

JUDICIAL CAPACITY AND THE CONDITIONAL SPENDING PARADOX

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This Article examines the spending power and anti-commandeering principle through the lens of the author’s judicial capacity model of Supreme Court decision making. Taking the Court’s recent decision in *NFIB v. Sebelius* as a jumping-off point, this examination yields three important payoffs. First, it helps to explain the Court’s historically broad interpretation of the spending power. Second, it refutes the conventional wisdom that this broad interpretation cannot be reconciled with the anti-commandeering principle—a view the Article dubs the “conditional spending paradox.” Third, it offers a rigorous theoretical basis for predicting that *NFIB*’s spending power holding will be short-lived. This account obviously has significant implications for the spending power and anti-commandeering doctrine. It also contributes to a broader understanding of the influence of judicial capacity on the substance of constitutional law.

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INTRODUCTION

In the lead-up to *National Federation of Independent Business v. Sebelius*¹ (“*NFIB*”), the vast majority of academic and popular attention focused on the Commerce Clause challenge to the Affordable Care Act’s (“the Act”) individual mandate.² By contrast, the spending power challenge to the Act’s Medicaid expansion flew almost completely under the radar. The reason was simple. Virtually no informed observer gave the challengers’ spending power argument any serious chance of succeeding. Of course, the United States Supreme Court exploded this conventional wisdom with a seven-two decision invalidating a portion of the Medicaid expansion as unconstitutionally coercive.³

The most important doctrinal move supporting this result was the explicit connection the Court drew between the spending power and the anti-commandeering principle announced in *New York v. United States*.⁴ That principle prohibits Congress from compelling state governments to enact, enforce, or administer federal policies.⁵ Coercive exercises of the conditional spending power, *NFIB* held, amount to the same thing. In both cases, “[p]ermitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system.”⁶

This holding is remarkable in at least two respects. The first is its exceptional character. Prior to *NFIB*, the Supreme Court struck down federal spending legislation only once in its entire history.⁷ The second is its relative tardiness. For more than two decades, critics and sympathizers alike decried the apparent inconsistency between the Court’s permissive spending doctrine and its stringent application of the

1. 132 S. Ct. 2566 (2012).

2. See, e.g., Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U. L. REV. 1723 (2011); Editorial, *Obamacare Goes to Court*, WALL ST. J., Nov. 15, 2011, at A18.

3. *Nat’l Fed’n Indep. Bus.*, 132 S. Ct. at 2577, 2601–07.

4. 505 U.S. 144 (1992).

5. *Id.* at 174–77.

6. *Nat’l Fed’n Indep. Bus.*, 132 S. Ct. at 2602.

7. See *United States v. Butler*, 297 U.S. 1, 64–65 (1936). I exclude cases in which the spending power was found to violate some external limitation, such as the First Amendment.

anti-commandeering principle.⁸ What took the Court so long to respond? And now that it has, will *NFIB* represent a sea change in the constitutional law of federalism or merely a short-term aberration?

In hopes of illuminating these issues and others, this Article examines the Court's spending power and anti-commandeering jurisprudence through the lens of my judicial capacity model of Supreme Court decision making.⁹ This model predicts that, in certain important constitutional domains, the limits of the Supreme Court's decisional capacity will create strong pressure on the Court to adopt hard-edged categorical rules, defer to the political process, or both. The reason is straightforward. In these high-stakes and high-volume domains, a departure from deferential rules-based decisions would invite more litigation than the Court can handle without sacrificing minimum professional standards.

The spending power is one such domain. It underwrites an enormous quantity of legislation.¹⁰ Moreover, that legislation is all federal, meaning that the Supreme Court feels strongly compelled to grant review any time a lower court strikes it down.¹¹ For these reasons, the judicial capacity model predicts that the Court will generally decide spending power cases according to highly deferential categorical rules.

The anti-commandeering principle, by contrast, is a narrow categorical limit on a rarely used federal power. Like the spending power, it implicates only federal legislation. But unlike that power, the

8. See Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 105–06; Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 190 (2002) (“[T]he Court’s opinion in *New York* appears to condone Congress’s use of the Spending Power to indirectly accomplish exactly the same goals that it found unconstitutionally intrusive on state sovereignty when Congress attempted to achieve them directly.”).

9. See Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422 (2012).

10. RONALD L. WATTS, *THE SPENDING POWER IN FEDERAL SYSTEMS: A COMPARATIVE STUDY* 12 (1999) (“The [U.S.] federal government makes extensive use of its spending power in relation to areas of state jurisdiction.”); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1103 (1987) (“The past five decades have seen tremendous growth in both the dimensions and the objects of spending by the federal government.”); see also Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 92 (2001) (“[A] virtually infinite range of social needs and problems require federal spending.”). Specific examples of conditional spending legislation are abound. See, e.g., Food Stamp Act of 1964, 7 U.S.C. §§ 2011–25 (2006); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–82 (2006); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006); Medicaid, 42 U.S.C. § 1396 (2006).

11. See ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 244 (8th ed. 2002); Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 763 (2001).

anti-commandeering principle threatens only a tiny handful of statutes. Furthermore, that principle's hard-edged categorical nature clearly marks off these statutes from the rest, minimizing the risk that others will get caught in the crossfire. For these reasons, the judicial capacity model predicts that the Court will be largely unconstrained in its application of the anti-commandeering principle.

Applying the judicial capacity model to the spending power and anti-commandeering principle yields three important payoffs. First, it helps to explain the Court's historically broad interpretation of the spending power. Including *NFIB*, the Court has found only two exercises of the spending power to exceed Congress's Article I authority. This history is puzzling, given the varying views on federal power that have prevailed on the Court during this time, especially over the last century. The judicial capacity model goes a long way towards solving the puzzle.

Second, the judicial capacity model refutes the conventional wisdom that the Court's historically broad interpretation of the spending power cannot be reconciled with the anti-commandeering principle. Whatever danger these two powers pose to federalism, rigorous judicial review of the spending power would invite far more litigation than does rigorous review of federal commandeering. This helps to explain the otherwise puzzling divergence in the Court's treatment of the two areas prior to *NFIB*, which I shall call the "conditional spending paradox."

Third, the judicial capacity model offers a rigorous theoretical basis for assessing the sustainability of *NFIB*'s spending power holding. *NFIB* marks the first time the Court has ever invalidated a federal spending power statute under a coercion theory and many observers have predicted this portion of the ruling will have little staying power.¹² The judicial capacity model helps to explain why. Absent a rapid retreat and retrenchment, the Court's remarkably muddy anti-coercion principle is likely to invite more litigation than the Court could handle.

The Article unfolds in three parts. Part I provides a critical summary of the Court's commandeering and conditional spending decisions. Like much of the existing literature, this Part criticizes the political accountability rationale supporting the Court's anti-commandeering decisions and the distinction that the Court has drawn between commandeering and conditional spending with respect to political accountability. Its main goal, however, is to set up the widely noted paradox: If commandeering and conditional spending pose similar dangers to federalism, why has the Court historically treated them so differently?

