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The Coercion Doctrine Invigorated: Conditional Spending Since NFIB v. Sebelius

Marcus Harmon Waterman
marcushwaterman@cedarville.edu

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Marcus H. Waterman

Cedarville University

Abstract

The federal government has long utilized the practice of attaching conditions to the receipt of its funds. In the few instances that the Supreme Court had reviewed state challenges to conditions, it had ultimately set only minimal limitations on Congress' spending power. That is why, when the Supreme Court's 2012 decision in *National Federation of Independent Business v. Sebelius* was delivered, a host of scholarly predictions emerged. Some thought the ruling would prompt an unraveling of other conditional spending programs. Others anticipated more indirect, structural changes to flow from the decision. I find that elements of both have occurred.

Over the past seven years, federal and state actions have revealed an interesting mix of results. A surge of recent legal challenges have relied on *NFIB's* coercion doctrine, but the courts have consistently rejected those challenges. Congress has also been careful when designing new programs to avoid the sort of federal coercion that was struck by the Court in *NFIB*.

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Introduction

In June of 2012, the United States Supreme Court handed down a remarkable decision in *National Federation of Independent Business v. Sebelius*. Known primarily for its political significance, the ruling dealt with two broad components of the Patient Protection and Affordable Care Act of 2010 (ACA): the individual mandate and the Medicaid expansion. While the first issue received the most public attention, many scholars have argued that the second will ultimately prove to be more impactful.

As is often true when change occurs, many concerns were voiced in the wake of the decision. Scholars were soon hard at work with pen and paper, predicting the likely implications of the outcome, especially relating to the Court's handling of the Medicaid expansion. How would the ruling impact the future of Obamacare? Had the Court set an important precedent against the federal government's attachment of conditions to funds? How would states and administrative agencies respond to the decision? All were questions asked and answered by scholars through countless publications.

Now, after nearly seven years, we stand in a convenient vantage point to evaluate the veracity of those claims. From the Court's handling of the Medicaid expansion, scholars generally expected two effects: legal challenges and restructuring. Some scholars expected only one of these, while others foresaw elements of both. Those expecting primarily legal challenges anticipated a surge of litigation against conditional funding programs, and a consequent reduction of congressional spending power. Those expecting primarily restructuring, in contrast, anticipated shifts in the architecture of federal-state partnerships.

The object of this paper is to identify the effects of the Supreme Court's ruling in *NFIB v. Sebelius*, as it related to the conditioning of federal funds. My research has resulted in three

primary findings. First, *NFIB* has not caused Congress to reduce funding for conditional programs. Second, the ruling has led states to challenge other conditional funding programs. And third, it has caused Congress to more carefully design new and existing conditional funding programs.

To arrive at these findings, this paper proceeds in three steps. First, I set the contextual stage for my research. Second, I describe each scholarly prediction. Third and finally, I evaluate those predictions in light of recent data.

Literature Review

Setting the Stage

The power of the purse has long been a subject of intense debate. As James Madison famously noted in Federalist 58, "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people" (Hamilton, Jay, Madison, Carey & McClellan, 2001, p. 303). Few doubt the importance of the power, but there are fundamental disagreements as to its originally intended use.

Even as Article I, Section 8, Clause I of the Constitution was being penned, Alexander Hamilton and James Madison saw its meaning differently. According to Hamilton, the Clause permitted Congress to promote the general welfare even where there was no separate enumeration of authority (Haney, 2013). According to Madison, the spending power was only to be used in tandem with other, constitutionally enumerated powers (Haney, 2013).

Both views have significant implications to the practice of attaching conditions to the receipt of federal funds. If Hamilton's view is adopted, the federal government has broad power

to leverage states with money in pursuit of policy goals. If Madison's view is adopted, the federal government may only do so within its otherwise enumerated powers.

In the 1935 case *United States v. Butler*, the Supreme Court sided with Hamilton, adopting "an expansive view of the spending power" (Haney, 2013, p. 580). The federal government could now pursue the general welfare by attaching conditions to the receipt of its funds. Naturally, Congress began to increasingly exercise this prerogative. Jurisprudence on the subject, however, was largely latent until the 1980s when the Court considered the case of *South Dakota v. Dole* (Haney, 2013).

South Dakota v. Dole (1987)

South Dakota v. Dole, decided in 1987, was the 20th century's most comprehensive and relevant Supreme Court case pertaining to the practice of conditioning funds (Pasachoff, 2013; Haney, 2013; *Dole*, 1987). There, South Dakota was challenging a federal spending program that conditioned receipt of highway funds on adoption of a 21-year-old minimum drinking age. The United States claimed that it could do so because of its power to pursue the general welfare through spending. South Dakota responded that the conditions amounted to a violation of federalism. Ultimately, the Court rejected South Dakota's challenge and sustained the spending program.

Dole's primary significance, Eloise Pasachoff explained (2013), was the Court's creation of a four-pronged test for evaluating the constitutionality of conditional spending programs. The standards would theoretically guide the adjudication of similar issues in the future. Instead of doing so, however, the prongs proved largely toothless for limiting Congressional spending power (Bagenstos, 2008; Jayaraman & Bates, 2015).

In addition to the four prongs, the *Dole* Court made a brief reference to the notion of 'coercion' (Haney, 2013; Alder & Stewart, 2017; Bagenstos, 2014; Baker, 2015). When a "condition left the state with 'no practical choice' other than to accept," (Jayaraman & Bates, 2015, p. 11) the Court might consider striking it as coercive. Years later, it was this afterthought of coercion, rather than any of the four official prongs, that would become the most important element of that ruling.

According to Reeve Bull's assessment (2006), it was only this coercion element of *Dole* that had the potential to impose real limitations on Congress. Although this fifth prong was left dangerously vague in *Dole*, Bull asserted, it "provides a check upon Spending Clause power sufficient to deter congressional abuse while maintaining Congress's ability to exercise effective control over the use of its funds" (2006, p. 293). Just six years after Bull made these comments, the Supreme Court fulfilled his prophecy by limiting Congress' spending power primarily on grounds that its conditions were coercive (*NFIB v. Sebelius*, 2012).[1]

NFIB v. Sebelius (2012)

In 2010, twenty-six states challenged two provisions of the Patient Protection and Affordable Care Act (ACA). Relevant to this paper is the provision expanding Medicaid, which broadened "the number and categories of individuals that participating states must cover" (Baker, 2013, p. 73). States failing to expand coverage to these categories would lose *all* of their federal Medicaid funding (*NFIB*, 2012). The Supreme Court issued a splintered conclusion on

[1] Between *Dole* and *NFIB*, the Court had only partially affirmed *Dole's* coercion doctrine in one instance. There, in *Virginia Department of Education v. Riley*, the Court struck Congress' condition on education funds, citing *Dole's* clear notice prong. A plurality, however, suggested that they would also strike on grounds of coercion (Adler & Stewart, 2017, p. 682; Pasachoff, 2013, p. 661).

this issue, consisting of three opinions (Haney, 2013, p. 585). One group concluded that the expansion was acceptable. The other two groups concluded that the expansion was unconstitutional. Describing the details of each opinion is beyond the scope of this paper, but one important note should be made. While the seven disapproving justices were not unified in their consideration of *Dole's* first four prongs, they were as to the fifth (*NFIB*, 2012). Both concurring opinions invalidated the expansion on grounds of coercion, thereby affirming that doctrine originally identified in *Dole*. This affirmation was the most significant element of *NFIB's* ruling on the Medicaid expansion, and is central to the scholarly predictions reviewed in this paper.

Prior to *NFIB*, challenges to federal funding conditions had only been successful when grounded in one of *Dole's* four traditional prongs (*Virginia Department of Education v. Riley*, 1994; Bagenstos, 2013). Uniquely in *NFIB*, the Court agreed to strike congressional action primarily upon the grounds that it was coercive. Ultimately, the effects of *NFIB* on conditional spending stem from this affirmation of *Dole's* coercion doctrine.

Legal Challenges

Prior to *NFIB*, "Never before ha[d] the Court invalidated a spending condition as unconstitutionally coercing the states" (Bagenstos, 2013, p. 920). According to some scholars, the new precedent would likely lead an increasing number of states to challenge federal spending conditions. By giving credence to a new form of challenge (i.e. that funding conditions are coercive), Professor Andrew Coan suggested (2013), "NFIB is sure to generate significant litigation" (p. 380).

In the words of Leonard, Huberfield and Outterson (2013), "the courthouse doors have now been thrown open to challengers" (p. 46). The federal government has historically relied on

conditions attached to funds to ensure state cooperation with a host of its programs (Adler & Stewart, 2017; Ryan, 2014). But, if states catch wind of *NFIB*'s new style of coercion challenge and begin confronting these programs in Court, it could mean an extensive (Jayaraman, 2015).

From here, we will proceed in two parts. First, several scholars who have predicted legal challenges will be introduced with their claims. Second, three acts deemed most vulnerable to challenge will be described.

In a 2013 article, Professor Samuel Bagenstos claimed that federal spending programs across the board - from education to civil rights law - were now vulnerable to coercion claims. In his own words, "NFIB's Spending Clause holding is exceptionally important. [...] By holding that the ACA's Medicaid expansion provisions were unconstitutionally coercive, the Court has opened the field for challenges to a wide range of conditional-spending laws" (Bagenstos, 2013, p. 920) Pointing specifically to the Clean Air Act (CAA) and No Child Left Behind (NCLB), he reasoned that the coming months and years would see numerous coercion-based challenges to federal spending programs (Bagenstos, 2013).

Joining Bagenstos were scholars Jonathan Adler and Nathaniel Stewart, who argued similarly that *NFIB* "opens the door to coercion arguments in other contexts [...] and occasion a reexamination of statutes from No Child Left Behind to the Clean Air Act" (2017, p. 721). Focusing on *NFIB's* break from precedent, Adler and Stewart contended (2017, p. 721) that the ruling turned the once-abstract restrictions of *Dole* into a concrete platform for discontent states.

Joining those three scholars is another, Bradley Joondeph, who also saw (2013) *NFIB* as having "potentially jeopardize[d] a range of federal spending programs" (p. 811). As a result, he suggested, congressional spending powers would be limited as the Court adhered to the recently affirmed coercion ruling (2013).

Patrick Haney has also supported his colleagues' predictions on this front. Applying the coercion doctrine specifically to federal education funding programs, Haney suggested (2013) that federal conditions in other domains would receive greater scrutiny in the wake of *NFIB*. Thus, although Haney thought a successful coercion challenge to the NCLB was unlikely in 2013, he suggested that the upward trend of conditional funding and a reauthorization of the Elementary and Secondary Education Act could change this.

