Federalism Challenge to Medicaid Expansion Under the Affordable Care Act: *Florida v. Department of Health and Human Services*

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Summary

In March 2010, the 111th Congress passed P.L. 111-148, the Patient Protection and Affordable Care Act as amended by P.L. 111-152, the Health Care and Education Reconciliation Act of 2010. Jointly referred to as the Affordable Care Act (ACA), the ACA, among other things, expands Medicaid eligibility. Following the enactment of the ACA, state attorneys general and others have brought several lawsuits challenging various provisions of the act on constitutional grounds. One of these cases, now before the Supreme Court, involves a federalism challenge to the expansion of Medicaid eligibility. This case, *Florida v. Department of Health and Human Services (HHS)*, will address the issue of whether withholding Medicaid reimbursement to a state unless that state complies with an expansion of its responsibilities under the Medicaid program exceeds Congress's enumerated powers under the Spending Clause and violates the Tenth Amendment.

The Supreme Court in *Florida v. HHS* will address whether, under the ACA, states are being "coerced" into compliance with the expanded state requirements. This "coercion" test, articulated in *South Dakota v. Dole* in 1987, appears to be closely related to the Tenth Amendment prohibition on the federal government "commandeering" states to implement federal programs. The "coercion" test, however, has never been applied by the Supreme Court to strike down a federal statute, and has been so little developed by the Court that most federal courts of appeals have simply rejected similar challenges with little analysis.

Of even more concern, an examination of analogous "unconstitutional conditions" cases (cases where a constitutional right is waived in order to receive a federal benefit) suggests that the issue of "coercion" is actually far more complex than just an evaluation of the level of federal benefits threatened to be withheld. Rather, such challenges generally also consider what burden is imposed by the grant condition itself, what federal interest the grant condition serves, and how direct is the relationship between the grant condition and the federal benefit. While it appears that the Medicaid expansion could be upheld under this more complex analysis, it is unclear whether the Court can develop a clear standard to balance these factors in a way that could be easily applied to the multitude of federal grant conditions that are presently imposed on states.

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Background

In March 2010, the 111th Congress passed the Patient Protection and Affordable Care Act[1] as amended by the Health Care and Education Reconciliation Act of 2010.[2] Jointly referred to as Affordable Care Act (ACA), the ACA expands Medicaid eligibility, increases access to health insurance coverage, expands federal private health insurance market requirements, requires the creation of health insurance exchanges to provide individuals and small employers with access to insurance, and in some instances mandates the provision and purchasing of health insurance.[3]

Following the enactment of the ACA, state attorneys general and others have brought several lawsuits challenging various provisions of the ACA on constitutional grounds.[4] One of these cases, now before the Supreme Court, involves a federalism challenge to the ACA's expansion of Medicaid eligibility. This case, *Florida v. Department of Health and Human Services (HHS)*,[5] will address the issue of whether withholding Medicaid reimbursement to a state unless that state complies with the expansion of the Medicaid program exceeds Congress's enumerated powers under the Spending Clause and violates the Tenth Amendment.

Medicaid is an entitlement program that finances the delivery of certain health care services to a specific population. Medicaid is financed jointly by the federal and state governments, and states choose whether or not to participate. Currently all 50 states participate. If a state chooses to participate, it must follow federal rules in order to receive federal reimbursement that offsets most of the state's Medicaid costs. It should be noted, however, that a number of these requirements can be waived, with approval from the Secretary of Health and Human Services (HHS).[6]

In general, Medicaid expansion under the ACA (1) raises Medicaid income eligibility levels for certain people; (2) adds both mandatory and optional benefits to Medicaid; (3) increases the federal matching payments for certain groups of beneficiaries and for particular services provided; (4) provides new requirements and incentives for states to improve quality of care and encourage more use of preventive services; and (5) makes a number of other Medicaid program changes.[7]

The most significant of these changes amends a section of federal law outlining what states must offer in their Medicaid coverage plans.[8] Starting in 2014, states will be required to cover adults under age 65 (who are not pregnant and not already covered) with incomes up to 133% of the

[1] P.L. 111-148.

[2] P.L. 111-152.

[3] For background on the ACA, see CRS Report R41664, *ACA: A Brief Overview of the Law, Implementation, and Legal Challenges*, coordinated by C. Stephen Redhead.

[4] For a detailed analysis of these legal issues, see CRS Report R40725, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, by Jennifer Staman et al.

[5] No. 11-400, cert. granted (Nov. 14, 2011). Other states besides Florida that have joined the suit include Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. *See* Florida v. Health and Human Services, 648 F.3d 1235, 1240 n.2 (11th Cir. 2011).

[6] For background on Medicaid, see CRS Report RL33202, *Medicaid: A Primer*, by Elicia J. Herz.

[7] For a detailed discussion of these provisions, see CRS Report R41210, *Medicaid and the State Children's Health Insurance Program (CHIP) Provisions in ACA: Summary and Timeline*, by Evelyne P. Baumrucker et al.

[8] 42 U.S.C. §1396a.

federal poverty level ("FPL").[9] This is a significant change because previously the Medicaid Act did not set a baseline income level for mandatory eligibility. Thus, many states currently do not provide Medicaid to childless adults and cover parents only at much lower income levels.[10]

The federal government predicts that the Medicaid expansion will increase enrollment by approximately 16 million by the end of the decade.[11] To finance the expansion, the federal government anticipates that its share of Medicaid spending will increase by $434 billion by 2020, and state spending will increase by at least $20 billion over the same time frame.[12] Other estimates suggest that both federal and state costs may be higher.[13]

The constitutional challenge to the Medicaid expansion is that, under the Spending Clause, states will be coerced into paying for the increased Medicaid requirements, as the failure to comply with these increased Medicaid requirements may result in the federal government withholding Medicaid funding. The argument is bolstered by the states noting that Medicaid represents 40% of all federal funds that states receive; that the majority of states receive more than $1 billion in Medicaid funding each year; and that this number is projected to increase under the ACA. The states argue that the withdrawal of this aid would have a dramatic effect on the ability of the states to provide health care to their population,[14] and that the states have no choice but to comply with the Medicaid expansion provisions.