12. See, e.g., Eloise Pasachoff, *NFIB v. Sebelius, the Spending Clause, and the Future of Federal Education Law*, 62 AM. U. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166933.

Prior to *NFIB*, the Supreme Court had never struck down an exercise of the conditional spending power as unduly coercive of state governments. Indeed, many commentators took that power to be effectively unlimited, an interpretation that appeared to be in deep tension with the anti-commandeering principle announced in *New York v. United States*.¹³ While *New York* prohibits Congress from compelling state governments to enact, enforce, or administer federal policies, the pre-*NFIB* spending power was widely understood as permitting Congress to achieve the same result through conditional grants that state governments had no practical option to refuse.¹⁴

This apparent paradox was widely noted in the academic literature and lamented by a number of individual justices.¹⁵ Views differed as to whether the spending power or the anti-commandeering principle ought to yield. But with only a few exceptions,¹⁶ there was general agreement that the two could not coherently coexist. This was not merely a run-of-the-mill contradiction. In the midst of the Rehnquist Court's "federalism revolution," when a majority of the Court was clearly enthusiastic about limiting federal power, its deferential approach to the spending power was a genuine mystery.

Part II unravels this mystery with the help of the judicial capacity model. In theory, commandeering and coercive exercises of the

13. This tension is by no means of mere historical interest. If the Court is forced to retreat from *NFIB*'s spending power holding, as I predict it will be, we will be left with the same puzzling disconnect between spending and commandeering doctrine that prevailed before June 2012.

14. See, e.g., Adler & Kreimer, *supra* note 8, at 104 ("[W]hat is to prevent Congress from making the payment of highway funds to the states conditional upon state enactment of legislation restricting abortion, homosexual sodomy, and the possession of guns near schools?"); Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" but Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 17 (1998) ("[T]here is really no doubt that *South Dakota v. Dole* permits Congress to use the spending power to accomplish indirectly that which it may not accomplish directly."); Edward A. Zelinsky, *Accountability and Mandates: Redefining the Problem of Federal Spending Conditions*, 4 CORN. J.L. & PUB. POL'Y 482 (1995); Zietlow, *supra* note 8, at 142–43 ("The Court's broad reading of the Spending Power creates a paradox: Congress may use its Spending Power to accomplish precisely the same goals the Court found unconstitutionally intrusive on state sovereignty when attempted through other means.").

15. See, e.g., *Printz v. United States*, 521 U.S. 898, 960–61 (1997) (Stevens, J., dissenting) (noting tension between stringent anti-commandeering principle and broad conditional spending power); *id.* at 978 (Breyer, J., dissenting) (criticizing *Printz*'s anti-commandeering principle as a merely "technical obstacle" in light of broad conditional spending power).

16. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism*, 96 MICH. L. REV. 813 (1998) (arguing that commandeering poses a different and greater threat to state autonomy than conditional spending or preemption).

conditional spending power pose a similar danger to federalism.¹⁷ But in practice, the two pose quite different institutional challenges for the Supreme Court. Whatever the danger to federalism, the Court simply could not handle the volume of litigation it would invite by invalidating exercises of the conditional spending power under an amorphous “coercion” standard. By contrast, it can very easily handle the modest litigation generated by a narrow categorical limit on Congressional commandeering of state legislatures and executive officials, especially when the spending power provides a ready alternative mechanism for Congress to achieve the same result. This helps to explain the Court’s historically divergent treatment of the two areas and thus to resolve the conditional spending paradox. It also has a number of important normative implications for the Court’s spending and anti-commandeering jurisprudence.

Part III applies these insights to the two opinions in *NFIB* endorsing a strong anti-coercion principle, Chief Justice John Roberts’s plurality opinion and the joint dissent. A careful review of these opinions demonstrates that their interpretations of the conditional spending power are neither categorical nor deferential. As such, they are likely to invite substantial Spending Clause litigation if the Court adheres to them in future cases. The judicial capacity model suggests that such firmness is unlikely. Rather, the Court is likely to retreat and retrench to a more defensible position—one that is both more categorical and more deferential than the positions taken in *NFIB*. Indeed, on close inspection, one can see that the opinions in *NFIB* have already paved the way for this retreat. It seems only a matter of time before the Court follows the path it has made for itself.

This account obviously has significant implications for the spending power and anti-commandeering doctrine. It also contributes to a broader understanding of the influence of judicial capacity on the substance of constitutional law. Neither skeptics nor proponents of judicial review have adequately appreciated the constraints that judicial capacity places on the power of the courts. There is little doubt that the Supreme Court can occasionally render important constitutional decisions, for good or ill. But my judicial capacity model suggests that such decisions will be rare, especially at the national level. When they occur, they will generally be sharply limited in scope, staying power, or both. There is therefore less to fear from the courts—and also less to hope for—than most of the constitutional theory literature would suggest.¹⁸ This

17. This is true whether one believes that danger to be large, small, or nonexistent. I do not mean to take a position on this question here.

18. Neil Komesar has insisted on this point for years with great clarity and force, but to little apparent avail. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES*:

dynamic is by no means confined to the spending power and anti-commandeering principle, but these doctrines provide a valuable case study of its influence.

I. A TALE OF TWO DOCTRINES

This Part provides a critical review of the Supreme Court's spending power and commandeering decisions. Its principal purpose is to establish the tension between the Court's historically deferential treatment of the spending power and its stringent application of the anti-commandeering principle recognized in *New York* and reaffirmed in *Printz v. United States*.¹⁹ The source of this apparent paradox lies in the political accountability rationale the Court has offered to justify its anti-commandeering principle²⁰—a rationale that would appear to extend, with at least equal force, to many exercises of the congressional spending power. At first blush, *NFIB* appears to resolve this tension, but, as we will see, its import remains highly uncertain. First, however, it is necessary to begin with some historical background.

A. The Spending Power

1. HAMILTON VERSUS MADISON

The spending power has its roots in Article I, Section 8, clause 1, which grants Congress 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.”²¹ Although this text does not expressly authorize Congress to spend the funds raised through the taxes it imposes, that power has from the beginning been understood as implicit in the clause.²² Also from the beginning, the federal spending power has been the subject of constitutional controversy. This controversy, like so many others in the early republic, was best crystallized in a dispute between Alexander Hamilton and James Madison. The nub of the issue was whether the spending power was an

CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 252 (1994) (“The physical capacity of the courts to review governmental action is simply dwarfed by the capacity of governments to produce such action.”).

19. 521 U.S. 898 (1997).

20. See *New York v. United States*, 505 U.S. 144, 169 (1992) (“[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”).