In a law review article published by Boston University, Georgina Suzuki joined these scholars, asserting that *NFIB* will "almost certainly lead to legal challenges of federal conditional spending programs" (2013, p. 2132). Focusing specifically on the Clean Air Act, however, Suzuki predicted (2013) that most coercion challenges will be unfruitful due to the specificity of the *NFIB* decision. Whether or not challenges are successful, however, the article agreed that *NFIB* will "embolden states to challenge conditional federal grants under the Spending Clause" (Suzuki, 2013, p. 2132).

While these several scholars vary on some specifics, they are largely unified in deeming at least three programs particularly vulnerable to coercion challenges after *NFIB*. Those three programs stem from the Family Educational Rights and Privacy Act (FERPA, 1974), the No Child Left Behind Act (NCLB, 2001) and the Clean Air Act (CAA, 1963). In each, the federal government has attached conditions to funding received by the states. Accordingly, if *NFIB* would lead to legal challenges, these acts would be the most likely targets. I will review each of the three here and return to analyze the predictions later in this paper.

Family Educational Rights and Privacy Act (FERPA).

In his dissent to *NFIB*, Justice Scalia noted that, "After Medicaid, the next biggest federal funding item is aid to support elementary and secondary education, which amounts to 12.8% of total federal outlays to the States." Although it appears that he intended this number to seem *small* in comparison to parallel Medicaid funding, some scholars have pointed to the comment as an indication that federal education funding would be the next target of coercion challenges.

In 1974, Congress enacted the Family Educational Rights and Privacy Act (FERPA) to "require all schools and colleges receiving federal money to enforce policies safeguarding the confidentiality of students' 'education records'" (LoMonte, 2012). To encourage implementation, the Act conditioned state eligibility for federal education funds on cooperation with its provisions (*Chicago Tribune Company v. University of Illinois Board of Trustees*, 2011; FERPA, 1974). Congress suggested that the condition was properly within their Article 1, Section 8, Clause 1, power to spend in promotion of the general welfare. To enforce its conditions, the Act passed authority to the Secretary of Education, who was given express authority to "adjudicate violations of FERPA, [...] and take any other action authorized by law with respect to the recipient" (*Chicago Tribune Company*, 2011, p. 5; Larson, 2015).

According to scholars (Pasachoff, 2013), the "amount of federal money at stake" (p. 643) made FERPA a likely target of coercion challenges. Interestingly, almost concurrent with the 11th Circuit Court's decision in *NFIB* being appealed to the Supreme Court, a dispute regarding FERPA was being processed in the 7th Circuit Court of Appeals. Relevant to this paper were arguments from appellants concerning the coercive nature of FERPA's conditions. They asserted that "compliance with FERPA is not a choice because of the amount of federal funding involved" (Pasachoff, 2013, p. 644). The argument, which sounds remarkably similar to that

upheld in *NFIB*, was made prior to the *NFIB* decision, but rejected by the circuit court. With that case in mind, scholars have suggested that *NFIB's* affirmation of the coercion doctrine would renew similar challenges to this program.

No Child Left Behind Act (NCLB).

Receipt of federal education funds has also been conditioned on cooperation with the No Child Left Behind program. According to Adler and Stewart, if *NFIB* does lead to state challenges, the NCLB may be the first target (2013). Both the size and design of the program make it particularly vulnerable to challenge in light of *NFIB*.

With the passage of the NCLB in 2001, federal education funding was remarkably enhanced (Pasachoff, 2013). According to Jayaraman (2015), the program "'significantly increased' both the federal funding and the attendant conditions" (p. 37). While the increase in funding was welcomed by most states, many protested the new conditions that were attached.

One 2005 report (Pound) from the National Conference of State Legislatures was indicative of the widespread discontent. Twenty-three states contributed to the report (Pound, 2005), levying an intense attack on the Act as a clear "federal overreach"(p. 615).

With these *pre-NFIB* challenges in mind, scholars consider what the ruling's new ammunition would mean for states who were already discontent with the NCLB. Would the ruling spur states to renew challenges to the program, citing *NFIB's* coercion doctrine? According to Pasachoff (2013) and several of his colleagues, it would.

In 2013, Haney authored an article specifically applying *NFIB's* coercion doctrine to the NCLB. The article considered how a state coercion challenge to the NCLB would play out in

court. As a part of his assessment, Haney made clear[2] his view that federal education spending would be the next in line for coercion challenges. Emphasizing the trend of increasing federal education spending over recent decades, Haney made two notable conclusions (2013). First, that the NCLB would be a target for coercion challenges, although unsuccessful ones. And second, that an increase in conditioned education funds may shift the balance, allowing for successful challenges. Haney described several elements of the NCLB that made it particularly vulnerable to a coercion challenge.

First, he pointed to the notion of "coercion by the numbers" (2013, p. 604). As of 2010, he commented, the NCLB comprised 1.55% of total state expenditures. This number, he noted, is somewhere between that considered in *Dole* and in *NFIB*, and therefore within somewhat of a gray area.

Second, Haney referred to the broader factor of "state choice" (2013, p. 609). Considering the increasing reliance of states on federal education funds, the Court might consider NCLB coercive on grounds that states lack a real choice to turn funds down (Haney, 2013).

Third and finally, Haney considered conditioned education funds as a percentage of state GDP (2013, p. 607). If the percentage were to increase, he asserted, the NCLB's susceptibility to a coercion challenge would increase (2013, 611). Turning to the ESEA reauthorization that was - at the time Haney published - pending in Congress, he projected that the reauthorization would likely increase the proportion of conditioned funds to state budgets. This percentage increase, he

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[2] "Under NFIB, if any other conditional spending item crosses from encouragement into unconstitutional coercion, it is education spending" (Haney, 2013, p. 604).

argued, would surely "increas[e] [the NCLB's] vulnerability to a coercion challenge post-NFIB" (2013, p. 11).[3]

By significantly bolstering federal education funds and conditions of their receipt, the NCLB has been seen as particularly vulnerable to coercion challenges.

Clean Air Act (CAA).

Both enactments identified thus far (FERPA and NCLB) focus on improving education, and correspondingly condition the receipt of education funds. Other programs, however, are not as uniform in their objectives and methods. The Clean Air Act (CAA), for instance, seeks to protect air quality, but threatens to withdraw federal highway funds from uncooperative states. For this reason, and considering the significant amount of funds conditioned, the CAA has also been deemed particularly vulnerable to coercion challenges after *NFIB*.

In the words of Adler and Stewart, the CAA is "an obvious target for [...] litigation" (2017, p. 675). Relying extensively on conditions to encourage state cooperation, the Act reportedly "represents Congress's most aggressive effort to induce state regulation through conditional spending, and is therefore the most vulnerable to a spending power challenge" (Adler & Stewart, 2017, p. 684).

The CAA (1963) authorizes the Environmental Protection Agency (EPA) to develop National Ambient Air Quality Standards (NAAQS) and require their adherence by states. The agency has two primary ways of ensuring compliance with these standards. First, if states fail to develop adequate implementation plans for meeting the standards, the EPA may develop its own

[3] More specifically, Haney asserted that "if the reauthorized ESEA continues the trend of increased conditional spending for education, the legislation will be vulnerable to coercion challenges" (2013, p. 617).

plan - Federal Implementation Plan (FIP) - and effectively usurp regulatory authority from the state in that area (CAA, 1963). Second, the agency has the prerogative to revoke federal highway funds to states who fail to comply (CAA, 1963; Adler & Stewart, 2017). Both methods of enforcement used by the EPA have been thought by scholars to be vulnerable to challenge in the wake of *NFIB*.

While numerous scholars have agreed to this vulnerability, disagreements persist as to what the outcomes of those challenges would be.

On one hand, Adler and Stewart assert (2017) that state challenges will likely be fruitful in court. They comment that *NFIB* has given states a "new set of arguments" (2017, p. 673) for challenging the CAA's "requirement that the EPA withhold federal highway funds[4] from noncompliant states" (2017, p. 701). In light of these new arguments, the scholars suggest, the Act's conditions will likely be ruled "impermissible coercion under NFIB" (Adler & Stewart, 2017, p. 701).

On the other hand, when Suzuki applied *NFIB* to the CAA (2013) she arrived at the opposite conclusion. Because the CAA is distinguishable from the Medicaid expansion, Suzuki concluded that it would undoubtedly pass constitutional muster over a coercion challenge (2013, p. 2159).

Despite foreseeing alternate conclusions, these scholars generally agree that *NFIB* "will almost certainly lead to legal challenges of federal conditional spending programs, particularly the Clean Air Act (CAA)" (Suzuki, 2013, p. 2131; Adler, 2012; Baake, 2012; Bagenstos, 2013).

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[4] These conditioned highway funds account for roughly between 3% and 4% of state budgets (Adler & Stewart, 2017, p. 708).

Each conditional funding program discussed above - FERPA, the NCLB and CAA - has been deemed by scholars a likely target for coercion challenges. In the Analysis section of this paper, we will assess these predictions by considering legal challenges made to the three acts since *NFIB* was handed down.

So far, we have considered predictions of legal challenge. Now, we move to discuss the second category of expected effect: legislative and administrative restructuring.

Restructuring

Since the establishment of judicial review in *Marbury v. Madison* (1803), Congress has been significantly influenced by decisions of the Court. While neither branch is technically superior, the Supreme Court's authority to strike congressional enactments sometimes makes it appear that way. One result of this dynamic has been Congress' responsiveness to the Court's rulings. As the Congressional Research Service has noted, even Congress' decisions relating to federal grants are significantly impacted by Supreme Court rulings (Dilger, 2018).

Numerous scholars have predicted that structural changes would flow from *NFIB*. They anticipate that Congress and administrative agencies might now fear coercion-based challenges and begin making adjustments. As Pasachoff put it, "the largest effects [of *NFIB*] are not likely to be doctrinal but instead legislative (in the size and design of spending programs) and administrative (in the implementation and enforcement of these programs)" (2013, p. 651; Ryan, 2014, p. 1057). Of the structural effects anticipated by scholars, three are most commonly cited: the underfunding of conditional spending programs, softened funding, and emboldening of the states. I review the arguments associated with each.

Reduced Funding for Conditional Programs.