The Spending Clause

The lines of authority between states and the federal government are, to a significant extent, defined by the United States Constitution and relevant case law regarding federalism. In recent years, however, the Supreme Court has decided a number of cases that would seem to be a reevaluation of this historical relationship. In particular, a number of these cases have cited the Commerce Clause,[15] the Tenth Amendment,[16] and the Eleventh Amendment of the Constitution as establishing limitations on the power of the federal government over the states.[17]

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[9] 42 U.S.C. §1396a(a)(10)(A)(i)(VIII).

[10] States currently must provide Medicaid to children under age 6 with family income up to 133% of the FPL and children ages 6 through 18 with family income up to 100% of the FPL. 42 U.S.C. §§1396a(a)(10)(A)(i)(IV), (VI), (VII), 1396a(l)(1)(B)-(D), 1396a(l)(2)(A)-(C).

[11] Letter from Douglas Elmendorf, Director, Cong. Budget Office, to the Hon. Nancy Pelosi, Speaker, U.S. House of Reps. ("CBO Estimate") 9 (Mar. 20, 2010) *cited in* Petition for Writ of Certiorari, brief at 9-10, Florida v. HHS, No. 11-400 (Sept. 27, 2011)("Petitioner's Writ").

[12] CBO Estimate, Table 4.

[13] Kaiser Comm'n on Medicaid & the Uninsured, *Medicaid Coverage & Spending in Health Reform: National and State-by-State Results for Adults at or Below 133% FPL* at 23 (May 2010) (estimating that increased costs could be as high as $532 billion for federal government and $43.2 billion for states) *cited in* Petitioner's Writ at 9-10.

[14] The states note that, in the past, when Congress sought to expand Medicaid coverage, it offered additional funding to states that agreed to additional obligations, without threatening existing funding of states that did not. Petitioner's Writ. at 22. *See, e.g.,* American Recovery and Reinvestment Act of 2009, P.L. 111-5, §5001(f); Omnibus Budget Reconciliation Act of 1986, P.L. 99-509, §9401(b).

[15] *See* United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun-Free School Zone Act of 1990).

[16] *See* New York v. United States, 505 U.S. 144 (1992) (striking down provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985); Printz v. United States, 521 U.S. 898 (1997) (striking down provisions of the Brady Handgun Control Act).

[17] *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (Indian tribe may not sue state in federal court under the Indian Gaming Regulatory Act).

In contrast to this trend, the Court has generally interpreted congressional power under the Spending Clause[18] expansively, even when that legislation arguably intrudes on state sovereignty. For instance, many areas of federal law that regulate states, such as civil rights statutes,[19] have been enacted pursuant to the Spending Clause. This is accomplished by Congress allocating money to the states, but then requiring the states to engage in or refrain from engaging in certain activities as a condition of receiving and spending that money. In many cases, Congress may use its spending power to accomplish precisely the same goals the Court has found unconstitutionally intrusive on state sovereignty when attempted through other means.[20]

The Tenth Amendment

One of the limits on federal power that would appear to most often stand in contrast with this Spending Clause doctrine is the Tenth Amendment. The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The significance of this language has varied over time. For a while, the Supreme Court interpreted the Tenth Amendment to provide that certain "core" state powers or "functions" would be beyond the authority of the federal government to regulate.[21] The Court, however, soon overruled that decision, suggesting that the states should look for relief from direct federal regulation of state activities through the political process, not through the courts.[22]

Modern Tenth Amendment doctrine may be traced to the Court's 1992 decision in *New York v. United States*.[23] In *New York*, Congress had attempted to regulate in the area of low-level radioactive waste by providing that states must either develop legislation on how to dispose of all low-level radioactive waste generated within the states, or the states would be forced to take title to such waste, which would mean that it became the states' responsibility.[24] The Court found that

[18] U.S. Const., Art. I, §8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States....").

[19] *See, e.g.,* 20 U.S.C. §1681 (1994) (prohibiting sex discrimination); 29 U.S.C. §794 (1994 & Supp. V 1999) (prohibiting discrimination on the basis of disability); 42 U.S.C. §§2000d to 2000d-4a (1994) (prohibiting race discrimination).

[20] *See, e.g.*, *New York*, 505 U.S. at 188 (pointing out that the Spending Clause provides an alternative to the congressional "commandeering" of state officials that violated the Tenth Amendment); Lynn A. Baker, *Conditional Federal Spending After Lopez,* 95 Colum. L. Rev. 1911, 1914 (1995) ("Thus, with *Dole*, the Court offered Congress a seemingly easy end run around any restrictions the Constitution might impose on its ability to regulate the states.").

[21] Thus, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court struck down federal wage and price controls on state employees as involving the regulation of core state functions. In *National League of Cities*, the Court conceded that the legislation under attack, which regulated the wages and hours of certain state and local government employees, was within the scope of the Commerce Clause, but it cautioned that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

[22] Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations" in areas of traditional governmental functions had proven impractical, and that the Court in 1976 had "tried to repair what did not need repair." 469 U.S. at 557. In sum, the Court in *Garcia* seems to have said that most disputes over the effects on state sovereignty of federal commerce power legislation are to be considered political questions. *See also* South Carolina v. Baker, 485 U.S. 505 (1988).

[23] 505 U.S. 144 (1992).

[24] Low-Level Radioactive Waste Policy Amendments Act of 1985, P.L. 99-240.

although Congress had the authority under the Commerce Clause to regulate low-level radioactive waste, it only had the power to regulate the waste directly. Here, Congress had attempted to require the states to perform the regulation, and decreed that the failure to do so would require the states to deal with the financial consequences of owning large quantities of radioactive waste. In effect, Congress sought to "commandeer" the legislative process of the states.[25] In the *New York* case, the Court found that this power was not found in the text or structure of the Constitution, and it was thus a violation of the Tenth Amendment.