21. U.S. CONST. art. I, § 8, cl. 1.

22. See *United States v. Butler*, 297 U.S. 1, 65 (1936).

independent grant of constitutional authority or whether it was limited to the purposes specified by the other enumerated powers granted to Congress by Article I, Section 8. Predictably, Hamilton took the former, broader position and James Madison the latter, narrower one.²³

The Supreme Court first squarely addressed this controversy in 1936 in the case of *United States v. Butler*.²⁴ Decided at the height of the Court's resistance to the New Deal, *Butler* involved a challenge to the provisions of the Agricultural Adjustment Act of 1933,²⁵ which taxed farmers who exceeded federally imposed crop quotas for the purpose of subsidizing those who allowed their land to lie fallow.²⁶ *Butler* ultimately struck down these provisions on the ground that they represented not an ordinary federal subsidy, but an attempt to regulate outside the limits of Congress's commerce power established in other Supreme Court decisions of the era.²⁷ Nevertheless, the Court firmly sided with Hamilton, recognizing the spending power as an independent source of congressional authority to promote the general welfare in ways beyond the specific purposes enumerated in Congress's other Article I powers.²⁸ Prior to *NFIB*, *Butler* was the only time the Supreme Court ever invalidated an exercise of the congressional spending power,²⁹ and it is probably best understood as an anomaly necessitated by the Court's need to protect its narrow commerce power decisions of the early 1930s.³⁰

2. SEVEN DECADES OF DEFERENCE

Two post-1937 decisions reaffirmed the Court's commitment to the broad Hamiltonian view, while backing substantially away from *Butler*'s anti-circumvention reading of the spending power. Together, *Helvering*

23. See, e.g., David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 26–27 (1994) (discussing the substance and historical influence of this dispute).

24. 297 U.S. 1 (1936). One reason it took so long was the difficulty of bringing challenges to spending legislation under then-prevailing notions of justiciability. Cf. *Massachusetts v. Mellon*, 262 U.S. 447, 480–89 (1923) (rejecting Spending Clause challenge to Maternity Act of 1921 as nonjusticiable).

25. *Butler*, 297 U.S. at 53.

26. Pub. L. No. 73–10, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601–24 (2006)).

27. *Butler*, 297 U.S. at 74 (“Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance.”).

28. *Id.* at 65–66 (surveying the controversy and endorsing Hamilton's view).

29. See Engdahl, *supra* note 23, at 26–35 (discussing spending power theory and practice prior to *Butler*).

30. See, e.g., Anuj C. Desai, *Filters and Federalism: Public Library Internet Access, Local Control, and the Federal Spending Power*, 7 U. PA. J. CONST. L. 1, 86–89 (2004) (explaining and partially defending *Butler* in these terms).

*v. Davis*³¹ and *Steward Machine Co. v. Davis*³² upheld the Social Security Act of 1935.³³ In the process, they inaugurated seven decades of uninterrupted judicial deference to Congress's spending power. During this period, the principal spending power issue the Court faced was Congress's ability to impose conditions on grants to state governments for purposes of encouraging states to adopt federally favored policies.³⁴ The reason for this shift was simple. Following the Court's post-New Deal retreat from serious scrutiny of the federal commerce power, there was little reason for Congress to resort to the spending power as a mechanism for circumventing limits on its commerce power authority.³⁵

During this seven-decade span, the Court's most important spending power decision was *South Dakota v. Dole*,³⁶ decided in 1987. *Dole* rejected a challenge to the National Minimum Drinking Age Act of 1984,³⁷ which withheld five percent of federal highway funds from states that did not adopt a legal drinking age of at least twenty-one.³⁸ In a decision most commentators understood as extremely deferential to Congress's conditional spending power, the Court emphasized that exercises of this power must satisfy five requirements. First, they must promote the general welfare.³⁹ Second, any conditions governing states' entitlement to federal funds must be clearly announced, to give states adequate notice of the bargain they are entering in accepting such funds.⁴⁰ Third, the conditions imposed on federal grants must be reasonably related to the purpose of the federal program of which those funds are a part.⁴¹ This is often referred to in the academic literature as the "germaneness requirement."⁴² Fourth, congressional conditions may

31. 301 U.S. 619 (1937).

32. 301 U.S. 548 (1937).

33. Pub. L. No. 74-271, 49 Stat. 620 (codified as amended 42 U.S.C. §§ 301-1397 (2006)); *Helvering*, 301 U.S. at 645-46; *Steward Mach. Co.*, 301 U.S. at 598.

34. Prior to 1937, the principal issue was Congress's ability to use financial incentives—in the form of conditional taxes or conditional spending—to regulate the behavior of individuals. *See, e.g., United States v. Butler*, 297 U.S. 1 (1936); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

35. *See, e.g.,* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 2-3 (2010) (recounting radical expansion of federal regulatory power between 1937 and 1942); Desai, *supra* note 30, at 87-90.

36. 483 U.S. 203 (1987).

37. *Id.* at 211-12.

38. 23 U.S.C. § 158 (2006).

39. *Dole*, 483 U.S. at 207.

40. *Id.*

41. *Id.*

42. *See, e.g.,* Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911, 1959 (1995).

not violate any “independent constitutional bar.”⁴³ Fifth, and finally, “the financial inducement offered by Congress” must not be “so coercive as to pass the point at which ‘pressure turns into compulsion.’”⁴⁴ I shall refer to this as the “anti-coercion principle.”

Of these requirements, only the germaneness and anti-coercion principles seemed to hold any promise as tools for meaningfully limiting the conditional spending power.⁴⁵ Neither, however, was applied in *Dole* in a way that suggested a willingness to impose serious limits. The consensus view of commentators, supported by twenty-five years of decisions following *Dole*, was that the decision represented a blank check to Congress.⁴⁶

3. *NFIB V. SEBELIUS*

This changed with the Court’s surprising recent decision—surprising to most informed observers—that the Affordable Care Act’s Medicaid expansion was unconstitutionally coercive of state governments that wished not to participate.⁴⁷ Both the *NFIB* decision and the Affordable Care Act are quite complex. But to understand the

43. *Dole*, 483 U.S. at 210.

44. *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

45. Long before *Dole*, the Court expressed its unwillingness to second-guess congressional judgments about the definition of “the general welfare.” *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (noting that “discretion” to define general welfare “belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment”). *Dole* reiterated this unwillingness, going so far as to suggest that the general welfare requirement may be nonjusticiable. 483 U.S. at 207 n.2. The clear-statement requirement limits only the form in which the conditional spending power is exercised, not its scope, and the independent constitutional bar rule prohibits only conditions that would “induce the States to engage in activities that would themselves be unconstitutional.” *Id.* at 210.

46. See, e.g., Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 355 (2008) (“None of [*Dole*’s] direct limitations on the spending power has had any real bite in the cases.”); Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 467–69 (2003) (noting that courts have treated *Dole*’s anti-coercion principle as “essentially nonjusticiable,” even in cases where “the absolute amount or percentage of federal money at stake is so large that [a state] has no choice but to accept the federal legislation’s many requirements” (internal quotation omitted)); Lynn A. Baker, *Conditional Federal Spending and States’ Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 113 n.18 (2001) (repeatedly describing *Dole* as “toothless”).