In *Dole*, the Court decided that the conditioned highway funds did not reach the level of coercion. In *NFIB*, however, the Court ruled that the amount of Medicaid funds being conditioned did indeed "pass the point at which 'pressure turns into compulsion'" (Pasachoff, 2013, p. 587). Together, these decisions send a message: the greater the amount of funds conditioned, the greater the program's vulnerability to challenge. Some scholars have wondered (Pasachoff, 2013, p. 651; Ryan, 2014, p. 1057) if this implication might incline Congress to decrease the amount of conditioned funds that it provides. The result, Pasachoff argues (2013), may be the "underfunding of cooperative spending programs" (p. 655).

A significant amount of federal education funds are given to states through the Title I Grant Program of the ESEA. These funds, historically conditioned on cooperation with the NCLB, have been deemed by scholars as likely targets of reduced funding after *NFIB*. The Individuals with Disabilities Education Act (IDEA) has also received similar attention from scholars. The IDEA created two relevant funding programs: Part B and Part C. Each provides grants to states, but conditions receipt upon cooperation with some federal policies (Pasachoff, 2013). Like the Title I grants, the IDEA may be suspect in light of *NFIB*. This vulnerability, Pasachoff claims (2013), may lead Congress to reduce the amount of funds offered through the three programs. Congress has historically been reluctant to fully fund the IDEA, and Pasachoff anticipates *NFIB* exacerbating this (2013, p. 655).

Reducing the amount of federal funds offered to states is one way that Congress may seek to avoid coercion challenges after *NFIB*.

Softened Funding Conditions.

Some scholars have hypothesized that Congress would be more careful when designing spending programs after *NFIB* (Pasachoff, 2013). The argument is basic: to avoid coercion challenges, Congress may lean toward softening funding conditions as it authorizes new programs. By doing so, the threat of coercion challenges may be diminished.

One reauthorization that has received significant scholarly attention is the most recent ESEA reauthorization, the Every Student Succeeds Act of 2015. In 2013, Haney suggested that unless the new reauthorization took a softer approach to conditioning than its predecessor (NCLB), the program would be vulnerable to challenge. Would Congress, aware of this danger, design the new program more softly to avoid a challenge?

Since Haney published, the reauthorization has been passed by Congress. In the Analysis section of this paper, I will consider its design in order to evaluate Haney's prediction.

Emboldening of States.

The emboldening of states is perhaps the most widely expected effect of *NFIB* among scholars. With a greater confidence to challenge federal demands, states may be more inclined to counter Congress and administrative agencies. A result of this kind could prompt changes to the "implementation and enforcement" (Pasachoff, 2013, p. 651; Ryan, 2014, p. 1057) of conditional programs, causing a shift of bargaining power toward the states and away from the federal government.

What would an emboldening of the states look like in practical terms? According to scholars, increasing demands for administrative waivers would be the most likely outplaying. As Bagenstos put it, "When states seek waivers of the requirements of entrenched programs [...]

they can now credibly threaten to sue to challenge the constitutionality of the underlying spending condition if they do not get their way" (2013, p. 921). To understand the emboldening prediction in more detail, it is necessary to review the role and function of administrative waivers.

Waivers are an implementation mechanism authorized by Congress and exercised by administrative agencies. Because regulatory authority was originally vested in Congress, the power to grant waivers must be passed to the executive branch via statute[5] (Bagenstos, 2013). Not every act of Congress may be waived by agencies, but only those specifically designated by a statute. Put simply, waivers allow states to fall short of certain statutory requirements. For instance, the Elementary and Secondary Education Act (ESEA), as amended by the NCLB of 2001, permitted the Secretary of Education to "waive statutory or regulatory requirements of the ESEA" (Flexibility and Waivers, 2012). States receiving those waivers would be allowed to fall short of certain NCLB standards without losing federal education funds. In another example, several sections of the Social Security Act (SSC, 1935) specify that "the Secretary of HHS can waive specific provisions of major health and welfare programs" (Hinton, Musumeci, Rudowitz, Antonisse, & Hall, 2019). A number of states[6] have been approved for such waivers, and thereby permitted to deviate from statutory SSC standards.

Because they are negotiated between agencies and states, waivers are revealing of state-federal bargaining dynamics. States apply for waivers when confident in receiving them. Depending on who has more leverage, states may be more confident in pursuing waivers, and

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[5] One example may be found in 42 U.S.C. § 1315 (2010)

[6] "As of September 2017, there are 33 states with 41 approved waivers and 18 states with 21 pending waivers" (Hinton, Musumeci, Rudowitz, Antonisse, & Hall, 2017, p. 1).

agencies may be less confident in denying them. According to numerous scholars, *NFIB* advantaged the states and thus empowered them to pursue waivers more commonly and confidently. It is for this reason that Bagenstos anticipates an "accelerate[ing] [...] trend toward federalism by waiver" (2013, p. 921) in the wake of *NFIB*.

In a nutshell, Bagenstos, Ryan and others suggest that *NFIB* shifted leveraging power to the states by giving teeth to the coercion doctrine. States, invigorated by the affirmation, may now be more inclined to request waivers from statutory requirements.

An emboldening of states to demand waivers would have significant implications. In fact, according to Bagenstos, "This expansion of the practice of federalism by waiver may be the most important legacy of NFIB's Spending Clause holding" (2013, p. 866).

Research Design

For decades, the federal government has conditioned the receipt of its funds on cooperation with its policies. History reveals that conditioning funds has hardly been uncommon, but the Supreme Court's 2012 decision in *NFIB v. Sebelius* called this practice into question. In the ruling's wake, scholars have made several predictions as to the ultimate impacts of the decision. For the sake of this discussion, I have divided those predictions into two broad categories: those focusing on legal challenges, and those focusing on legislative and administrative restructuring.

Nearly seven years down the road, we seek to uncover which supposed effects have actually occurred. To do so, I have designed my research in two ways.

First, I conducted my study according to a before-and-after approach. In the literature review, I have identified two broad predictions voiced by scholars, each with more specific

subset predictions. In the Analysis section, I revisit each prediction in light of the past seven years. This before-and-after approach allows us to evaluate each claim independently, and in light of recent data.

Second, I pull from a variety of sources, each tailored to the nature of the prediction being assessed. To evaluate predictions of legal challenge, two main methods were employed. First, the three acts considered most widely by scholars were used as case studies. All legal challenges to these acts were reviewed, and those relevant to this discussion were identified and included in my Analysis. Second, all United States Federal Court decisions and filings, as archived on govinfo.gov, were searched. To begin searching, I narrowed the scope of cases to review by using keywords: "NFIB," "Sebelius," "coerce," "coercive," "condition," "federal," and "funds." The results were also limited to cases decided between January 2011, and April 2019. Next, the keyword uses in those results were reviewed, and cases relating to our discussion identified. Finally, having identified relevant cases, the list was further narrowed to those helpful to inform my findings. Through these two methods - case studies and keyword searches - my findings on the first prediction were procured.

To evaluate predictions of restructuring, three different methods were taken, each relating to a different subset prediction.

For assessing the first subset claim, both federal budgets and the congressional record were consulted. To determine if conditional federal funding has been reduced, official federal budgets from FY 2011 to FY 2019 were consulted, and relevant data included in my findings. To determine if efforts to fully fund the IDEA have diminished, I searched the congressional record, as archived on govinfo.gov. Several keywords were used to locate relevant information: "Individuals with Disabilities Education Act," "IDEA," "fund," "funding," "fully," and "IDEA

Full Funding Act." The search was also limited to those records created from January 2011 to April 2019. Results with these keywords were then reviewed, and relevant records identified and included in my findings.

To evaluate the second subset claim, both a narrow and broad approach were taken. First, the ESEA's most recent reauthorization was considered as a case study. Relevant scholarly publications, congressional records and United States Code were all drawn upon. Second, the congressional record was reviewed for instances of legislators citing *NFIB* in their deliberations.

To evaluate the third subset claim, two primary methods were utilized. First, state-level initiatives were considered. Commentaries, legislative records and the texts of enactments were informative to my findings. Second, the domains of education and medicaid were taken as case studies for considering recent state waiver requests. Commentaries, legislative records, political statements, and administrative data each contributed to my findings. These sources informed both quantitative waiver trends and qualitative motivations.

Designing my research in these two broad ways has enabled me to arrive at a relatively comprehensive set of findings.

Analysis

Legal Challenges

Evaluating this prediction is a challenging task. For every dispute in every level of court, numerous filings are made for different reasons and with different outcomes. Instead of relying on a broad review of all filings, I use a more controlled method. Having identified the three acts considered to be most vulnerable to coercion challenges (FERPA, NCLB, CAA), I return now to each, armed with seven years of data.

To begin my Analysis, I explore whether the ruling in *NFIB* did indeed prompt coercion challenges to these enactments. Then, I will briefly consider recent legal challenges to other acts, separate from these three.

Family Educational Rights and Privacy Act (FERPA)

As anticipated by scholars, FERPA has been challenged at least once since *NFIB*. More importantly, components of the challenge were specifically grounded in *NFIB's* affirmation of the coercion doctrine. The petition, filed by Arthur West in 2015, reflects just the kind of challenge expected by Pasachoff (2013).

West filed a complaint against Evergreen State College for redactions made to public records that he had requested under the Public Records Act (PRA) (*West v. Tesc Board of Trustees*, 2018). After losing in trial and appellate courts, West appealed to the Supreme Court of Washington. Although his claims largely focused on elements of the PRA, another central component of West's petition asserted that FERPA was unconstitutionally coercive in light of *NFIB*. West contended that "the coercive requirements of FERPA [...] violate the 10th Amendment anti-coercion principles recognized in NFIB v. Sebelius" (Petition for Review, 2018, p. 9). As of now, the Supreme Court has not responded to West's request for review.

West's petition is revealing. He not only used a coercion argument, but further clarified that it was the Court's decision in *NFIB* that gave teeth to his complaint. In the petitioner's own words, *NFIB* "transformed the coercion principle from a mere rhetorical device into a legitimate restraint on federal conditional spending" (Petition for Review, 2018, p. 16).

West's petition gives validity to Pasachoff's predictions of legal challenge. While the outcome of the case is yet to be determined, the challenge itself is revealing. At least in West's case, it appears that *NFIB* has actually contributed to a challenge of FERPA.

No Child Left Behind Act (NCLB)

Scholars also suggested that the NCLB would be the subject of coercion challenges in *NFIB's* wake. My findings reveal that this has not been the case. There is, however, an important factor that helps to explain this result.