A later case presented the question of the extent to which Congress could regulate through a state's executive branch officers. This case, *Printz v. United States*,[26] involved the Brady Handgun Act. The Brady Handgun Act required state and local law-enforcement officers to conduct background checks on prospective handgun purchasers within five business days of an attempted purchase.[27] This portion of the act was challenged under the Tenth Amendment, under the theory that Congress was without authority to "commandeer" state executive branch officials. After a historical study of federal commandeering of state officials, the Court concluded that commandeering of state executive branch officials was, like commandeering of the legislature, outside of Congress's power, and consequently a violation of the Tenth Amendment.[28]

In the instant case, if the federal government had directly required states to fund and implement new responsibilities under the Medicaid expansion, then it would appear likely that a legal challenge could be made that the Congress was commandeering the states to implement a federal program. However, while the Congress will be requiring states to provide expanded service under Medicaid as a condition of receiving federal funds under that program, there is no requirement on states to accept those funds. For this reason, a challenge to the Medicaid expansion does not fit comfortably into the commandeering line of cases. Since the state is free to choose not to receive such funds, then it is difficult to argue that such state is being directly commandeered, as was the case in *New York* and *Printz*.

However, in a separate line of cases, the Supreme Court has considered the question of whether conditioning a government benefit on the waiver of a constitutionally based right may in itself be a constitutional violation. The legal theory behind these cases is generally referred to (although not always explicitly by the courts) as the doctrine of "unconstitutional conditions." Thus, the question which is before the Supreme Court in *Florida v. HHS* is whether a state may constitutionally be required to accede to the Medicaid expansion as a condition of receiving federal funds, despite the fact that, under *New York* and *Printz*, such requirements could not be imposed directly.

The Doctrine of Unconstitutional Conditions

The Supreme Court has long held that constitutional rights may be "waived" voluntarily. Even rights of the most profound importance, such as the right to challenge the imposition of capital punishment under the Eighth Amendment, may knowingly be waived.[29] A more difficult question

[25] 505 U.S. at 175-76.

[26] 521 U.S. 898 (1997).

[27] Brady Handgun Violence Prevention Act, P.L. 103-159, §102.

[28] 521 U.S. at 935.

[29] *See* Gilmore v. Utah, 429 U.S. 1012, 1014-16 (1976) (finding that the prisoner knowingly and intelligently waived (continued...)

arises, however, where some form of inducement is offered that is conditioned on such a waiver, bringing into question whether such waiver is voluntary.

In some cases, such a waiver is considered unremarkable, even though the rights waived are significant and the inducements are serious. For example, the Court has held that as a result of plea bargaining, a criminal defendant may choose to waive his or her right to a trial in exchange for a reduction in the level of penalty to which the defendant may be subjected.[30] Arguably, such an inducement is unlikely to violate a defendant's rights because the defendant can use his or her estimation of the likelihood of conviction in deciding whether to accept such a bargain.

In other cases, it may be more difficult to evaluate whether the circumstances surrounding the waiver of a constitutional right are so coercive as to in some way infringe on the waived right. Of even more concern, it does not appear that the Court has laid out a universal doctrine for evaluating which rights can be made a condition of a government benefit, and what circumstances must be in place for such conditioning to be valid. Rather, the Court appears to vary significantly in its approach, changing its level of scrutiny based on the nature of the governmental inducements and the importance of the constitutional right which is sought to be waived. Commentators have often suggested that attempting to discern doctrinal consistencies in the area yields little predictive benefit.[31]

Despite this lack of a universal approach, there are two consistent themes (again, not always made explicit by the courts) in evaluating the possibility that a required waiver of a constitutional right is an "unconstitutional condition." Under this approach, a court will evaluate whether there is a logical relationship between the purposes of the overall legislation and the burden imposed (relatedness).[32] In addition, a court will evaluate the subjective value of the governmental benefit that would be withheld as weighed against the importance of the constitutional right being burdened, to determine whether the threatened loss of the benefit is coercive (proportionality).[33] The relative weight of these factors and their relationship to each other, however, may vary depending on the circumstance to which they are applied.

The doctrine of unconstitutional conditions, which has generally been invoked by individual persons or entities against a government, has not been successfully invoked by the states. For instance, as will be discussed below, the Supreme Court in *South Dakota v. Dole*[34] upheld a federal grant requirement that states legislate a minimum drinking age. While the Court enumerated relatedness and proportionality standards (noting that such conditions may be

(...continued)

his rights).

[30] *See* Brady v. United States, 397 U.S. 742, 748 (1970). In modern criminal practice, the right to a jury trial is often bargained away by a defendant in order to be allowed to plead guilty to lesser charges.

[31] Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES at 798 (1997) ("[P]erhaps the cases cannot be reconciled, and the decisions simply turn on the views of the Justices in particular cases. If the Court wishes to strike down a condition, it declares it to be an unconstitutional condition; if the Court wishes to uphold a condition, it declares that the government is making a permissible choice to subsidize some activities and not others.").

[32] Angel D. Mitchell, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 Kan. L. Rev. 161, 176 (1999).

[33] "The Supreme Court not only requires that the exchange be in some sense 'like kind,' but that the exchange be fair so that the foregone right is not in some sense disproportionate." Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 Florida State University 913 (2003).

[34] 483 U.S. 203 (1987).

illegitimate if they are unrelated to particular federal programs[35] or if "the financial inducement offered by Congress [were] so coercive as to pass the point at which 'pressure turns into compulsion'"[36]), the Court also seemed inclined to show Congress significant deference in establishing such conditions.

One theory suggests that the reason for this deference is that the Supreme Court has been most concerned in the area of unconstitutional conditions when there is an imbalance in bargaining power, such as can occur between individuals and the government. Such imbalances are particularly exacerbated when the government holds a monopoly power over the offered benefit.[37] For this reason, the doctrine of unconstitutional conditions has been most robust when the cases have involved private individuals being limited in the exercise of either personal autonomy or property rights.[38]

On the other hand, it appears that states have traditionally been considered by the courts to be relatively resistant to such coercion. For instance, after *Dole*, the lower courts have been disinclined to find that conditions imposed on states fail either the relatedness or proportionality test.[39] Consequently, if the Supreme Court's decision in the *Florida* case were to raise the scrutiny by which conditions imposed on states are to be considered, this could have a significant impact on federal authority to impose spending conditions.