47. *Nat’l Fed’n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603–04 (2012); see, e.g., Marty Lederman, *The States’ Extraordinary Medicaid Challenge: Claiming a Right Not to Take the Savory with the Sweet (or, . . . All Carrots; No Stick)*, BALKINIZATION (Mar. 27, 2012), <http://balkin.blogspot.com/2012/03/states-extraordinary-medicaid-challenge.html> (writing before the decision that “many believe[] it is highly unlikely a majority of Justices will be sympathetic to that challenge”).

spending power aspect of the decision, it is necessary only to appreciate one key point: the Act requires states to participate in a substantial expansion of Medicaid in order to remain eligible to receive any federal Medicaid funds. “A State that opts out of the Affordable Care Act’s expansion in health care coverage thus stands to lose not merely ‘a relatively small percentage’ of its existing Medicaid funding, but *all* of it.”⁴⁸

In holding this portion of the Act unconstitutional, Chief Justice Roberts’s controlling opinion relied on three principal factors: (1) the dramatic size of the Act’s Medicaid expansion, almost forty percent of the preexisting federal Medicaid budget;⁴⁹ (2) states’ long-term reliance on federal funds they had been receiving under the preexisting Medicaid program;⁵⁰ and (3) the enormous size of the grants the Act threatened to withdraw from nonparticipating states.⁵¹ The basic logic of the decision is that Congress cannot use the leverage afforded by its conditional spending power to coerce states into actions that Congress could not command them to take directly. Whether *NFIB* represents a major shift or a minor blip, of course, remains to be seen.

B. Commandeering

I. TWO STEPS FORWARD

The reason Congress could not directly command the states to expand Medicaid is found in another modern line of cases that prohibits Congress from conscripting states as foot soldiers in the enactment, enforcement, or administration of federal law. This is commonly known as the “anti-commandeering principle,” and its story begins with *New York*.⁵² *New York* involved a complex set of interlocking provisions of

48. *Nat’l Fed’n Indep. Bus.*, 132 S. Ct. at 2604.

49. *Id.* at 2601 (“In light of the expansion in coverage mandated by the Act, the Federal Government estimates that its Medicaid spending will increase by approximately \$100 billion per year, nearly 40 percent above current levels.”).

50. *Id.* at 2604 (“[T]he States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid.”).

51. *Id.* (“Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs.”).

52. Of course, one could always go back further—in this case, to the Supreme Court’s earlier, subsequently abandoned attempts to limit direct federal regulation of states in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (invalidating the Fair Labor Standards Act to the extent it burdened “traditional governmental functions” of states). See also H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 868 (1999) (“Without saying so, *New*

the Low-Level Radioactive Waste Policy Amendments Act of 1985.⁵³ The Court upheld two of the challenged provisions, which gave states a choice between regulating or providing for the disposal of waste within their borders and losing federal funds or having their own regulations preempted by direct federal regulation of waste producers in their states.⁵⁴ But it struck down a third provision on the ground that it directed states to legislate in accordance with federal policy, either by establishing a waste disposal plan or by subsidizing waste generators within their states.⁵⁵

The principal practical rationale the Court offered for this decision was the need to preserve the political accountability of both federal and state officials.⁵⁶ If Congress were permitted to commandeer state legislatures into enacting federal policy, voters might inaccurately and unfairly hold state officials responsible for a decision imposed upon them by the federal government.⁵⁷ Conversely, if the federal government were permitted to take credit for national legislation addressing a serious problem like low-level radioactive waste, while foisting the difficult and unpopular decisions entailed by that solution onto state legislatures, it might avoid political responsibility for its policy choices.⁵⁸

Five years later, the Court decided *Printz*, extending *New York's* anti-commandeering principle to federal commandeering of state executive officials.⁵⁹ *Printz* invalidated certain interim provisions of the

York . . . fulfilled the promise of the *Garcia* dissenters by marking a return to the approach of *National League of Cities*,” though not a complete one.).

53. Pub. L. 99-240, 99 Stat. 1842 (codified at 42 U.S.C. § 2021b-j (2006)); *New York v. United States*, 505 U.S. 144, 149 (1992).

54. *New York*, 505 U.S. at 173 (“The Act’s first set of incentives, in which Congress has conditioned grants to the States upon the States’ attainment of a series of milestones, is . . . well within the authority of Congress under the Commerce and Spending Clauses.”); *id.* at 174 (“The Act’s second set of incentives thus represents a conditional exercise of Congress’ commerce power, along the lines of those we have held to be within Congress’ authority.”).

55. *Id.* at 176 (“Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two.”).

56. *Id.* at 182-83.

57. *Id.* at 168-69.

58. *Id.* at 169 (“[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”).

59. *Printz v. United States*, 521 U.S. 898, 933 (1997) (“We adhere to that principle today, and conclude categorically, as we concluded categorically in *New York*: The Federal Government may not compel the States to enact or administer a federal regulatory program.”).

Brady Handgun Violence Prevention Act⁶⁰ that required state law enforcement officers to perform background checks on would-be gun purchasers until a comprehensive national database could be created.⁶¹ Much of the Court's discussion was historical, but to the extent that it offered a practical or structural rationale for its decisions, it was the same as that offered in *New York*. Like state legislatures, state executive officials make discretionary policy decisions in the course of carrying out their responsibilities. To permit those officials to be commandeered by the federal government would risk confusing the lines of accountability carefully separated by the Constitution.⁶²

2. ONE STEP BACK

Many commentators greeted *New York* and *Printz* with alarm. Their principal concern in the immediate aftermath of the decisions was the Court's failure to precisely define "commandeering." The opinions in both *Printz* and *New York* could be read as prohibiting any federal regulation requiring that state governments or their officers take affirmative action in response to federal commands—an interpretation that would call into question virtually every federal regulation of state governments from the Fair Labor Standards Act to income tax withholding requirements.⁶³ As Matthew Adler and Seth Kreimer pointed out, some of the language in *New York* seems fairly to cry out for this reading.⁶⁴ *Printz* and *New York* did generate a certain amount of litigation along these lines,⁶⁵ but the Court quickly moved to quash speculation that it intended to threaten all federal regulation of states.

The vehicle for this message was *Reno v. Condon*.⁶⁶ Decided in 2000, *Reno* involved a challenge to the Driver's Privacy Protection Act

60. *Id.* at 902.

61. Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended 18 U.S.C. §§ 921-22 (2006)); *Printz*, 521 U.S. at 902-03.

62. *Printz*, 521 U.S. at 930 ("[E]ven when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.").

63. See Adler & Kreimer, *supra* note 8, at 71-72 ("The anticcommandeering doctrines are of interest not only because they have impelled the Court to invalidate two federal statutes in the last seven years, but because they are both unspecified and potentially explosive."); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2205-07 (1998) (noting that "[t]he breadth of *Printz's* effect on other federal statutes is unclear" and collecting numerous examples of potentially threatened statutes).

64. Adler & Kreimer, *supra* note 8, at 87 ("Surprising as this view might seem, there is real textual support for it in a passage from the *New York* opinion . . .").