Beginning in 2010 and accelerating in the following years, the Department of Education offered states waivers from NCLB requirements (Ayers, 2011). Consequently, states have had an alternate outlet from requirements of the NCLB, and have not resorted to challenging the program in court.

Even when states' requests for NCLB waivers have been denied, however, they have not filed suit. California, for instance, requested a waiver from NCLB requirements but was denied by the Education Department (Pasachoff, 2014). Nonetheless, the state did not file suit. Iowa was similarly denied a waiver request, but chose not to file suit, "notwithstanding the potential new ground for a legal challenge" (Pasachoff, 2014).

While the availability of waivers may account for the lack of legal challenges to the NCLB, the absence of challenge by California and Iowa complicates the issue. If *NFIB* equipped states to make legal challenges, why did California and Iowa not press the issue? That question is beyond the scope of this paper. Based upon available data, we conclude that *NFIB* has not prompted coercion-based challenges to the NCLB.

The Clean Air Act (CAA)

As predicted by scholars, the CAA has been a target for legal challenges in the wake of *NFIB*. It should be noted that the CAA had also been challenged extensively prior the 2012

(Adler & Stewart, 2017). Pre-*NFIB* and post-*NFIB* challenges, however, differed in an important way. The challenges prior to *NFIB* cited only *Dole*, and generally relied upon one of the four traditional prongs. The post-*NFIB* challenge, though, did not even mention *Dole*, but relied *solely* upon *NFIB's* affirmation of the coercion doctrine (Adler and Stewart, 2017).

After *NFIB*, numerous states and sub-state entities challenged provisions of the CAA, claiming coercion (Adler and Stewart, 2017). In one case, challenges by the Texas Pipeline Association, Mississippi Commission on Environmental Quality, Gas Producers Association, and others, were consolidated and ultimately reviewed in *Mississippi Commission on Environmental Quality v. EPA* (2015; Nolan, Lewis, Sykes, Freeman & Hickey, 2018).

There, petitioners challenged the Act's provision that permitted the EPA to deny federal project funding for states failing to meet the air quality standards (*Mississippi Commission*, 2015). Each petitioner challenged the provision on slightly different grounds, but both Wise County, Texas and the Texas Commission on Environmental Quality (Schwinn, 2015) argued that the provisions exceeded federal conditioning authority (*Mississippi Commission*, 2015). Particularly, the petitioners pointed to the Act's allowance of the EPA to "prohibit the approval of any transportation projects or grants within the nonattainment area" (*Mississippi Commission*, 2015, p. 66). The Court reviewed coercion doctrine as applied in *Dole* and *NFIB*. Focusing primarily on disparate percentages of funding being conditioned, the D.C. Circuit ultimately concluded that "the potential funding sanctions contained in section 7509(b) of the Clean Air Act are not nearly as coercive as those in the ACA" (*Mississippi Commission*, 2015, p. 70). Of particular note is that petitioners "relied exclusively on *NFIB*," (Adler & Stewart, 2017, p. 690) not even mentioning *Dole*.

Were the challenges made in this case an effect of *NFIB*? Some scholars are convinced that they were. Professor Steven Schwinn, for example, commented just days after the D.C. Circuit's decision, "The federalism challenge in the case, Mississippi Commission on Environmental Quality v. EPA, sought to exploit the plurality ruling in NFIB" (Schwinn, 2015). I conclude that the nature of the assertion in this case confirms Schwinn's suspicion that *NFIB* prompted these challenges.

Numerous other challenges have been made to the CAA. In *Oklahoma v. EPA* (2013), for example, the State submitted a motion to stay the EPA's standards, alleging that "Section 111(d) Rule Unlawfully Coerces Oklahoma" (*Oklahoma v. EPA*, 2013, p. 12) according to the Supreme Court's ruling in *NFIB*. Oklahoma claimed that the policy "violates this anti-coercion doctrine by threatening to punish the citizens of States (as well as the States themselves) that do not carry out federal policy" (*Oklahoma v. EPA*, 2013, p. 12). Oklahoma's direct references to *NFIB* for support indicate that the State's challenge was, at least in some degree, precipitated by the ruling.

In another instance, just a month after *NFIB* was announced, a Notice of Supplemental Authority was filed by Texas in a then-pending dispute with the EPA. In the suit, Texas was challenging a CAA requirement that states update their regulations on greenhouse gases (Ryan, 2014), but on grounds other than coercion. When the ruling in *NFIB* was published, Texas quickly filed a Notice of Supplemental Authority, arguing that the decision's coercion doctrine was relevant to the ongoing dispute. As one Chicago-Kent Law Review article put it, "After NFIB, Texas wasted little time submitting a notice of supplemental authority, arguing that the EPA's action is coercive" (*Oklahoma v. EPA*, 2014). The state's argument was grounded in *NFIB*, and clearly prompted by the ruling's affirmation of *Dole's* coercion doctrine. The Court ultimately rejected Texas' argument, distinguishing the circumstances from those at issue in

NFIB. Although unsuccessful, Texas' filing demonstrated a willingness by states to "make use of the new Sebelius doctrine" (Ryan, 2013, p. 16).

The Clean Power Plan (CPP), an EPA policy under the CAA, has also seen a host of recent challenges. When the CPP was proposed in 2015, numerous states and entities (*West Virginia v. EPA*, 2016; Goelzhauser & Rose, 2017; Martina, 2015, p. 27) sought a stay on its implementation, arguing that it would be unconstitutionally coercive under *NFIB (*Federal Register, 2015, p. 64881; Rivkin, Grossman, & DeLaquil, 2015). Cumulatively, "150 entities including 27 states, 24 trade associations, 37 rural electric co-ops, and three labor unions challenged the CPP highlighting a range of legal and technical concerns" ("Electric Utility Generating Units…", 2017, p. 2).

Ultimately, in February of 2016, the Supreme Court issued a stay on the CPP (Goelzhauser & Rose, 2017; Revesz, 2016). Then in October of 2017, the EPA proposed to repeal the CPP ("Electric Utility Generating Units…", 2017).

The nature of these challenges to the CAA and CPP indicate a relation to the Court's ruling in *NFIB*. Even as the CPP was being developed in 2015, the implications of *NFIB* were included in the discussion. For instance, during a meeting of the House Committee on Energy and Commerce, Subcommittee on Energy and Power, Professor Laurence Tribe was invited to testify (Tribe, 2015) to his "legal views regarding EPA's proposed" (p. 1) CPP. In concluding his statement, Tribe asserted (2015) that, "These sanctions closely resemble those found impermissible in NFIB v. Sebelius," (p. 24) and are therefore likely to elicit coercion-based challenges.

Other

So far, our review has revealed that two of the three acts (FERPA and CAA) considered most vulnerable by scholars have, indeed, been challenged in the wake of *NFIB*. While these acts have borne the brunt of post-*NFIB* challenges, there are several additional programs to mention.

For instance, in *State of Texas v. United States of America* (2016), the United States District Court for the Northern District of Texas heard a complaint from Texas, Indiana, Kansas, Louisiana, Nebraska, and Wisconsin. The plaintiff states' arguments relied heavily upon *NFIB's* affirmation of the coercion doctrine. Quoting *NFIB* extensively, the states challenged the conditions attached to healthcare funds disbursed through Medicaid and the Children's Health Insurance Program (CHIP) (*State of Texas*, 2016, p. 3). According to the states, the conditions should be struck in light of *NFIB*, because they amounted to the coercion of a "gun to the head" (*State of Texas*, 2016, p. 27). Ultimately, the court found that because Congress technically established the requirements as a tax, rather than a condition, the states did not have a valid claim. Although ultimately unsuccessful in court, the challenge demonstrates *NFIB's* coercion doctrine in action.

In another case, *Mayhew v. Burwell* (2014), the courts considered a healthcare related petition filed by the State of Maine. In 2009, Maine agreed to a provision in the American Recovery and Reinvestment Act (ARRA, 2009), stipulating that the state would maintain its "Medicaid eligibility criteria at July 1, 2008 levels until December 31, 2010" (*Mayhew*, 2014, p. 7). In exchange, Congress offered additional stimulus funds to the state. In March of 2010, a Maintenance of Effort (MOE) provision was included in the Affordable Care Act (ACA), conditioning the continued receipt of those stimulus funds on the state's sustaining of those eligibility requirements until October 1, 2019.

In August of 2012, Maine's Department of Health and Human Services (Maine DHHS) increased Medicaid eligibility requirements in excess of the ACA's allowed levels (*Mayhew*, 2014). The U.S. Department of Health and Human Services (DHHS) subsequently disapproved the change, notifying Maine that the state would lose stimulus funds if the change was implemented. Maine DHHS challenged the DHHS' threat, arguing that the financial conditions were unconstitutionally coercive according to *NFIB* (*Mayhew*, 2014; Miller, 2015). After losing in court on two occasions, Maine filed a Writ of Certiorari with the US Supreme Court. In denying that request, the Court gave significant attention to the state's coercion claims, concluding ultimately that "there is no merit to petitioner's contention (Pet. 12-22) that the MOE requirement at issue here is impermissibly coercive under NFIB v. Sebelius" (*Mayhew*, 2014; Miller, 2015). Despite this conclusion, the dispute demonstrates the role that *NFIB* has played in enabling coercion challenges.

In March of 2015, Sara Rosenbaum from the Health Affairs Journal wrote an article highlighting another relevant case. There, in *King v. Burwell* (2015), the US Supreme Court considered plaintiffs' coercion arguments against the conditioning of tax credits. While many other elements were involved, related issues arose during oral arguments, where US Attorney Michael Carvin discussed the implications of *NFIB* with Justices Kennedy, Ginsburg and Scalia. The Justices challenged Carvin's claims that the program was not coercive under *NFIB* (Oral Arguments, 2015, p. 19), a conversation demonstrating *NFIB's* continued relevance. Jayaraman has even argued that this questioning during oral argument "suggest[s] that the Supreme Court might adopt a broader restriction on Congress' ability to condition funds" (Jayaraman & Bates, 2015, p. 44).

In 2013, another dispute (*NCAA v. New Jersey*, 2013) arose where New Jersey challenged the Professional and Amateur Sports Protection Act of 1992 (PASPA) as coercive. The United States government had filed suit against New Jersey's proposed licensing of sports gambling, claiming that the state law would violate PASPA. In response, New Jersey argued that "the choices states face under PASPA are as coercive as the Medicaid expansion provision struck down in Sebelius" (*NCAA*, 2013, p. 80). The Court ultimately disagreed and upheld federal PASPA requirements.