Application to Individuals

When unconstitutional conditions challenges are brought, the Court has often considered both the relatedness and proportionality of those challenges together. For instance, the Court has found that an evaluation of the proportionality and the relatedness of a condition to the federal benefit provided is an important factor in considering challenges to limits on individual rights such as free speech. In *Pickering v. Board of Education*,[40] the Court considered the dismissal of a high school teacher who had written a letter to a local newspaper criticizing the administration of the school system, and found that the withdrawal of the government benefit of public employment violated the teacher's First Amendment rights. The Court explained that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[41] The Court found that dismissal of a public employee for criticism of his superiors was not closely related to the government interest cited, as there was no day-to-day personal contact between the employer and employee; the

[35] 483 U.S. at 207-08 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

[36] 483 U.S. at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

[37] Richard Epstein, *Unconstitutional Conditions, State Power and the Limits of Consent*, 102 Harv. L. Rev. 5, 21-22 (1988).

[38] Pace v. Bogalusa City School Bd., 403 F.3d 272, 286 (5th Cir. 2005). However, as is discussed later, the more related the condition is to the underlying federal benefit, the more reluctant the Court has been to find that the constitutional right is being "coerced."

[39] *See* note 70, *infra*.

[40] 391 U.S. 563 (1968).

[41] 391 U.S. at 568.

publication of the article did not create discipline or disharmony among coworkers; and problems of personal loyalty and confidence did not arise.[42]

In some cases, a lack of relatedness may increase concerns of proportionality. In *Nollan v. California Coastal Commission,*[43] the owners of beachfront property in California sought a permit to demolish a bungalow and replace it with a three-bedroom house. The permit was granted subject to the condition that the owners record an easement allowing the public to cross their property in order to reach the beach. The permit condition was challenged as a taking of property without the just compensation required by the Constitution.[44] The California government argued that the new construction would increase blockage of the view of the ocean, creating a psychological barrier to beach access, and that the easement was necessary to counter this effect.

The Court noted that if California had merely taken the easement outright, this would have required payment of just compensation. On the other hand, the Court opined that the government's "power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end."[45] The Court, however, evaluated whether the condition in question, providing "physical access," served the purpose put forward as the justification for the prohibition, since the remedy for losing visual "access" to the beach was to provide the more significant physical "access" to the beach. Thus, the Court found that, at least in the takings context, there must be a close "fit" between the purpose of the regulation and the burden required, and that the conditioning of the permit in this manner was unconstitutional.[46]

Conversely, concerns about proportionality are substantially diminished when there is a high degree of relatedness between the activity being directly subsidized by the government and the conditions imposed. For instance, in the case of *Rust v. Sullivan*,[47] a free speech challenge was brought against regulations that prohibited recipients of federal funds under Title X (which provided funds for family-planning services) to engage in abortion advocacy and counseling while providing those services.[48] To the extent that persons or entities associated with Title X projects sought to engage in these activities, they were required to do so in "physically and financially separate" locations.[49]

The Court rejected the challenge to these regulations, holding that the government was not denying a subsidy or benefit because of the exercise of a constitutional right, but was only requiring that the federal funds be used for the purposes required by the statute: "to support preventive family planning services, population research, infertility services, and other related

[42] 391 U.S. at 573. The Court also found that the issue addressed by the teacher, the allocation of funds in the school district, was a matter of important public concern of which the community should be aware.

[43] 483 U.S. 825 (1987).

[44] The Fifth Amendment (which has been incorporated against the states through the Fourteenth Amendment), provides that "nor shall private property be taken for public use, without just compensation."

[45] 483 U.S. at 836.

[46] 483 U.S. at 838.

[47] 500 U.S. 173 (1991).

[48] 500 U.S. at 179-80.

[49] 500 U.S. at 180-81.

medical, informational, and educational activities."[50] Unlike the earlier cases, the Court seemed to find a more direct relation between the federal benefit and the activity in question.

The Court distinguished *Rust* from cases such as *Pickering*, which precluded a recipient from engaging in constitutionally protected activities, even when government funds were not being expended. The Court noted that:

> The regulations govern the scope of the Title X project's activities, and leave the grantee unfettered in its other activities. The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.[51]

In other cases, concerns regarding the proportionality between the value of the benefit being withdrawn and the governmental interest served predominate. For instance, in *Wieman v. Updegraff*,[52] the Court struck down an Oklahoma statute that required state employees to take a loyalty oath within 30 days of employment or be fired. The Court reasoned that the interest of the employees in having a job and not suffering public humiliation was substantial, and was not justified by the state's interest in requiring such an oath. "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy.... [W]e need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."[53]

Application to the States

Although the Supreme Court has discussed the constitutionality of applying federal grant conditions to the states, the Court has not closely tied these decisions to the doctrine of unconstitutional conditions as applied to private individuals.[54] The Court has, however, established a similar structure for such analysis, which seems to include an examination of both the relatedness and proportionality of such conditions. As noted above, it does appear that the Court has generally been more deferential to the Congress in evaluating benefit conditions imposed on states than it has those conditions imposed on individuals. In *South Dakota v. Dole*,[55] the Court found that Congress was well within its authority to withhold a percentage of federal highway funds from states in which the age for purchase of alcohol was below 21 years.[56]

In *Dole*, the State of South Dakota, which permitted 19-year-olds to purchase beer, brought suit challenging the grant requirement, arguing that the law was an invalid exercise of Congress's

[50] H. R. Conf. Rep. No. 91-1667, at 8 (1970).

[51] 500 U.S. at 196.

[52] 344 U.S. 183, 190-91, 192 (1952).

[53] 344 U.S. at 192.

[54] *See* Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 287 (5th Cir. 2005) (en banc) ("The Supreme Court has not yet applied the "unconstitutional conditions" doctrine to cases between two sovereigns" (citation omitted)).

[55] 483 U.S. 203 (1987).

