same manner as the existing program.*** Different regulatory approaches, funding levels, or mechanisms of funding could lead a court to conclude that the legislation does not modify an existing program, but rather is a new and independent program.

- ***Invoke sources of federal authority other than the Spending Clause.*** Include specific findings on the issue in the proposed legislation. For example, when incorporating or renewing existing statutory conditions barring racial, religious, gender, or other discrimination by federal grantees, a statute might refer to the protection of rights guaranteed by the First and Fourteenth

Amendments. Regulations relating to the enforcement of those conditions might also cite the constitutional origins of the rights at issue and perhaps of the enforcement authority.

- ***Make sure that any conditions on federal grants are unambiguous***. To the extent that there is ambiguity in the governing statute, consider regulations or other agency pronouncements that might provide greater clarity or specificity.
- ***Identify and cite the earliest instances of particular conditions.*** The longer particular conditions have been in force, the better the argument that States are on notice. As to conditions barring discrimination, note the opinion by the Office of Legal Counsel during the Reagan Administration, that, "The language and legislative history of the four nondiscrimination laws at issue [Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments Act of 1975, Section 504 of the Rehabilitation Act, and the Age Discrimination Act] reveal that they were intended by Congress to be statements of national policy broadly applicable to all programs or activities receiving federal financial assistance. Therefore, in the absence of a clear expression of congressional intent to exempt a particular program from the obligations imposed by the four cross-cutting laws, those laws will be presumed to apply in full force." 6 U.S. Op. Off. Legal Counsel 83 (1982).
- ***Consider the extent to which the conditions may arguably encroach on traditional areas of State authority.*** The joint dissent in *NFIB* posited an enormous hypothetical federal education grant 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." 132 S. Ct. at 2662. States that "gave in to the federal law," the joint dissenters argued, "would surrender their traditional authority in the field of education." *Id.* The dissenters' suggestion that such conditions would be inappropriate did not prevail, but only by one vote. Within the confines of overriding policy objectives, advocates and legislators should be aware of the risks when conditions on federal grants touch on areas of "traditional State authority."
- ***Obtain testimony from State officials at hearings confirming that the conditions are not coercive.*** This testimony may not deter the Court from finding coerciveness, but it could provide ammunition for counterarguments.

CONCLUSION

NFIB may be the case of the century. But it is unclear at this point whether that is because the issues are unlikely to arise again for 100 years, or because it marks a new epoch in which an anti-regulatory ideology gained new and committed apostles on the

Court. Absent clarity on the question, it makes sense for legislative advocates and drafters to hew as closely as feasible to the lines the case sketches out. The guidelines set forth above are intended to assist in that effort.