Finally, the courts have also considered the Trump Administration's conditions to grant-in-aid programs. Under this Administration, the United States Attorney General's Office and Department of Justice have been directed to interpret the Immigration and Nationalization Act (INA, 1965) as allowing for conditioning federal grants. Specifically, the Administration has determined that receipt of the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) and grants issued by the Office of Community Oriented Policing Services (COPS) are to be conditioned on the meeting of INA Section 1373 requirements (*City and County of San Francisco v. Trump*, 2018). In 2013, the State of California passed the TRUST Act, in 2016 the TRUTH Act, and in 2017 the Values Act (*San Francisco*, 2018). Each statute limited the prerogatives of state officers to seek the private information of crime victims and witnesses. In doing so, each of these state provisions limited officers' cooperation with requirements of INA Section 1373. Claiming the state provisions contravened requirements of Section 1373, the President issued Executive Order 13768 which directed the Department of Justice to withhold "federal grants to so-called sanctuary jurisdictions" (*San Francisco*, 2018, p. 3). The City and County of San Francisco filed suit, challenging the executive order.

In *City and County of San Francisco v. Trump*, the Ninth Circuit Court of Appeals considered this dispute. Ultimately, it concluded that the executive branch could not apply funding conditions without authorization by Congress. While the holding speaks only indirectly to the effects of *NFIB*, California's challenge demonstrates a state willingness to confront federal conditions on grounds of coercion (*San Francisco,* 2018).

Having reviewed several *post-NFIB* coercion challenges, we draw conclusions on the veracity of scholarly claims. In line with the predictions, two of the three acts considered most vulnerable to coercion challenge have been confronted with those challenges since 2012. Although the third did not sustain legal challenges, this appears to have been due to a surge in waiver availability. Additionally, numerous *NFIB-style* legal challenges have been made to other spending programs, including healthcare, PASPA and grants-in-aid. While some coercion challenges were made before 2012, the arguments of the more recent petitions reveal a heavy reliance upon *NFIB* for support. This reliance evidences the conclusion that *NFIB* has, at least in some degree, encouraged states and sub-state entities to challenge federal conditions.

Having assessed the first scholarly prediction of legal challenges, we move now to consider the indirect, structural effects of the decision.

Restructuring

Claims of restructuring are somewhat more complex to evaluate. Instead of reviewing direct effects (i.e. legal challenges made in court), we review indirect effects (i.e. administrative and legislative adjustments made *in anticipation* of legal challenges).

I will proceed by assessing each scholarly prediction in light of available data. The three primary predictions, as described above, are of (1) reduced funding for conditional programs, (2) softened funding conditions, (3) and emboldening of the states.

Reduced Funding for Conditional Programs

To begin, our scope must be narrowed. While many conditional spending programs exist, most of them are not large enough to elicit coercion challenges. Thus, an assessment of those budgets would not be helpful. Instead, I take as a case study the program scholars have deemed most likely to have been adjusted by Congress: federal education funding. Contrary to scholarly predictions, the conditional education program has not seen reduced discretionary funding in the wake of *NFIB*.

The ESEA was passed in 1965, increasing federal financial involvement in education. Of its many parts, Pasachoff suggests that the Title I Grant Program, "which focuses on the education of poor children," is the "centerpiece of the Act" (Pasachoff, 2013, p. 614). Title I is also the primary funnel for federal education aid to state governments. Consequently, when conditions are attached to education aid, it is usually funds granted through the Title I Program that are at stake.

Contrary to scholarly predictions, however, there has not been an overall decrease to discretionary Title I funding in the wake of *NFIB*. In 2012, the total discretionary funding for the Department of Education was $68,112,288, and the portion given as ESEA Title 1 Grants was $14,516,457. In 2018, the numbers were $70,867,406, and $15,759,802. According to the government's most recent budget for FY 2020, these numbers are set to continue increasing this year ("A Budget for a Better...", 2019). (Department of Education, 2018)

If Congress were to have begun decreasing funding to conditional spending programs, Title I Grants would have been the place to start. The fact that this aid has not been reduced is indicative of a broader conclusion: scholarly predictions were incorrect.

Scholars also predicted a congressional adjustments to the IDEA funding program. According to Pasachoff (2013), "the bi-partisan movement to fully fund special education programs" (p. 655) would be diminished as a result of *NFIB*. Recent data reveals otherwise. Federal aid to states through the IDEA has not decreased since *NFIB*. In 2012, the amount granted to states under the IDEA Part B and C[7] was $454,650,501 ("Broken Promises...", 2018, pp. 22-23). In 2018, the number was $470,971,086 ("Broken Promises…", 2018, p. 22). Furthermore, there is no evidence of Congress stepping away from efforts to fully fund the IDEA. In fact, two bipartisan bills have recently been introduced, one to the House in 2017 (H.R.2902 - IDEA Full Funding Act) and another to the Senate in 2018 (S.2542 - IDEA Full Funding Act), that would provide "a glidepath to fully funding IDEA" ("IDEA Full Funding...", 2018). Although neither has yet been adopted by Congress, bipartisan support has been sustained since *NFIB*.

The case study of ESEA Title I grants reveals no decrease of conditional spending since 2012. Neither do recent developments of the IDEA reveal *post-NFIB* adjustment. Accordingly, we conclude that as of April 2019, Congress has not reduced conditional spending in response to *NFIB*.

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[7] "IDEA Part B distributes funds to states under two sections: Section 611 provides funds for children ages three to 21 receiving special education in public schools and Section 619 provides preschool grants for children ages three to five"(p. 20) "IDEA Part C provides grants to states to assist in providing services to children with disabilities, from birth to age two, and their families" (p. 23; "Broken Promises…", 2018, p. 20).

Softened Funding Conditions

Some scholars have hypothesized that Congress would begin designing funding conditions more carefully after *NFIB*. Considering the new threat of coercion challenges, they predicted, Congress would be less inclined to attach harsh requirements to its aid. To evaluate this prediction, I first take a case study approach and consider the most recent reauthorization of the ESEA. Then, I review several other instances of softening beyond the ESEA.

In 2015, Congress passed and the President signed the Every Student Succeeds Act (ESSA, 2015), a reauthorization of the ESEA to replace No Child Left Behind (NCLB, 2001). The NCLB had been embroiled in conflict since its authorization, but especially in the wake of *NFIB*. States were generally discontent with the statute and its conditions on federal education funding. If states did not cooperate with NCLB requirements, they were at risk of losing education funds received through the ESEA Title I program.

Discussions in both houses of Congress during the ESSA's consideration revealed an awareness that, as Kimberly Robinson put it, the authorization "must be adopted consistent with the Supreme Court's analysis in NFIB" (Robinson, 2016, p. 225). Legislators considering the ESSA were intent on designing the reauthorization to be less coercive than its predecessor, the NCLB. Numerous evidences support this conclusion.

First, the final design of the reauthorization is significantly less vulnerable to coercion claims than the NCLB had been. As Paul Hoversten has noted, the "ESSA is not more lucrative than its predecessor No Child Left Behind, and its conditions are less onerous" (Hoversten, 2017). Congress designed the ESSA to be much softer toward states than the NCLB had been.

Second, this softened design was specifically intended by legislators to create a less coercive program. Several congressional reports evidence this conclusion. For instance, in a

report filed by the Senate Health, Education, Labor, and Pensions Committee, it was noted that, "The committee bill [ESSA] expands prohibitions on the Federal Government and use of Federal funds. [...] This language will help address long-standing concerns that the Federal Government became too involved pushing States to adopt the Common Core" (Committee Report, 2016, p. 54). In a conference report (2015) to the House, similar comments were made. There, Representative Roe from Tennessee spoke in support of the ESSA, noting that the reauthorization would eliminate the Department of Education's authority to condition funds on adoption of Common Core, and thereby reduce the program's coerciveness (Conference Report, 2015). Roe's comment exemplifies the sort of efforts to soften conditions that scholars expected.

Other statements from members of Congress have also been revealing. As Representative Barletta mentioned to the House, the ESSA "includes unprecedented restrictions on the Secretary of Education's authority, and prevents the federal government from requiring or coercing states to adopt the Common Core curriculum" (Conference Report, 2015).

While the ESSA's adoption does appear to support scholars' predictions, it should be noted that federal involvement in education tends to go through "cycles of great expansion and contraction" (Robinson, 2016). The ESSA's favor toward states, then, should not be seen solely as a result of *NFIB*, or any other single factor.

It is clear, however, that Congress was particularly interested in reducing the coerciveness in education through its new reauthorization. The legislative records reveal a clear congressional care to design the program carefully, and in light of *NFIB's* implications. Beyond the case study of the ESSA, there are also several noteworthy anecdotes.

First, when the House Committee on Veterans Affairs was considering the GI Bill Tuition Fairness Act of 2013, they expressed concern that the program might cross the coercion

line drawn in *NFIB*. Before voting to advance the Bill, the Committee requested legal advice from the Congressional Research Service on the question of coercion (Committee Report, 2013). This congressional care for the implications of *NFIB* is precisely the kind predicted by scholars.

Second, in a meeting of the Committee on Health, Education, Labor and Pensions, the Strengthening America's Schools Act of 2013 (SACA) was being considered. Senators Alexander, Enzi, Burr, Isakson, Paul, Hatch, Roberts, Murkowski, Kirk, and Scott issued a joint statement (Committee Report, 2013) in opposition to the Act. Among the criticisms voiced in the statement were fears that the Act would be coercive in light of *NFIB*. Using the Court's language, the Senators noted that the Act functioned as a ''gun to the head'' that crossed the line between encouragement and coercion (Committee Report, 2013, pp. 96-98). The Senators' concerns exemplify the effects that scholars expected.

Third, the Private Property Rights Protection Act of 2017 (PPRP) (H. R. 1689) was introduced and referred to the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary. The Bill eventually moved from the Committee and was passed by the House, but rejected by the Senate. Several critiques were offered in committee, but opponents specifically voiced concern that the Act's funding conditions were unconstitutional under *NFIB*. One point of dissent offered in the committee report specifically pointed to *NFIB* and suggested that the PPRP's conditions may be struck under the 2012 ruling (Committee Report, 2018, p. 20). Opposing committee members suggested that, "as the Court noted in Sibelius, conditional federal spending can constitute unconstitutional coercion if it threatens states with too great of a loss. Here, H.R. 1689's threatened loss of all federal economic development funds may be so draconian as to be unconstitutionally coercive" (Committee Report, 2018, p. 20).