[56] National Minimum Drinking Age Amendment of 1984, 23 U.S.C. §158.

power under the Spending Clause to provide for the "general welfare."[57] The Court considered four factors in evaluating this claim. First, was whether the law was consistent with the requirements of Article I, §8, cl. 3 that spending be "in pursuit of 'the general welfare.'" Second, was a requirement that the condition be unambiguous so that states can make choices knowingly and be aware of the consequences.[58] Third, the Court found that a grant condition must be related to the particular national projects or programs to which the money was being directed (arguably a relatedness requirement).[59] Fourth, the Court considered whether other constitutional provisions may independently bar the conditional grant of federal funds, such as because a state has been "coerced" through the Spending Clause to engage in action that infringes on state sovereignty (arguably a proportionality requirement).[60]

The Supreme Court held that, as the indirect imposition of such a standard was directed toward the general welfare of the country, it was a valid exercise of Congress's spending power. The Court also held that the requirements were sufficiently clear so that state officials were voluntarily waiving their rights in order to receive federal grants.[61] Of more concern was the relatedness requirement. In *Dole*, the congressional condition imposing a specific drinking age was found to be related to the national concern of safe interstate travel, which was one of the main purposes for expenditure of highway funds.[62] It should be noted that this standard of relatedness was relatively lenient, in that the condition was not directly related to how the federal money was being spent or to the specific federal projects involved. Rather, the condition was related to the overall regulatory goal (transportation safety) of the provided funds.

Finally, the Court turned to the question of whether there was an independent constitutional bar to the grant condition. Two constitutional provisions were at issue – the Twenty-First Amendment (which provides that states have the authority to regulate alcohol within their borders) and the Tenth Amendment (which provides that state legislatures or executive branch officials may not be "commandeered"). The argument that the Court considered was whether the grant condition was intruding on the state's authority to regulate alcohol or on the right of the state legislature to be free from federal directives as to how to legislate regarding its own state liquor laws.

The Court held that because the state had voluntarily agreed to comply with the grant condition in question, the statute was not a violation of the Twenty-First or the Tenth Amendment. The Court did suggest, however, that there were some proportionality limits to Congress's power under the Spending Clause, noting that financial inducements offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion."[63] In *Dole*, however, the percentage of highway funds that were to be withheld from a state with a drinking age below 21 was relatively small, so that Congress's program did not coerce the state to enact higher minimum drinking ages than it would otherwise choose.

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[57] U.S. Const., Art I, §8, cl. 1 (Congress has the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States").

[58] *Dole*, 483 U.S. at 207 (citing Helvering v. Davis, 301 U.S. 619, 640-41 (1937); United States v. Butler, 297 U.S. 1, 65 (1936)).

[59] 483 U.S. at 207.

[60] *See* 483 U.S. at 208.

[61] The Court also considered and rejected the argument as to whether the grant condition violated the state's rights under the 21st Amendment. 483 U.S. at 209-211.

[62] 483 U.S. at 208.

[63] 483 U.S. at 211.

After *Dole*, lower courts considering challenges to grant conditions on states have examined the level of financial burden that would be imposed on the state by the withdrawal of a particular federal grant, and have considered the relatedness of the grant conditions to the federal benefit.[64] However, it should be noted that lower courts do not appear to have engaged in particularly close scrutiny of either of the two requirements.[65] In fact, some courts have even expressed a reluctance to engage in such an inquiry at all, suggesting that the difficulty of the analysis and the ability of states to seek relief through the political process precluded meaningful review.[66]

For example, although the Supreme Court has imposed significant limits on Congress's ability to directly abrogate state sovereign immunity[67] and has indicated that the courts should be extremely deferential to state sovereignty in evaluating whether such abrogation has occurred,[68] this does not appear to have prevented the lower courts from finding that states can be required to waive their sovereign immunity as a condition of receiving federal grants.[69] In this context, lower courts have noted that, according to the Supreme Court, a state's sovereign immunity is "a personal privilege which it may waive at its pleasure."[70] Consequently, the courts have held, it is clearly possible to require a state to waive sovereign immunity as a condition for receiving federal funds,[71] and there seems to be no constitutional bar to the Congress imposing such a

[64] *See, e.g.,* Jim C. v. United States, 235 F.3d 1079, 1084 (8th Cir. 2000) (Bowman, J, dissenting) (arguing that waiver of sovereign immunity was not related to purpose of education grants).

[65] *See, e.g.*, Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 287 (5th Cir. 2005) (en banc) (threatened loss of $800 million not coercive because state could have declined federal funds); A.W. v. Jersey City Pub. Sch., 341 F.3d 234, 255 (3d Cir. 2003) ("state's powers as a political sovereign, especially its authority to tax, appear more than capable of preventing undue coercion"); Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc) (threatened loss of $250 million "politically painful," not coercive); California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997) (coercion "not reflected" by threatened loss of all Medicaid funding).

[66] *See, e.g.,* Nevada v. Skinner, 884 F.2d 445, 448-49 (9th Cir. 1989) (coercion doctrine presents "questions of policy and politics that range beyond [the judiciary's] normal expertise" and should be discarded because states are "adequately protected by the national political process"); Kansas v. United States, 214 F.3d 1196, 1202 (10th Cir. 2000) (declaring doctrine "unclear" and "suspect").

[67] *See* CRS Report RL30315, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, by Kenneth R. Thomas at 15-19.

[68] Edelman v. Jordan, 415 U.S. 651 (1974). The Court has held that a waiver of sovereign immunity does not occur unless "stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." Id. at 671-72.

[69] The reasoning of these cases arises from Supreme Court holdings that where a federal statute contains an "unambiguous waiver" of a state's Eleventh Amendment immunity, then a state's acceptance of such funds can be an effective waiver. Lane v. Pena, 518 U.S. 187, 200 (1996). For instance, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§701, *et seq.* provides that "a state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973...." 42 U.S.C. §2000d-7(a)(1). Consequently, a number of federal Courts of Appeals have found that receipt of federal funding subject to this condition was sufficient to waive a state's sovereign immunity. Koslow v. Commonwealth of Pennsylvania Department of Corrections; 302 F.3d 161 (3rd Cir. 2002); Nihiser v. Ohio EPA, 269 F.3d 626 (6th Cir. 2001); Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000); Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000); Pederson v. La. St. Univ., 213 F.3d 858, 875-76 (5th Cir. 2000); Sandoval v. Hagan, 197 F.3d 484, 493-94 (11th Cir. 1999), *rev'd on other grounds*, 532 U.S. 275 (2001); Litman v. George Mason Univ., 186 F.3d 544, 554 (4th Cir. 1999); Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997).

[70] *See, e.g.,* AT&T v. BellSouth, 238 F.3d 636, 643 (5th Cir. 2001) *quoting* College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 674 (1999).