65. For a list of cases, see Jackson, *supra* note 63, at 2205 n.115.

66. 528 U.S. 141 (2000).

of 1994 (DPPA)⁶⁷ on the ground that it required the state of South Carolina to undertake extensive and expensive affirmative acts, including the adoption of state regulations to ensure compliance with the complex provisions of the Act.⁶⁸ There was no question that the DPPA required states to take many affirmative steps and to formulate new internal policies pursuant to a federal mandate. Nevertheless, a unanimous Supreme Court held that the touchstone of commandeering is a federal requirement that “the States in their sovereign capacity . . . regulate their own citizens.”⁶⁹ It does not include regulations that merely require states to comply with federal standards. With this interpretation, the Court both placed commandeering doctrine on firmer footing and narrowed its potential scope substantially.

C. *The Conditional Spending Paradox*

1. THE PARADOX DEFINED

The anti-commandeering principle announced in *New York* and *Printz* has come in for a great deal of criticism, some historical,⁷⁰ some empirical,⁷¹ and some theoretical.⁷² Much of this criticism is very persuasive, but for present purposes I am interested only in the most persistent strand of it. That is the argument that the Court has failed to offer a principled distinction between commandeering, which it categorically prohibits, and the conditional spending power, which seems to permit Congress to achieve the same objectives by alternate means.⁷³ This is the “conditional spending paradox.”

67. 18 U.S.C. §§ 2721–25 (2006).

68. *Reno*, 528 U.S. at 149–50.

69. *Id.* at 151.

70. See, e.g., H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 635 (1993) (“I conclude that *New York* is a decision without a firm basis in founding-era discussion or the subsequent history of constitutional debate.”).

71. See, e.g., Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 213, 231 (Kalypso Nicolaidis & Robert Howse eds., 2001) (“[P]roper lines of accountability can be preserved when component States are vigilant in publicizing the respective roles of the federal and State policy-makers on any given issue. Given proper information, citizens should find the lines of accountability reasonably clear.”).

72. See, e.g., Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1655 (2006) (criticizing the Court’s anti-commandeering principle for being “so broad, so context insensitive, that it applies not just in the face of a compelling government interest . . . [but also] when accountability concerns are minimal”).

73. For a list of sources discussing this argument, see *supra* note 14.

This criticism rang especially true before *NFIB*, when most observers assumed that the federal spending power was essentially unlimited.⁷⁴ At the time, it was widely agreed, in fact taken as obvious, that a great deal of federal spending legislation gave states little option but to comply with the conditions imposed.⁷⁵ Even legislation like that challenged in *Dole*, where the federal government threatened to withhold only five percent of states' highway funds, produced universal compliance.⁷⁶ Countless conditional spending statutes put states to far less palatable choices.⁷⁷

The differential treatment of commandeering and conditional spending therefore seemed flatly inconsistent to many observers. To the extent that commandeering created a serious problem of political accountability, the conditional spending power seemed to create at least as serious a problem, perhaps an even greater one, given the plausible deniability that such statutes actually compel state action.⁷⁸ Some of these critics advocated scrapping the anti-commandeering principle,⁷⁹

74. See Bagenstos, *supra* note 46, at 355–56; Chemerinsky, *supra* note 10, at 93 (“[N]o limits on the scope of the spending power can be reasonably inferred from the text of the Constitution.”).

75. Adler & Kreimer, *supra* note 8, at 103–05; Krotoszynski, *supra* note 14, at 17; Zietlow, *supra* note 8, at 142–43; see also Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1, 14 (2006) (“[C]onditional funding remains an effectively unbridled source of federal power.”); Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 865 n.23 (2000) (A virtually unlimited conditional spending power “suffuses the Court’s federalism jurisprudence, threatening to reduce all of it to a matter of form rather than substance.”). See generally Zelinsky, *supra* note 14.

76. See *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

77. See, e.g., No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2006) (requiring state-run schools to meet challenging annual yearly progress standards or risk losing \$24 billion in funding annually); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601 (2006) (conditioning \$16 billion in Temporary Assistance to Needy Families Grants on states conforming welfare programs to federal requirements, including a work requirement, a five-year limit on assistance, submitting data reports to the federal government, and participation in the Income and Employment Verification System).

78. See, e.g., Jackson, *supra* note 63, at 2202 (“Conditional spending regulatory requirements, though nominally involving a state’s choice to accept federal funds, can result in a very confusing picture of responsibility for voters. Why, then, would commandeering be different?”); Zietlow, *supra* note 8, at 190 (“The reason for the anti-commandeering rule was the Court’s fear that commandeering state officials would cause a lack of accountability and confuse state voters Yet conditional funding arguably creates the same concern about accountability since states agree to comply with conditions beyond their control in order to receive federal funds.”).

79. See Adler & Kreimer, *supra* note 8; Jackson, *supra* note 63; Siegel, *supra* note 72; see also *Printz v. United States*, 521 U.S. 898, 960–61 (1997) (Stevens, J., dissenting) (noting tension between stringent anti-commandeering principle and broad conditional spending power); cf. *id.* at 978 (Breyer, J., dissenting) (describing *Printz*’s

while others counseled limiting the conditional spending power.⁸⁰ But in general, there was broad agreement that the two doctrines could not be reconciled.⁸¹

2. A RESOLUTION?

The Court's recent *NFIB* decision appears to resolve this paradox against the conditional spending power. To the extent that spending legislation is the practical equivalent of commandeering, *NFIB* holds that it is unconstitutional.⁸² The Court treats this result as a straightforward application of its familiar political accountability argument: "when the state has no choice" but to accept a federal offer, "the Federal Government can achieve its objectives without accountability, just as in *New York* and *Printz*."⁸³ Voluntary conditional spending programs, by contrast, permit states to be held accountable for their choice to accept federal funds and the conditions that come with them.⁸⁴ For this reason, *NFIB* does not question their constitutionality.⁸⁵

Considered on its own terms, this reasoning is deeply unsatisfying. If voters cannot figure out that the federal government is responsible for commandeering or coercive exercises of the conditional spending power—and the Court assumes they cannot—it is unclear why they will be able to figure out that states are responsible for their choice to accept federal funds in the absence of coercion.⁸⁶ Indeed, commandeering seems

anti-commandeering principle as a merely "technical obstacle" in light of broad conditional spending power).

80. See Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377 (2005) (describing broad conditional spending power as "unsustainable" in light of the anti-commandeering principle); Baker & Berman, *supra* note 46, 466–67 (lamenting *Dole*'s toothlessness).

81. *But cf.* Hills, *supra* note 16 (arguing for differential treatment of commandeering and conditional spending on political economy grounds).

82. *Nat'l Fed'n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) ("The Constitution simply does not give Congress the authority to require states to regulate. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." (citation omitted)).

83. *Id.* at 2603.

84. *Id.* at 2602–03 ("Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer.").

85. Considered in terms of political accountability, this reasoning is deeply problematic. The Court offers no reason to believe that voters who are too confused to hold the federal government responsible for commandeering and conditional spending will be sufficiently perceptive to hold state officials responsible for choosing to accept federal grants. This might suggest another paradox.

86. See Hills, *supra* note 16, at 826 n.32 ("Of course, voters might be astute enough to blame Congress for imprudently giving unrestricted funds to nonfederal

the easiest case for the public to sort out. When a federal statute commandeers state governments, officials at both levels of government can point to a concrete federal mandate as the source of a particular policy.⁸⁷ Voluntary conditional spending programs, by contrast, force voters to sort out the far murkier question of a state's practical ability to refuse a sizeable federal grant.