NFIB was also on the minds of the PPRP's proponents. So much so, in fact, that they included a preemptive defense to coercion arguments, explicitly referencing *NFIB* (Committee Report, 2018, p. 2). William Buzbee, Professor of law at Georgetown University Law Center, was asked to testify to the Committee concerning the legal components of the Act. In line with opponents' concerns, he cautioning that "the 2012 NFIB v. Sebelius decision did say that conditional Federal spending can be unconstitutionally coercive, and so I think important for this committee and Congress to assess the magnitude of this bill's financial threat to State and local governments if Federal economic development funds were forfeited" (Committee Report, 2018, p. 11). The Committee's deliberations of the PPRP suggest that legislators are, indeed, carefully designing funding conditions in light of *NFIB*.

Fourth and finally, when the EPA was considering implementation of the Clean Power Plan (CPP) in 2015, the House Committee on Energy and Commerce, Subcommittee on Energy and Power invited Laurence Tribe to testify concerning his "legal views" (p. 1) of the CPP. In an almost prophetic statement, Tribe testified that "These sanctions closely resemble those found impermissible in NFIB v. Sebelius," and may be targets of coercion challenge (2015, p. 24).

Both the ESSA case study and the four additional examples are revealing. In each case, a congressional care for designing funding conditions is made clear. Based on these cases, we conclude that scholars correctly predicted that Congress would design new funding conditions carefully in light of *NFIB*.

Emboldening of States

Scholars have also suggested that *NFIB* would embolden states in their dealings with administrative agencies. As Ryan put it, "the better a state's chances in court [...] the stronger the

state's bargaining position becomes at the table" (Ryan, 2013, p. 19). In light of both state-level initiatives and waiver trends, I find that no large scale emboldening has occurred. There have been, however, some small scale efforts to combat federal funding conditions. Two recent state-level initiatives in Texas and West Virginia are examples.

In February of 2013, House Bill 1379 was proposed to the Texas legislature, which would require:

> the attorney general and the Legislative Budget Board to prepare a report to the legislature [...] each even-numbered year that identifies all the coercive federal funding programs[8] that deliver more than $100 million yearly to the state; the governor to work with governors of other states to develop a coordinated approach with respect to all coercive federal funding programs; and agencies and officers of the state to implement, during the pendency of an action brought by the attorney general related to coercive federal funding programs, all coercive federal funding programs without regard to any conditions designated as coercive by the bill.

Furthermore, as Budget Director Ursul Parks described, the Act would authorize "the attorney general to bring an action to enjoin the enforcement of a coercive condition [...] and to sue for appropriate relief if certain actions are taken by the federal government" (Parks, 2013). In May of 2013, the Bill was approved in a 3-2 vote by the House Committee on Federalism and Fiscal Responsibility. Since then, however, it has not been considered by the whole legislative body (Texas Legislature Online, 2019).

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[8] In a 2013 article, the Texas Public Policy Foundation identified several programs that would likely fit this ticket. Included were both ESEA Title 1 Grants and CAA financial sanctions.

In October of 2013, the Texas Public Policy Foundation endorsed the Bill in an article (Loyola, 2013) entitled, "Loosening the Federal Straightjacket: How the NFIB Decision Affects Federal Funds in State Budgets." The Foundation's advocacy provides a helpful insight into public support for the Bill.

The Foundation (Loyola, 2013), with other proponents, have focused significant attention on *NFIB*. They argued that *NFIB* opened the door for Texas to be liberated from federal coercion, and that it was now the state's duty to fight the federal programs in court (Loyola, 2013). From this belief flowed proponents' broad conclusion: "it is up to the states to test the boundaries of that new flexibility—and to push back everywhere that federal coercion comes attached to a dollar of federal 'assistance'" (Loyola, 2013, p. 10).

The emboldened spirit seen in proponents of Texas' Bill has also been exemplified in some West Virginians. Largely parallel to Texas' Bill, House Bill 2556 was introduced to the West Virginia Legislature in 2017, and referred to the House Judiciary Committee where it is currently pending (West Virginia Legislature, 2019). The Bill (House Bill 2556, 2017), if enacted, would require one of the state's financial committees to draft a 'Coercive Federal Funds Report' to accompany every state budget. In light of the report's findings each year, the state Attorney General would be authorized to challenge federal conditions that the state deemed to be coercive (House Bill 2556, 2017).

Both proposed bills, House Bill 1379 and House Bill 2556, reflect some emboldening of state representatives to challenge federal conditions. Neither has yet been adopted as law, however, which evidences a lack of broad public support for the measures. In sum, the proposed

bills do reveal some degree of the emboldening anticipated by scholars. Ultimately, however, their minimal success points to the emboldening's lack of breadth.

In addition to considering these state-level initiatives, we turn also to recent administrative waiver trends. As noted earlier in this paper, waivers were expected by scholars to be a primary vehicle for state emboldening. We now consider what recent data reveals of those expectations.

Administrative waivers have been used increasingly since 2012. What is uncertain, however, is why that has been the case. One explanation, supported by Bagenstos and Ryan, is that *NFIB* has emboldened states to demand waivers. If this prediction were valid, we would expect to find a trend of states confidently pursuing waivers. To assess, we again take a case study approach, reviewing the two domains that scholars considered most likely to be affected.

Education

If states were to demand waivers from a federal requirement, the NCLB would have been a likely target. By significantly increasing federal grants and conditions on their receipt (Bagenstos, 2013), the NCLB caused ripples since its passage in 2001. It established that to receive certain federal education funds, states were required to jump through federal hoops (Bagenstos, 2013).

In 2011, Secretary Arne Duncan of the Department of Education announced that he would begin accepting state applications for waivers from several NCLB requirements (Duncan, 2011; "Obama Administration Sets…", 2011). The move was widely seen as a means of sidestepping Congress, who had been delaying passage of President Obama's ESEA reauthorization proposal (Black, 2015). Under the new program, states with approved waivers

could continue to receive federal education funding even without meeting the NCLB's statutory requirements.

To receive waivers, however, states were required to adopt a new set of federal standards ("Obama Administration Sets…", 2011). Functionally, waivers from the NCLB's conditional funding programs were *themselves conditioned* upon agreement to another set of requirements (Nathaniel, Metzger & Morrison, 2013). Among the requirements were some eighteen policy commitments (McGuinn, 2016). Despite the program's requirements, "forty-five states had submitted requests for a waiver" (Black, 2015) by 2012.

Three relevant points should be made concerning the nature of the waivers. Each point indicates that, while more waivers were granted after *NFIB*, this does not mean that those waivers were a result of the ruling.

First, they were initiated by the federal government. Second, the conditions indicate a federal, not state, emboldening. Third, the states had ulterior motives for seeking waivers.

Several facts support the first point. Most convincing is that the waivers were first advertised by the federal agency. They were not conceded upon pressure or leveraging by states, but offered on federal initiative. Additionally, the purpose of the new waivers was not to appease states who threatened coercion-based challenges, but to leverage states for the Administration's policy objectives. The waiver conditions essentially replicated the Obama Administration's ESEA reauthorization that Congress had rejected. As the President himself confirmed, this was no coincidence. Announcing the new waiver program, President Obama commented, "I've urged Congress for a while now, let's get a bipartisan effort to fix this [NCLB]. Congress hasn't been able to do it. So I will...Given that Congress cannot act, I am acting" (McGuinn, 2016, p. 8). The waiver program was an initiative of the Administration, not a response to emboldened states.

To the second point, several facts are supportive. While many states[9] applied for waivers, some did not. California, for instance, opted not to apply ("ESEA Flexibility", 2016) and their reasons for doing so are informative. According to State Official Tom Torlakson, the Department of Education was simply "switching out one set of onerous standards, No Child Left Behind, for another set of burdensome standards" (Hart, 2012). The waivers envisioned by Bagenstos and Ryan would be timid efforts to appease emboldened states. The waivers offered here, though, were clearly much more aggressive. Montana also refused to apply for a waiver, and for parallel reasons. State Official Denise Juneau echoed Torlakson's sentiments that the waivers being offered were even more burdensome than the NCLB had been.

According to Senator Lamar Alexander, Chairman of the Senate Health, Education, Labor, and Pensions Committee, the waivers offered by the Secretary were not federal concessions, but rather an effort by the agency to leverage states toward the Administration's policies (Black, 2015; Wong, 2015).

To the third point, there is also supportive evidence. State motives for pursuing the waivers have been widely attributed to intense dissatisfaction with the NCLB (McGuinn, 2016). Thus, even though receipt of a waiver was conditioned upon agreement to the Secretary's new set of policies, most states saw the opportunity as worthwhile. This ulterior motive helps to explain why states sought waivers, even when it meant committing to a new set of conditions.

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[9] "45 states, the District of Columbia, Puerto Rico and the Bureau of Indian Education submitted requests for ESEA flexibility and 43 States, the District of Columbia and Puerto Rico are approved for ESEA flexibility" ("ESEA Flexibility", 2016).

These three points demonstrate that increasing waiver requests in the field of education do not necessarily evidence an emboldening of states, as predicted by scholars. In the domain of Medicaid, a similar result is apparent.

Medicaid

A number of states have recently pursued waivers from Medicaid requirements. This is, however, primarily a result of the Trump Administration's recent changes, rather than from emboldening effects of *NFIB*. In December of 2018, the Trump Administration "issued [a] new waiver guidance" policy (Rudowitz, 2018). The new policy represents a significant departure from the former Administration's approach, where the federal government had imposed significant demands on states. The Obama Administration had "substantially [...] limited the types of state waiver proposals that the federal government would approve," accepting only reinsurance waivers (Centers for Medicare & Medicaid Service, 2018). Now, the Centers for Medicare & Medicaid Services (CMS) have opened the door to accepting waiver applications from a much broader range of requirements, in an effort to give states "more flexibility to design alternatives to the ACA" ("Trump Administration announces…", 2018). Naturally, this broadened scope has prompted a surge of state waivers requests.

The question we must ask is whether the noted pursuit of NCLB and Medicaid waivers was truly a result of *NFIB's* coercion ruling. Did *NFIB* cause an emboldening for this pursuit, or would it have occurred regardless of the Court's conclusion? Ultimately, in light of ulterior political motives and federal initiative, we conclude that recent surges in NCLB and Medicaid waivers *do not* affirm scholarly predictions. No evidence has been uncovered that reveals an emboldening of states to pursue these waivers.