[71] Since such a waiver must be voluntary, the Court will consider carefully whether a state has actually waived its immunity. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241 (1985). For instance, a court will generally only find a waiver to federal suit based on a state statute if a state makes a "clear declaration" that it intends to submit itself to federal jurisdiction. Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944). *See also* Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984) (State's consent to suit must be "unequivocally expressed").

requirement.[72] Thus, the doctrine of unconstitutional conditions does not appear to have had a significant impact in the context of conditions on federal funding to states.

Medicaid Expansion and Coercion

Despite this relative lack of concern by the lower courts about challenges to grant conditions on states, the Supreme Court in *Florida* has agreed to consider whether Congress's use of the grant conditions in the ACA to expand state Medicaid requirements violates tenets of federalism because it "coerces" the states into compliance with the federal objective. In essence, the question is whether the Medicaid expansion provisions of the ACA are so coercive as to commandeer the state legislature or executive in violation of the Tenth Amendment.

Eleventh Circuit Decision

In *Florida v. HHS,* the Supreme Court will review a decision by the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) regarding a challenge to Medicaid expansion under the ACA. In *Florida*,[73] the Eleventh Circuit considered a Tenth Amendment/Spending Clause "coercion" challenge to the Medicaid expansion provisions of the ACA, and rejected it. First, the court noted the difficulty of distinguishing persuasion and coercion. The court referenced *Steward Machine Co. v. Davis*,[74] where a corporation challenged a provision of the then newly enacted Social Security Act, arguing that the federal government had improperly coerced states into participation in the Social Security program. The Supreme Court rejected this argument, noting that:

> The difficulty with the petitioner's contention is that it confuses motive with coercion. Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.... Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact.[75]

[72] Susan M. Luken, *Irreconcilable Differences: the Spending Clause and the Eleventh Amendment: Limiting Congress's Use of Conditional Spending to Circumvent Eleventh Amendment Immunity*,70 U. Cin. L. Rev. 693 (2002); Michael T. Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond)*, 29 Hastings Const. L.Q. 439 (2002); Litman v. George Mason University, 186 F.3d 544 (4th Cir. 1999); Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000).

[73] 648 F.3d 1235 (11th Cir. 2011).

[74] 301 U.S. 548 (1937).

[75] 301 U.S. at 589-90, 892 (quotation marks, citation omitted) (as quoted in *Florida*, 648 F.3d. at 1265).

The Eleventh Circuit also noted that after *Dole*, the Court had never devised a test to ascertain when financial pressure would lead to coercion, which has led many circuits to hold that the doctrine was not a viable defense to Spending Clause legislation.[76]

The Eleventh Circuit did, nonetheless, proceed to analyze whether the ACA Medicaid expansion had passed the point where "pressure turns into compulsion," and found that those provisions were not unduly coercive under *Dole* and *Steward Machine*. The court relied on a variety of factors. First, the Medicaid-participating states were warned from the beginning of the Medicaid program that Congress reserved the right to make changes to the program,[77] and since that time Congress had made numerous amendments to the program.[78] Second, most of the cost of the Medicaid expansion will be borne by the federal government until 2016, after which states will gradually become responsible for up to 10% of the increase.[79]

Third, the court noted that the states would have nearly four years from the date the bill was signed into law to decide whether they will continue to participate in Medicaid, or, if they decided to do so, to develop a replacement program in their own states. Finally, the court noted that, under the Medicaid Act, HHS need not withhold all Medicaid funding to a state refusing to comply with the expansion, but it may withhold only a portion of such funding.[80]

Supreme Court Review

The specific question that will be considered by the Supreme Court in its review of the Eleventh Circuit holding is whether the ACA "violates basic principles of federalism" by "coerc[ing]" states into accepting "onerous conditions" in violation of *Dole*.[81] It should be noted that the Court granted argument on this issue despite the fact that the Eleventh Circuit upheld the Medicaid expansion; that no other circuit has struck down these provisions; and that no similar spending

[76] *See, e.g.*, Pace v. Bogalusa City School Bd., 403 F.3d 272, 278 (5th Cir. 2005) (en banc) ("It goes without saying that, because states have the independent power to lay and collect taxes, they retain the ability to avoid the imposition of unwanted federal regulation simply by rejecting federal funds."); A.W. v. Jersey City Pub. Schools, 341 F.3d 234, 243-44 (3d Cir. 2003) (noting that the state's freedom to tax makes it difficult to find a federal law coercive, even when that law threatens to withhold all federal funding in a particular area); California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997) (noting in a Medicaid expansion case that "to the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record"); Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) ("The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments.").

[77] *See* 42 U.S.C. §1304 ("The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress").

[78] For example, in 1972, Congress required participating states to extend Medicaid to recipients of Supplemental Security Income, thereby significantly expanding Medicaid enrollment. Social Security Act Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972). In 1989, Congress again expanded enrollment by requiring states to extend Medicaid to pregnant women and children under age six who meet certain income limits. Omnibus Budget Reconciliation Act of 1989, P.L. 101-239, 103 Stat. 2106 (1989).

[79] 648 F.3d at 1267.

[80] 648 F.3d at 1286. *See* 42 U.S.C. §1396c.

[81] Supreme Court Order List (November 14, 2011)(cert. granted to question: Does "Congress[s] exceed its enumerated powers and violate basic principles of federalism when it coerces States into accepting onerous conditions that it could not impose directly by threatening to withhold all federal funding under the single largest grant-in-aid program, or does the limitation on Congress's spending power that this Court recognized in *South Dakota v. Dole*, 483 U.S. 203 (1987), no longer apply?," Petitioner's Cert., at i).

provisions have been invalidated under the coercion theory.[82] Generally, the criteria for the Supreme Court to take a case is that there is disagreement between federal circuit courts on an issue, or because a federal law has been struck down.[83]

"Coercion"

It is difficult to discern at this point how the Supreme Court might approach this case, considering how little analysis the Court did of the coercion doctrine in *Dole*.[84] Also, as noted previously, the Court's approach to analogous cases regarding unconstitutional conditions ("relatedness" and "proportionality") has varied depending on the context in which grant conditions are considered. In addition, it should be noted that the Supreme Court has not even suggested that "relatedness" is at issue in this case, as the question presented in the *Florida* case is limited to the question of "coercion" and "onerous conditions" (more closely associated with proportionality).