Troubling as it may be, this sloppy reasoning is immaterial to the conditional spending paradox. At most, it suggests that the Court's real concern is state autonomy rather than political accountability and that concern distinguishes the prohibited (commandeering and coercive conditional spending programs) from the permitted (voluntary conditional spending programs).⁸⁸ The important point is that *NFIB* prohibits both commandeering and functionally equivalent exercises of the spending power. It was the Court's previous failure to do so that created the conditional spending paradox and *NFIB*'s change of course appears to resolve it.

If applied rigorously, *NFIB*'s anti-coercion principle would indeed resolve the paradox. For now, however, *NFIB* is only a single data point. If its anti-coercion principle is not applied rigorously or if the Court retreats from that principle altogether, the paradox will remain. In fact, this is just what Part III predicts will happen. To see why, it is first

governments and blame nonfederal governments for the waste of such funds. But, if voters are so adept at apportioning responsibility, it is hard to see why they could not also properly assign blame for unconditional mandates on nonfederal officials. Why is imprudent coercion easier to detect than imprudent expenditures?"

87. Cf. Jackson, *supra* note 63, at 2204 ("[I]t is considerably easier for a state officer to identify to state voters the federal government's responsibility when decisionmaking involves less rather than more discretion."). It is possible to imagine conditional spending grants that afford states less discretion than instances of commandeering and vice versa. But, as a general matter, conditional spending—especially noncoercive conditional spending—seems almost certain to delegate more discretion than commandeering and therefore to create more serious political accountability problems.

88. I use "state autonomy" as shorthand for the ability of state governments to respond to the interests and preferences of their local constituencies as opposed to the national constituency of Congress. Almost by definition, commandeering and coercive conditional spending programs threaten this conception of state autonomy in a way that voluntary spending programs do not. A felt imperative to protect against this threat provides a far more satisfying explanation for *New York, Printz*, and *NFIB* than does the Court's political accountability argument. At times, the Court itself seems to recognize this. See, e.g., *Printz v. United States*, 521 U.S. 898, 920–21 (1997) (Kennedy, J., concurring) (The Constitution created "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995))); *New York v. United States*, 505 U.S. 144, 169 (1992) ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.").

necessary to consider the puzzling doctrinal landscape that preceded *NFIB*. That landscape merits attention in its own right, as a significant historical anomaly and a possible future one. But it also offers insights that help to forecast the future—of *NFIB* specifically, and the spending power and anti-commandeering principle more generally.

II. THE JUDICIAL CAPACITY MODEL APPLIED

If commandeering and coercive conditional spending programs pose similar dangers to federalism, why did the Court treat them so differently prior to *NFIB*? The solution to this paradox lies not in the structural logic of federalism, but in the institutional limitations of the Supreme Court, in particular the limits of judicial capacity. In an effort to better understand how these limits influence the substance of constitutional law, my recent work has developed a judicial capacity model of Supreme Court decision making.⁸⁹ This Part applies that model to the spending power and anti-commandeering principle. Doing so helps to explain the Court's historically divergent treatment of the two areas and yields a number of other important positive and normative insights.

A. The Judicial Capacity Model

Following Richard Posner and Neil Komesar, my judicial capacity model traces the limits of judicial capacity to the hierarchical structure of the federal judiciary. Because the Supreme Court sits alone at the apex of that structure, the Court's limited capacity functions as a kind of bottleneck limiting the capacity of the system as a whole.⁹⁰ Structure is not the whole story, however. Widely held judicial norms also play an important role. In particular, the Court's commitment to maintaining minimum professional standards requires it to spend substantial time and effort on each case it decides. This commitment limits the Court's capacity to 150 or 200 full-dress decisions per year.⁹¹

Of course, the Court's jurisdiction is largely discretionary, so it might choose to stay under this limit simply by denying review to any more cases. But another widely held judicial norm makes this extremely unlikely. That is the Court's commitment to maintaining uniformity in the interpretation and application of federal law. This norm requires the

89. See Coan, *supra* note 9.

90. *Id.* at 426–27; see also NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 40–41 (2001); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 133–34 (1996).

91. Coan, *supra* note 9, at 427–28; see also ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 268 (2006) (suggesting this ceiling on the Supreme Court's capacity).

Court to hear enough cases to maintain such uniformity and to review any individual decision that threatens it.⁹² Together with the hierarchical structure of the federal judiciary, these commitments starkly limit the volume of litigation the Court can handle. To maintain them, the Court can invite no more than 150 or 200 cases per year that must be decided in order to preserve an acceptable degree of uniformity.⁹³

This might not seem that difficult, given that the Court currently decides fewer than 100 cases per year.⁹⁴ But the appearance is deceiving.

Had the Court interpreted the Commerce, Equal Protection, or Takings Clauses differently—to pick just a few examples—the demands on its capacity would be vastly higher. That the Court has shaped constitutional law to avoid overwhelming its modest capacity should not be taken as evidence that this capacity is unlimited or overabundant.⁹⁵

Of course, many of the factors that influence the volume of federal litigation are outside the Court's control. The creation of new causes of action, the expansion or narrowing of federal jurisdiction, and the supply and affordability of legal services are just a few examples.⁹⁶ But this does not change the bottom line. To maintain its basic normative commitments, the Court has no choice but to use the levers at its disposal to ensure that the total volume of litigation does not exceed its limited capacity.

It has three principal tools, or approaches, for doing so. First, it can tighten procedural or justiciability requirements for bringing and maintaining a lawsuit.⁹⁷ Second, it can make substantive law less friendly

92. Coan, *supra* note 9, at 428–29; Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1631 (2008) (“[E]nsuring uniformity for its own sake is the Supreme Court’s central preoccupation; it is the Court’s first order of business and the task to which it devotes the great majority of its time.”).

93. All litigation, in other words, is not created equal. The Court’s normative commitments require it to pay special attention to the volume of cases that pose the greatest threats to uniformity. As we shall see, these consist largely of constitutional cases, especially those contesting the validity of federal laws. See Coan, *supra* note 9, at 427–28 (“[T]he Court is much more willing to tolerate disuniformity in statutory domains than it is in constitutional domains.”).