Conclusion

Just as Madison and Hamilton saw the Spending Clause differently, contemporary scholars anticipated a wide range of effects to flow from *NFIB*. Some focused on legal challenges, and others on legislative and administrative restructuring. All, however, recognized that the ruling was significant, and would have some recognizable effects.

Through case studies and broad reviews, I have evaluated numerous scholarly predictions in light of the past seven years of data. In conclusion, I summarize my findings in four points.

First, *NFIB* has prompted a series of coercion-based legal challenges. Disputes involving both FERPA and the CAA reveal a significant use of *NFIB* by entities to challenge federal funding conditions. Furthermore, other legal challenges to healthcare, PASPA and grant-in-aid programs support this finding. By affirming *Dole's* coercion prong, *NFIB* gave teeth to complaints against federal conditions.

Second, there is no evidence that Congress has reduced amounts of conditional funding in the wake of *NFIB*. Looking to the ESEA Title I Grant Program and IDEA Parts B and C as case studies, I find that neither has sustained funding reductions since 2012. Furthermore, bipartisan support for fully funding the IDEA does not appear to have been affected by *NFIB*.

Third, there is evidence that *NFIB* has affected how Congress designs new conditional funding programs. Using the ESSA as a case study, I find that Congress has intentionally designed new programs with softened conditions. Further examples of other congressional acts[10] are also supportive of this conclusion.

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[10] The GI Bill Tuition Fairness Act of 2013, Strengthening America's Schools Act of 2013, Private Property Rights Protection Act of 2017, and the Clean Power Plan of 2015.

Fourth and finally, I find lacking evidence of state emboldening. Legislative initiatives in Texas and West Virginia do indicate some level of boldness stemming from *NFIB*, but neither measure has been enacted or put to a vote. Waiver requests also provide no evidence of emboldening. In both case studies - education and Medicaid - increasing waiver applications were a result of federal, not state, action. Accordingly, these increases reflect administrative policy efforts, not state emboldening. Furthermore, neither state whose waiver was denied has filed suit, or threatened to do so. In light of these facts, I conclude that *NFIB* has not emboldened states to demand administrative waivers.

From *Butler*, to *Dole*, to *NFIB*, federal conditioning authority has undergone continual evolution. For now, the Court has applied brakes to the practice of attaching conditions, but there is no guarantee that this will be sustained. In 2012, *NFIB* gave teeth to coercion challenges. What tomorrow may hold for conditional spending, however, is far from obvious.

Works Cited

A Budget for a Better America: Promises Kept. Taxpayers First. (2019, March). *United States White House*. Retrieved From *https://www.whitehouse.gov/wpcontent/uploads/2019/03/budget-fy2020.pdf*

Adler, J., Stewart, N. (2017, March 28). Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending after NFIB v. Sebelius. *Ecology Law. Quarterly, Volume 43.* Retrieved from https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2139&context=elq

Adler, J. H. (2012, July 23). Could the Health Care Decision Hobble the Clean Air Act? Retrieved from http://perc.org/blog/could-health-care-decision-hobble-clean-air-act .

Ayers, J. (2011, December). No Child Left Behind Waiver Applications. Retrieved from https://files.eric.ed.gov/fulltext/ED535638.pdf

Baake, D. (2012). Federalism in the Air: Is the Clean Air Act's "My Way or No Highway" Provision Constitutional After NFIB v. Sebelius? *Harvard Environmental Law Review, Volume 37*. Retrieved from https://heinonline.org/HOL/LandingPage?handle=hein.journals/helf1&div=2&id=&page=

Bagenstos, S. R. (2008, December). Spending Clause Litigation in the Roberts Court. *Duke Law Journal, Volume 58*. Retrieved from https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1381&context=dlj

Bagenstos, S. R. (2013). The Anti-leveraging Principle and the Spending Clause After NFIB. *The Georgetown Law Journal, Volume 101*. Retrieved from

https://georgetownlawjournal.org/articles/127/anti-leveraging-principle-spending-clause/pdf

Bagenstos, S. R. (2014). Viva Conditional Federal Spending! *Harvard Journal of Law & Public Policy, Volume 37.* Retrieved from https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2078&context=articles

Baker, L. A. (2015, October 11). The Spending Power after NFIB v. Sebelius. *Harvard Journal of Law and Public Policy, Volume 37*. Retrieved from https://ssrn.com/abstract=2672621

Black, E. W. (2015). Federalizing Education by Waiver? *Vanderbilt Law Review, Volume 68.* Retrieved from https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2015/05/Federalizing-Education-by-Waiver.pdf

Broken Promises: The Underfunding of IDEA. (2018, February 7). *National Council on Disability*. Retrieved from https://ncd.gov/sites/default/files/NCD_BrokenPromises_508.pdf

Bull, Reeve. (2006). The Virtue of Vagueness: A Defense of South Dakota v. Dole. *Duke Law Journal, Volume 56*. Retrieved from https://scholarship.law.duke.edu/dlj/vol56/iss1/7

Cavanagh, S. (2012, January 11). Some States Skeptical of NCLB. *Education Week*. Retrieved from https://www.edweek.org/ew/articles/2012/01/11/17waivers.h31.html

Chicago Tribune Company v. University of Illinois Board of Trustees 781 F. Supp. 2d 672 (N.D. Ill. 2011).

City and County of San Francisco v. Trump, No. 17-17478 (9th Cir. 2018)

Clean Air Act of 1963. 42 U.S.C. § 7401 (1963).

Coan, A. B. (2013, May 2). Judicial Capacity and the Conditional Spending Paradox. *Wisconsin Law Review, Volume 2013*. Retrieved from http://wisconsinlawreview.org/wp-content/uploads/2013/05/2-Coan-2.pdf

Committee Report. (2013). Report to the Committee on Veterans' Affairs. Retrieved from https://www.govinfo.gov/content/pkg/CRPT-113hrpt94/pdf/CRPT-113hrpt94.pdf

Committee Report. (2016). Report of the Committee on Health, Education, Labor, and Pensions United States Senate. Retrieved from https://docs.google.com/document/d/1myRpxG-_1JEODY-JrY7q067LbJ6JtuVI6YieIIhSMMU/edit

Committee Report. (2018). Report together with Dissenting Views To the Committee on the Judiciary. Retrieved from https://www.govinfo.gov/content/pkg/CRPT-115hrpt859/pdf/CRPT-115hrpt859.pdf

Conference Report. (2015). Conference Report on S. 1177, Student Success Act. Retrieved from https://www.govinfo.gov/content/pkg/CREC-2015-12-02/html/CREC-2015-12-02-pt1-PgH8884-2.htm

Dilger, R. (2018, May). Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues. *Congressional Research Service*. Retrieved from https://fas.org/sgp/crs/misc/R40638.pdf

Duncan, A. (2011) Letters from the Education Secretary or Deputy Secretary. Retrieved from https://www2.ed.gov/policy/gen/guid/secletter/110923.html

Electric Utility Generating Units: Repealing the Clean Power Plan: Proposal. (2017). *Environmental Protection Agency*. Retrieved from https://www.epa.gov/stationary-sources-air-pollution/electric-utility-generating-units-repealing-clean-power-plan-0

ESEA Flexibility. (2016, May 12). Retrieved from https://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html

Every Student Succeeds Act 2015 Pub.L. 114-95, S. 1177 (114th).

Family Educational Rights and Privacy Act of 1974. 20 U.S.C. § 1232g (1974).

Federal register. (2015, October 23). *Environmental Protection Agency*. Retrieved from https://www.govinfo.gov/content/pkg/FR-2015-10-23/pdf/2015-22842.pdf

Flexibility and Waivers. (2012, October 12). Retrieved from https://www2.ed.gov/nclb/freedom/local/flexibility/index.html#waivers

Garcia, M., Lewis, C., Nolan, A., Totten, M. & Tyson, A. (2017, August 26). The Constitution of the United States of America: Analysis and Interpretation. *Congressional Research Service*. Retrieved from https://www.govinfo.gov/content/pkg/GPO-CONAN-2017/pdf/GPO-CONAN-2017.pdf

Goelzhauser, G. & Rose, S. (2017). The State of American Federalism 2016–2017: Policy Reversals and Partisan Perspectives on Intergovernmental Relations. *Publius: The Journal of Federalism, Volume 47*. Retrieved from https://academic.oup.com/publius/article/47/3/285/3865381

Hamilton, A., Jay, J., Madison, J., Carey, G. W., & McClellan, J. (2001). The Federalist. Indianapolis, IN: Liberty Fund. Retrieved from http://files.libertyfund.org/files/788/0084_LFeBk.pdf

Haney, P. (2013). Coercion by the Numbers: Conditional Spending Doctrine and the Future of Federal Education Spending. *Case Western Reserve Law Review, Volume 64*. Retrieved from https://scholarlycommons.law.case.edu/caselrev/vol64/iss2/13

Hart, S.V. (2012, October 26). Facts About the No Child Left Behind Waivers. *Truth in American Education.* Retrieved from https://truthinamericaneducation.com/federalized-education/facts-about-the-no-child-left-behind-waivers/

Hinton, E., Musumeci, M., Rudowitz, R., Antonisse, L. & Hall, C. (2017, September). Section 1115 Medicaid Demonstration Waivers: A Look at the Current Landscape of Approved and Pending Waivers. *The Henry J Kaiser Family Foundation*. Retrieved from http://files.kff.org/attachment/Issue-Brief-Section-1115-Medicaid-Demonstration-Waivers-A-Look-at-the-Current-Landscape

Hinton, E., Musumeci, M., Rudowitz, R., Antonisse, L. & Hall, C. (2019, February 12). Section 1115 Medicaid Demonstration Waivers: The Current Landscape of Approved and Pending Waivers. https://www.kff.org/medicaid/issue-brief/section-1115-medicaid-demonstration-waivers-the-current-landscape-of-approved-and-pending-waivers/

House Bill 2556. (2017). *West Virginia State Legislature*.

Hoversten, P. A. (2017). Counting Zeros: The Every Student Succeeds Act and the Testing Opt-Out Movement. *Michigan Law Review, Volume 116*. Retrieved from http://michiganlawreview.org/counting-zeros/

IDEA Full Funding: Why Should Congress Invest in Special Education? National center for learning disabilities. (2018). Retrieved from https://www.ncld.org/archives/action-center/what-we-ve-done/idea-full-funding-why-should-congress-invest-in-special-education

IDEA Full Funding Act, H. 2902, 115 Cong. (2017)

Jayaraman, T., Bates, T. (2015, May 13). NFIB v. Sebelius: A Potential Shift in the Doctrine of Conditional Spending. *Harvard Law School Briefing Papers on Federal Budget Policy*.