At a minimum, the Court would need to begin setting standards to evaluate when a threatened withdrawal of federal funding is coercive, a task it has so far declined to do. In the instant case, the first factor the Court would be likely to consider would be the amount of federal funds at issue. The argument has been made that Medicaid is one of the larger federal programs currently in existence, and consequently, withdrawal of all Medicaid funds for failure to meet the Medicaid expansion requirements under the ACA would be so disruptive to state finances as to make the requirements coercive. It is unclear, however, how the expanded Medicaid requirements under the ACA can be easily distinguished from existing Medicaid requirements. Further, it is not clear how the Supreme Court would distinguish Medicaid from a variety of other large federal programs. It should be noted that various federal courts of appeals have already considered and rejected coercion claims with respect to Medicaid,[85] as well as grants for state prisons,[86] education,[87] welfare,[88] and transportation.[89]

While the question presented in this case can be stated simply (are the states being "coerced?"), how this question may be resolved under the facts of this case is unclear. For instance, it is not apparent what amount of federal funds would be withdrawn from a state for failure to comply with the Medicaid expansion provisions of the ACA. As noted by the Eleventh Circuit, HHS may have the authority to withdraw either all or some portion of the federal Medicaid funds for refusal to comply with the Medicaid expansion. In the case where only a portion of federal Medicaid funds are withheld, the argument could be made that the coerciveness of such withdrawal should not be measured by the size of the Medicaid program, but instead by the amount of federal

[82] *See* Nevada v. Skinner, 884 F.2d 445, 448-49 (9th Cir. 1989) ("The coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party.").

[83] Robert Stern, Eugene Gressman, Stephen Shapiro, SUPREME COURT PRACTICE at 194, 213 (6th Ed. 1986).

[84] Kansas v. United States, 214 F.3d 1196, 1201-02 (10th Cir. 2000) ("The cursory statements in *Steward Machine* and *Dole* mark the extent of the Supreme Court's discussion of a coercion theory. The Court has never employed the theory to invalidate a funding condition, and federal courts have been similarly reluctant to use it." (footnote omitted)); id. at 1202 (observing that the theory is "unclear, suspect, and has little precedent to support its application").

[85] *See, e.g.,* California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997).

[86] *See, e.g.*, Van Wyhe v. Reisch, 581 F.3d 639, 652 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 3323 (2010), and 131 S. Ct. 2149 (2011).

[87] *See, e.g.*, Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000).

[88] *See, e.g.,* Kansas v. United States, 214 F.3d 1196, 1198, 1201-1202 (10th Cir. 2000).

[89] *See, e.g.,* Nevada v. Skinner, 884 F.2d 445, 448-449 (9th Cir. 1989).

monies actually withheld. Since HHS has not yet moved to terminate federal funds for failure to comply with the ACA Medicaid provisions, it will be difficult for the Supreme Court to ascertain the degree of coercion that is being imposed upon the states.

"Onerous Conditions"

A further potential problem with the question presented to the Court is that it appears to introduce an element to the *Dole* analysis that is not found in that case – a requirement that a grant condition be financially "onerous." In general, analysis under *Dole* has focused on the amount of federal monies threatened to be withheld, which, for purposes of this report, will be termed the "burden of non-compliance." In the *Florida* case, however, the states have argued that the Court should also consider the additional amounts of money that the states would have to expend to comply with the ACA Medicaid requirements. Thus, the states appear to be attempting to introduce a new factor to the *Dole* analysis that, for purposes of this report, will be termed the "burden of compliance."

The Court in *Dole* did not indicate that a coercion analysis relied on the existence of a high burden of compliance (financially "onerous" or otherwise) imposed on the states by a grant condition. Instead, the Court appeared to focus its analysis on whether the grant condition in question threatened South Dakota's sovereignty and its ability to make its own policy decisions.[90] Arguably, the Court's decision in *Dole* would suggest that any grant condition that was "coercive" and intruded on a state's sovereignty would be unconstitutional, regardless of whether the financial or other burden of compliance was substantial or insignificant.[91] In either instance, the withdrawal of too much federal funding (the burden of non-compliance) could have a coercive effect.

To the extent that the Court did decide to introduce an evaluation of the financial burden of compliance to its *Dole* analysis, one could argue that, rather than finding that a high or "onerous" level of burden is necessary to a finding of coercion, the Court might conclude that states' were more likely to be coerced when the burden of compliance was relatively insubstantial. In *Virginia Department of Education v. Riley*,[92] the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) indicated that coercion is more likely to be found where the burden of non-compliance is high, but the burden of compliance is relatively small.

In *Riley*, the Fourth Circuit suggested, in *dicta*, that there would be a "substantial constitutional question" whether a federal agency could withhold a state's entire $60 million special education grant because of a failure to provide educational services to 126 special education students who

[90] *Dole*, 483 U.S. at 211-212 (upholding the grant condition because "the enactment of such laws remains the prerogative of the States not merely in theory but in fact").

[91] This reasoning is bolstered by the Court's Tenth Amendment analysis, in which the Court rejected an argument that the level of the financial burden imposed by compliance with a federal directive was relevant to a finding of commandeering. In *Printz*, the federal government argued that the requirements imposed on state and local officials by the Brady Act were a "minimal [and] temporary burden." *Printz*, 521 U.S. at 932. The Court responded:

> But where, as here, it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.

521 U.S. at 932-33.

[92] 106 F.3d 559 (4th Cir. 1997) (en banc) (per curiam) (incorporating Judge Luttig's dissent from prior panel decision).

had been suspended from school. Since the $60 million in federal funds provided to Virginia went to support the education of 128,000 special education students, the court suggested that the withholding of these funds because of the state's desire to impose disciplinary procedures on a small number of students was out of proportion with the federal interests being protected, and infringed on the state's sovereign interests. In *Riley*, the court stated:

> [I]f the Court meant what it said in Dole, then [we] would think that a Tenth Amendment claim of the highest order lies where, as here, the Federal Government ... withholds the entirety of a substantial federal grant on the ground that the States refuse to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States.[93]

Under this line of reasoning, a state would have far stronger incentive to comply with a minor grant condition than it would to a costly one, especially if the penalty were to lose an entire large federal grant. If the grant condition is minor, there would be minimal cost to the state and thus a strong incentive to fulfill the condition in order to obtain the benefit. If the grant condition is more significant, this cost would decrease the attractiveness of accepting the federal aid. Thus, the less "onerous" the burden of compliance, the more potentially "coercive" it would appear to be. It is the lack of "proportionality" (to borrow the term from the doctrine of unconstitutional conditions) that seems to have motivated the *Riley* court's *dicta*. As noted, however, this seems to undercut the argument being made by the petitioners in *Florida*, who are not disputing some minor Medicaid requirements imposed on the states, but are instead emphasizing the significant financial burdens imposed by the expansion of the Medicaid eligibility requirements.