94. See David R. Stras, *The Supreme Court’s Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 153 fig.1 (2010).

95. Coan, *supra* note 9, at 428.

96. For a more comprehensive list, see *id.* at 433–35.

97. *Id.* at 433–34; see also KOMESAR, *supra* note 18, at 147 (“[T]he courts can decrease litigation by requiring more forms and procedures, by narrowing the types of cases acceptable for adjudication, by narrowing standing or by increasing the requirements for class action.”); POSNER, *supra* note 90, at 95–96 (describing Article III

to plaintiffs and thereby reduce the expected value of bringing a lawsuit. In the context of constitutional law, this means deferring more extensively to the political process.⁹⁸ Finally, the Court can employ clearer and more categorical rules for deciding cases, reducing uncertainty and thereby encouraging greater compliance and the frequency of settlement outside of court.⁹⁹

In most domains, constitutional and otherwise, the Court has fairly wide latitude to choose among these tools or to employ none at all. It must avoid exceeding its overall capacity budget, but it can do that in any number of ways. As a result, the Court is generally free to make federal law more generous to plaintiffs or to employ vague legal standards—the two main ways in which the Court’s decisions invite more litigation—so long as it is willing to make some package of compensating tradeoffs in other domains or in the procedural rules that cut across legal domains. I call domains in which the Court enjoys this type of flexibility “normal domains.”¹⁰⁰

Not all domains, however, are normal in this sense. In some domains, the nature and volume of litigation that the Court would invite by ignoring the constraints of judicial capacity is such that no procedural recalibration or shifting of resources from other areas could possibly stem the tide.¹⁰¹ As a consequence, to maintain its commitment to minimum professional standards and the uniformity of federal law, the Court has essentially two choices. It can decide these issues using clear-cut categorical rules, as opposed to vague standards, in the hope of reducing disuniformity among lower courts and encouraging settlement out of court. Or it can adopt more parsimonious standards of liability,

standing as “another form of indirect pricing of federal judicial services,” whose relaxation greatly increased the volume of litigation in the 1960s and 1970s).

98. Coan, *supra* note 9, at 433; *see also* KOMESAR, *supra* note 18, at 147 (“[T]he courts can reduce the number of requests that they review governmental activity by setting out standards that increase the deference given to the reviewed entity.”).

99. Coan, *supra* note 9, at 433 n.7 (“Categorical rules reduce disuniformity among lower courts by reducing mistakes and making deviation easier to police. They encourage settlement by reducing uncertainty and more closely aligning adverse parties’ assessments of the risk-adjusted value of litigation.” (internal citations omitted)); *see also* Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 819–20 (1967) (using the “one man, one vote” rule of *Reynolds v. Sims*, 377 U.S. 533 (1964), as an illustration); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 32 (2000) (“The *ex ante* certainty that rules provide should encourage more disputes to settle out of court and not require adjudication at all.”).

100. Coan, *supra* note 9, at 434–35.

101. *Id.* at 435 (“There are judicial analogues to a \$300,000 Ferrari or a \$5 million house—certain classes of decisions that would not only require compensating tradeoffs but which, by themselves, would invite litigation beyond the overall capacity of the judiciary . . .”).

reducing the expected value—and thereby the likely volume—of litigation. Often, it will feel compelled to do both.¹⁰²

Domains of this sort fall into two frequently overlapping categories. The first of these I call “high-volume domains.” These are domains where the Court does not feel any especially strong pressure to maintain a high degree of uniformity, but the volume of litigation that it would invite with a plaintiff-friendly rule or a vague standard would itself exceed the Court’s limited capacity. The Equal Protection Clause is a good example. This clause applies mostly to state and local regulations. As a consequence, the Court feels comfortable allowing a large fraction of lower court decisions to go unreviewed, since their effect on the uniformity of federal law is relatively small.¹⁰³

Nevertheless, the potential scope of the Equal Protection Clause is so broad that if the Court read it as embodying anything like a stringent and general principle of equal treatment, it would call into question half the *United States Code* and a good fraction of state and local laws, not to mention administrative regulations and executive actions. The resulting volume of litigation would be far more than the Court could handle. It is no surprise, therefore, that the Court has never read the Equal Protection Clause in this way. Instead, when not treating the clause as a completely dead letter, the Court has employed a system of tiered scrutiny that amounts to a rule of categorical deference for most forms of discrimination and rule of categorical invalidity for a small handful of discrete exceptions.¹⁰⁴

The second category of domains in which judicial capacity strongly constrains the Court I call “high-stakes domains.” In these domains, the absolute volume of litigation may or may not be especially great, but the stakes are sufficiently high that the Court will feel compelled to grant review of a very large fraction of lower court decisions, especially

102. To be clear, I do not mean to claim that the Court will always recognize perfectly what kinds of decisions would invite an overwhelming volume of litigation. Indeed, at any given point in time, judges may have only a vague sense of what the limits of judicial capacity are. But I believe they have a strong intuitive sense for the extraordinary capacity risks posed by high-volume and high-stakes domains. And when they make mistakes, the system responds. “More specifically, the volume of litigation increases, which pushes the Court, when it veers off course or begins to veer off course, to back off its original mistaken predictions.” Coan, *supra* note 9, at 453.

103. *Id.* at 436–37; see also ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 246–47, 271–72 (8th ed. 2002).

104. Coan, *supra* note 9, at 436–37; see also Suzanne B. Goldberg, *Equality without Tiers*, 77 S. CAL. L. REV. 481 (2004). The categorical nature of this rule is nearly as important as its deference. By drawing a clear line between suspect classifications subject to heightened scrutiny, and all others, the Court eliminates the litigation-generating uncertainty that would attend an equally deferential but less categorical rule.

decisions invalidating government action.¹⁰⁵ The commerce power is a perfect example. Because every law grounded in the commerce power is a federal statute, any lower court decision invoking it will create a serious risk of disuniformity. As already mentioned, the Court feels compelled to grant review of almost any lower court decision invalidating a federal law.¹⁰⁶ On top of this, the commerce power underwrites an enormous quantity of legislation. It is therefore a high-volume as well as a high-stakes domain—what I call a “hybrid domain.”¹⁰⁷

For these reasons, any serious or far-reaching review of the commerce power would generate an avalanche of litigation, nearly all of which the Court would feel compelled to review. It is unthinkable that the Court could keep this up for long and indeed historically it has generally adopted a broadly deferential posture toward the commerce power. On the relatively rare occasions when it has engaged in serious review, it has done so in the form of relatively hard-edged categorical rules that clearly insulate the vast majority of political action from serious scrutiny—exactly what the judicial capacity model would predict.¹⁰⁸

B. Spending and Judicial Capacity

The spending power, like the commerce power, is both a high-stakes and a high-volume domain. It underwrites an enormous quantity of legislation and all of that legislation is federal legislation, meaning that almost any time a lower court invalidates a spending power statute, the Supreme Court will feel compelled to grant review. As of 2006, there were 814 different federal programs distributing funds to the states.¹⁰⁹ In 2010, the federal government distributed \$608 billion to state

105. Coan, *supra* note 9, at 439–41.

106. *Id.* at 439.

107. *Id.* at 442–43.

108. *Lopez* and *NFIB* are good examples. The former made clear that all federal regulations of economic activity—the vast majority—remained subject to the extremely deferential rational basis test. See *United States v. Lopez*, 514 U.S. 549, 616–17 (1995). The latter is explicit that its reading of the Commerce Clause (broadly shared by the Chief Justice and the four joint dissenters) threatens only a single federal statute. See *Nat'l Fed'n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (“Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.”).