Retrieved from https://wiki.harvard.edu/confluence/download/attachments/204380235/JAYARAMAN%20-%20Briefing%20Paper%20No.%2055.pdf?api=v2

Jones, Jessica. (2015, April). National Federation of Independent Business's Impact on State Medicaid Programs & the Rise of Federalism by Waiver. *University of Pennsylvania Law Review.* Retrieved from https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1559&context=jcl

Joondeph, B. W. (2013). The Health Care Cases and the New Meaning of Commandeering. *North Carolina Law Review, Volume 91*. Retrieved from https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=4604&context=nclr

King v. Burwell, 576 U.S. ___ (2015). Retrieved from https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-114_1bo2.pdf

Larson, L. (2015, December). Federal and State Laws Governing Access to Student Records. *Minnesota House of Representatives Research Department*. Retrieved from https://www.house.leg.state.mn.us/hrd/pubs/studrec.pdf

Leonard, E., Huberfield, N. & Outterson, K. (2013, January). Plunging Into Endless Difficulties: Medicaid and Coercion in National Federation of Independent. *University of Kentucky Law Faculty Publications, Volume 93*. Retrieved from https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1284&context=law_facpub

LoMonte, F. D. (2012, September 13). Why FERPA Is Unconstitutional. Retrieved from http://www.insidehighered.com/views/2012/09/13/federal-privacy-law-should-be-deemed-unconstitutional-essay

Loyola, M. (2013, October). Loosening the Federal Straightjacket: How the NFIB Decision Affects Federal Funds in State Budgets. *Texas Public Policy Foundation*. Retrieved from https://files.texaspolicy.com/uploads/2018/08/16095745/2013-10-RR07-LooseningFederalStraightjacket-CTAA-MarioLoyola.pdf

Marbury v. Madison, 5 U.S. 137 (1803).

Martina, M. (2015, November 12). Litigation Begins Over Clean Power Plan. Retrieved from https://www.eesi.org/articles/view/litigation-begins-over-clean-power-plan

Mayhew v. Burwell, No. 14-1300 (1st Cir. 2014).

McGuinn, P. (2016, June). From No Child Left Behind to the Every Student Succeeds Act: Federalism and the Education Legacy of the Obama Administration. *Publius: The Journal of Federalism, Volume 46*. Retrieved from https://www.researchgate.net/publication/303819372_From_No_Child_Left_Behind_to_the_Every_Student_Succeeds_Act_Federalism_and_the_Education_Legacy_of_the_Obama_Administration

Medicaid Expansion to the New Adult Group. (n.d.) Retrieved from https://www.macpac.gov/subtopic/medicaid-expansion/

Miller, T. (2015, May 1). Unfair Coercion, or Greater Deference? Two New Sides of King v. Burwell. *University of Miami Business Law Review, Volume 23*. Retrieved from https://repository.law.miami.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1259&context=umblr

Mississippi v. EPA, 790 F. 3d 138, 175 (D.C.Cir. 2015).

National Federation of Independent Business v. Sebelius. 567 U.S. 519.

NCAA v. New Jersey, No. 14-4546 (3d Cir. 2015). https://www.govinfo.gov/content/pkg/USCOURTS-ca3-13-01713/pdf/USCOURTS-ca3-13-01713-0.pdf

No Child Left Behind Act of 2001, P.L. 107-110, 20 U.S.C. § 6319 (2002).

Nolan, A., Lewis, K., Sykes, J., Freeman, W., & Hickey, K. (2018, September 27). Federalism-Based Limitations on Congressional Power: An Overview. *Congressional Research Service*. Retrieved from https://fas.org/sgp/crs/misc/R45323.pdf

Obama Administration Sets High Bar for Flexibility from No Child Left Behind in Order to Advance Equity and Support Reform. (2011). Retrieved from https://www.ed.gov/news/press-releases/obama-administration-sets-high-bar-flexibility-no-child-left-behind-order-advanc

Oklahoma v. EPA, 723 F.3d 1201, 1204 (10th Cir. 2013) Retrieved from https://www.chamberlitigation.com/sites/default/files/cases/files/2015/State%20of%20Oklahoma%20v.%20EPA%20%28ESPS%29%20--%20Motion%20for%20Stay.pdf

Parks, U. (2013, May 6). Fiscal Note, 83rd Legislature Regular Session. *Texas Legislative Budget Board*. Retrieved from https://capitol.texas.gov/tlodocs/83R/fiscalnotes/html/HB01379H.htm

Pasachoff, E. (2013). Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law. *American University Law Review, Volume 62*. Retrieved from https://scholarship.law.georgetown.edu/facpub/1112

Pasachoff, E. (2014, November). Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off. *Yale Law Journal, Volume 124*. Retrieved from https://www.yalelawjournal.org/article/agency-enforcement-of-spending-clause-statutes#_ftnref19

Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010).

Persily, N., Metzger, G. & Morrison, T. (2013). The Health Care Case: The Supreme Court's Decision and Its Implications. *Oxford University Press.* Retrieved from http://ebooks.ohiolink.edu/xtf-ebc/view?docId=tei/ox/9780199301058/9780199301058.xml&chunk.id=acprof-9780199301058-miscMatter-1&toc.id=&brand=default

Petition for Review. (2018). West v. TESC Board of Trustees. Retrieved from https://www.courts.wa.gov/content/petitions/95795-9%20Amended%20petition%20for%20review.pdf

Pound, W. (2005, February). Task Force on No Child Left Behind Final Report. *National Conference of State Legislatures*. Retrieved from http://www.hartfordinfo.org/issues/documents/education/nclb.pdf

Revesz, R. (2016, March 16). Supreme Court ruling on Clean Power Plan doesn't halt EPA action or change timeline. Retrieved from https://thehill.com/blogs/pundits-blog/energy-environment/273189-supreme-court-ruling-on-clean-power-plan-doesnt-halt

Rivkin, D., Grossman, A. & DeLaquil, M. (2015, June 15). Does EPA's Clean Power Plan Proposal Violate the States' Sovereign Rights? *Engage, Volume 16*. Retrieved from https://fedsoc.org/commentary/publications/does-epa-s-clean-power-plan-proposal-violate-the-states-sovereign-rights

Robinson, K. (2016). No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism. *Richmond School of Law, Law Faculty Publications*. Retrieved from https://pdfs.semanticscholar.org/d857/771ea568f9661033228c8670c6e8a97aa155.pdf

Rosenbaum, S. (2015, March 5). Coercion Argument Returns. Retrieved from https://www.healthaffairs.org/do/10.1377/hblog20150305.045264/full/

Rudowitz, R. (2018, June 8). Medicaid Waivers: Sharing State Experiences. *Henry J Kaiser Family Foundation*. Retrieved From http://www.ncsl.org/Portals/1/Documents/fiscal/Robin_Rudowitz_Presentation.pdf

Ryan, E. (2014, April 29). The Spending Power and Environmental Law after Sebelius. *University of Colorado Law Review, Volume 85.* Retrieved from https://ssrn.com/abstract=2378675

Ryan, Erin. (2013, October). Environmental Law After Sebelius: Will the Court's New Spending Power Limits Affect Environmental State-Federal Partnerships? *American Constitution Society for Law and Policy*. Retrieved from https://www.acslaw.org/wp-content/uploads/2016/08/Environmental_Law_After_Sebelius_0.pdf

Sachs, Rachel. (2016, March 15). Medicaid Expansion Through Section 1115 Waivers: Evaluating The Tradeoffs. Retrieved from https://www.healthaffairs.org/do/10.1377/hblog20160315.053925/full/

Schwinn, S. D. (2015, June 5). Clean Air Act Survives Federalism Challenges. Retrieved from https://lawprofessors.typepad.com/conlaw/2015/06/clean-air-act-survives-federalism-challenges.html

Social Security Act, 42 U.S.C. §§ 301-1305 (Suppl. 4 1934).

Solum, Lawrence. (2013) How NFIB v. Sebelius Affects the Constitutional Gestalt. *Washington University Law Review, Volume 91*. Retrieved from http://openscholarship.wustl.edu/law_lawreview/vol91/iss1/1

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

State of Texas v. United States, Civil Action No. 7:15-cv-00151-O (N.D. Tex. Aug. 4, 2016)

Suzuki, G. J. (2013). Clearing The Air Following National Federation of Independent Business v. Sebelius: The Clean Air Act and the Constitutionality of Highway Sanctions. *Boston University Law Review, Volume 93*. Retrieved from http://www.bu.edu/bulawreview/files/2014/01/SUZUKI.pdf

Texas Legislature Online. (2019). Retrieved from https://capitol.texas.gov/BillLookup/History.aspx?LegSess=83R&Bill=HB1379

Tribe, L. (2015, March 17). EPA's Proposed 111(d) Rule For Existing Power Plants: Legal and Cost Issues. *House Committee on Energy and Commerce: Subcommittee on Energy and Power*. Retrieved from https://docs.house.gov/meetings/IF/IF03/20150317/103073/HHRG-114-IF03-Wstate-TribeL-20150317-U1.pdf

Trump Administration announces State Relief and Empowerment Waivers to give states the flexibility to lower premiums and increase choices for their health insurance markets. (2018, October 22). Retrieved from https://www.cms.gov/newsroom/press-releases/trump-administration-announces-state-relief-and-empowerment-waivers-give-states-flexibility-lower

Turner, Eric. (2014, January). Protecting from Endless Harm: A Roadmap for Coercion Challenges After N.F.I.B. v. Sebelius. *Chicago-Kent Law Review, Volume 89*. Retrieved

from https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=4004&context=cklawreview

United States v. Butler, 297 U.S. 1, 85 (1936).

Virginia Department of Education v. Riley, 23 F.3d 80 (4th Cir. 1994).

West v. TESC Board of Trustees, 424 P.3d 1216 (2018)

West Virginia Legislature. (2019). Retrieved from http://www.wvlegislature.gov/Bill_Status/Bills_history.cfm?input=2556&year=2018&sessiontype=RS&btype=bill

Wong, K. K. (2015, May 1). *Publius: The Journal of Federalism, Volume 45*. Retrieved from https://cprehub.org/sites/default/files/pjv020.pdf