"Relatedness"

Even if the Court were to disregard the *Riley* court's analysis of proportionality, and to accept the petitioner states' focus on "onerous conditions," it is still not clear that the issue of "coercion" can be examined solely by balancing the financial burden of compliance imposed by a grant condition versus the financial burden of non-compliance. The problem is that this analysis does not consider the possibility that some grant conditions, because of their "relatedness" to core aspects of the federal program, would be likely to be found acceptable regardless of a proportionality analysis. For instance, under the doctrine of unconstitutional conditions, the Court has found that the ability of the federal government to direct how federal funds are to be spent by benefit recipients is generally not subject to constitutional challenge.[94] Thus, even if the Court found that a threatened withdrawal of federal funds was so large as to be "coercive," it would still be likely to find that requiring compliance with directions as to how federal monies will be spent would be an acceptable burden on the state. Otherwise, the government would theoretically be unable to establish any criteria for eligibility under a large federal benefit program.

The problem here would appear to be that, while the question accepted by the Court focuses on whether the states are being "coerced" under the ACA, it may be that the issue of "coerciveness" and "relatedness" cannot be analyzed in isolation. As noted previously, under the analogous unconstitutional conditions doctrine, the burdens being imposed (proportionality) and the relation between a grant condition and the purpose of a federal grant or program (relatedness) are generally part of the same analysis. Under this line of reasoning, there are some conditions which

[93] 106 F.3d at 570.

[94] *See* Rust v. Sullivan, 500 U.S. 173 (1991).

are so closely "related" to the provision of federal grants that they would appear to be "proportional" regardless of the size of the federal program or of the threatened level of withdrawal.

Under this argument, the Court would likely need to establish some form of a sliding scale so that coercion concerns would become more acute the further conditions stray from core purposes of the federal program and into matters reserved to states.[95] Thus, as the level of coercion increases, the requirement of relatedness should also be tightened. So for instance, while grant conditions directly related to Medicaid's core purposes of providing medical treatment to disadvantaged populations (such as an audit requirement to ensure that federal reimbursements to states are accurate) would probably be constitutional regardless of the amount of funds at stake, grant conditions that were only tangentially related to the Medicaid program (such as requiring states to ban unhealthy foods) might be scrutinized more closely the more federal funds were being withheld.

How would this apply to the instant case? It appears that the Medicaid expansion provisions of the ACA may fall somewhere in between these two examples. The states' objections in the *Florida* case are not so much directed at how federal Medicaid funds will be spent, but instead on the requirement that additional state funds will be needed to fund the expanded Medicaid benefits. These new benefit requirements, however, are clearly more closely tied to the core purposes of the Medicaid program than the 21-year-old drinking age was to the purpose of the federal highway transportation funds under *Dole*. Potentially, the Supreme Court could find that even if there is a "coercive" effect associated with the withdrawal of Medicaid funds from the state under *Dole*, it should still uphold the ACA provisions based on the fact that the state requirements under the Medicaid expansion are closely related to the core activities of the Medicaid program – providing care for disadvantaged populations.

Conclusion

The federalism challenge to Medicaid expansion under the ACA in the case of *Florida v. HHS* will require the Supreme Court to address whether states are being "coerced" by "onerous conditions" into compliance with the expanded state requirements by the threat of the withholding of Medicaid reimbursements. This "coercion" test, articulated in *South Dakota v. Dole* in 1987*,* appears to be closely related to the Tenth Amendment prohibition on the federal government "commandeering" states to implement federal programs. The *Dole* test, however, has never been applied by the Supreme Court or the lower federal courts to strike down a federal statute, and has been so little developed by the Court that most federal courts of appeals have simply rejected similar challenges with little analysis. Further, it is unclear, how, using these concepts, the Court would be able to develop a clear standard that could be easily applied to this case or to the multitude of grant conditions that are presently imposed on states.

[95] *See, e.g.,* Angel D. Mitchell, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 Kan. L. Rev. 161 (1999); Virginia Department of Education v. Riley, 106 F.3d at 570 (en banc) (per curiam) (incorporating Judge Luttig's dissent from prior panel decision) (federal decision to withhold special education funds because of a state policy allowing suspension of special education students intrudes on disciplinary issues, an area of state, not federal, concern).

Considering other types of "unconstitutional conditions" cases (cases where a constitutional right is waived in order to receive a governmental benefit) suggests that the issue of "coerci[ng]" a state in violation of the Tenth Amendment is actually far more complex than just evaluating the level of economic benefit which the federal government is threatening to withhold. An analogous unconstitutional condition analysis would generally require an evaluation of both the "proportionality" of the grant condition (comparing the burden imposed by the grant condition against the burden of the federal benefit being withdrawn) and the "relatedness" (how direct is the relationship between the grant condition and the federal interest).

Using this more complex analysis, the Court might conclude that withdrawal of Medicaid funds from a state for failure to comply with the expansion of benefits would have a dramatic effect on that state's finances. However, the Court might also conclude that the additional funds that a state would need to expend under the Medicaid expansion would reduce the coercive effect of the ACA, since the imposition of "onerous conditions" would make accepting Medicaid funds less desirable to a state. Further, one could argue, the Court might find that the relationship between the states' expanded responsibilities under the ACA were so closely related to the core purposes of Medicaid (providing medical care to disadvantaged populations) as to reduce the requirement of proportionality between the burden imposed and the threatened withdrawal of funds. Under this line of reasoning, the expanded Medicaid expansion under the ACA could be upheld.

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