109. CHRIS EDWARDS, CATO INST., POLICY ANALYSIS NO. 593, FEDERAL AID TO THE STATES: HISTORICAL CAUSE OF GOVERNMENT GROWTH AND BUREAUCRACY 1 (2007), available at <http://www.cato.org/pubs/pas/pa593.pdf>.

and local governments,¹¹⁰ making federal aid to the states the third-largest budget item after Social Security and defense spending.¹¹¹ Most federal expenditures are authorized under the Spending Clause, rather than an enumerated power, including such political and historically significant legislation as Social Security itself,¹¹² the American Recovery and Reinvestment Act of 2009,¹¹³ the No Child Left Behind Act of 2001,¹¹⁴ and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.¹¹⁵ The judicial capacity model therefore predicts that the Court will feel strong pressure to interpret the spending power broadly, employ hard-edged categorical rules, or both.¹¹⁶

This, in fact, is what we see when we examine the Court's historical treatment of the Spending Clause. Including the Court's partial invalidation of the Medicaid expansion in *NFIB*, the Court has only twice in its history struck down federal spending legislation as unconstitutional. Apart from these decisions, the Court has formulated its Spending Clause doctrine in terms approaching a rule of categorical deference.¹¹⁷ Indeed, before *NFIB*, judges and commentators alike routinely assumed the spending power to be so broad as to effectively

110. OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES FISCAL YEAR 2013 tbl.12.1 (2013), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/hist12z1.xls>.

111. EDWARDS, *supra* note 109.

112. 42 U.S.C. §§ 301–1397 (2006).

113. Pub. L. No. 111–5, 123 Stat. 115 (2009).

114. 20 U.S.C. § 6311(a)(1) (2006).

115. Pub. L. No. 104–193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C., 21 U.S.C., 42 U.S.C.).

116. One complicating factor is worth mentioning. If states on the whole benefit from federal grants, one might think they would be reluctant to advance legal arguments that could threaten programs from which they stand to benefit. If this were true, the amount of legislation grounded in the Spending Clause might be a misleading guide to the volume of litigation that could be expected from stringent judicial review or review based on vague standards. This seems unlikely for two reasons. First, even if all states benefit from an expansive conditional spending power, for any given program some individual state or states will generally object to some of the conditions Congress places on its disbursement of funds. Other states might like to buy these states off, but collective action problems will prevent them from doing so. Second, the likelihood that a legal victory will threaten federal aid—and hence be adverse to the interest of states as a whole—will generally be remote. In most cases, the result will simply be to strengthen the state's bargaining position against the federal government.

117. To be sure, the Court never said explicitly that the spending power was without judicially enforceable limits. But what matters for judicial capacity purposes is the expectations of litigants. As the commentary makes clear, the operative pre-*NFIB* understanding was that the spending power was a blank check. This was partly the product of the virtually unanimous lower court rejection of Spending Clause challenges and partly the product of the Court's refusal to reverse any of these decisions.

swallow any other meaningful limits on federal power.¹¹⁸ For more than two decades of this time, a solid majority of the Supreme Court was enthusiastic about protecting states and limiting federal power.¹¹⁹ And for at least as long, sympathetic academics were calling for judicial intervention, to the point of describing the spending power as “the greatest threat to state autonomy.”¹²⁰ Yet the Court consistently stayed its hand. Such restraint is difficult to fathom from an attitudinalist perspective, but the judicial capacity model renders it perfectly intelligible.

This history is broadly similar to the Court’s treatment of the commerce power over the past seventy years, with three notable exceptions. In *United States v. Lopez*,¹²¹ *United States v. Morrison*,¹²² and *NFIB*, a majority of the Court motivated to restrain federal power imposed narrow categorical limitations on the commerce power. *Lopez* and *Morrison* held that the commerce power did not reach noneconomic activities,¹²³ and *NFIB* held that it could not reach economic inactivity.¹²⁴

118. See *supra* notes 14, 46; cf. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting) (“[T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.”).

119. Justice Clarence Thomas, the most recently appointed member of the *Lopez* majority, joined the Court in 1991. *Biographies of Current Justices*, SUP. CT. U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Dec. 1, 2012). Of course, before this, the Court was by no means uniformly hostile to the federalism claims of states. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833 (1976). Indeed, federalism was one of the main rhetorical themes of the criminal procedure and habeas counter revolutions of the Burger and Rehnquist Courts. See generally Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1179 (1988). Not coincidentally, the latter two areas were ones in which a commitment to federalism tended to reduce judicial caseloads.

120. Baker, *supra* note 46, at 105 (“Amidst all the attention afforded the Supreme Court’s recent federalism decisions, one important fact has gone largely unnoticed: the greatest threat to state autonomy is, and has long been, Congress’s spending power.”); see also Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 896 (1979) (advocating intermediate scrutiny for spending conditions “that would exceed the congressional power under the commerce clause because of its interference with state autonomy”); Rosenthal, *supra* note 10 (tentatively calling for judicial limitation of the spending power in 1987).

121. 514 U.S. 549 (1995).

122. 529 U.S. 598 (2000).

123. *Lopez*, 514 U.S. at 559–60; *Morrison*, 529 U.S. at 610.

124. *Nat’l Fed’n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587 (2012). I recognize that there is some debate over whether this amounts to a holding of the Court in the technical jurisprudential sense. For judicial capacity purposes, what matters is that five members of the Court endorsed this view and could be expected to vote similarly in future cases.

For present purposes, the most notable feature of these limitations was their clear, categorical insulation of the vast majority of commerce power legislation from meaningful constitutional review. Under *Lopez* and *Morrison*, so long as legislation can be described as regulating economic activity that substantially affects interstate commerce, which virtually all commerce power legislation can be, it will be subject to the categorically deferential rational basis test.¹²⁵ Similarly, so long as federal legislation regulates economic activity rather than economic inactivity, it remains subject to rational basis review under *NFIB*.¹²⁶ Indeed, in *NFIB*, the Court specifically emphasized that it was aware of only one statute in the entire history of the United States that violated the limitation it imposed.¹²⁷

These Commerce Clause decisions suggest that, even in high-stakes and high-volume domains, a motivated court has room to impose and sustain limits on federal power, *so long as those limits clearly insulate the vast majority of federal legislation from constitutional attack*. One might expect the Court to have adopted a similar course in the context of the spending power. However, none of the potential limits on that power that have been suggested by courts and commentators meets the italicized criterion. Most are vague and standard-like, and as such would call into question a large and uncertain fraction of spending power legislation if applied rigorously. The others are so stringent that, despite their categorical nature, they would threaten to overwhelm the courts with challenges to a very broad array of federal legislation.

For illustrative purposes, I will discuss four such limits.¹²⁸ The first is the requirement that federal spending and conditions attached to it promote “the general welfare.”¹²⁹ The Court has paid lip service to this requirement throughout the modern era, but has all along made clear that it has no intention of calling Congress’s judgments on the subject into question.¹³⁰ Some commentators have urged that the Court put more

125. *Gonzales v. Raich* expanded the scope of insulated legislation even further with an exceedingly broad definition of “economic activity.” 545 U.S. 1, 25–26 (2005); see also *id.* at 49 (O’Connor, J., dissenting) (“[T]he Court’s definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.”).

126. *Nat’l Fed’n Indep. Bus.*, 132 S. Ct. at 2587.

127. *Id.* at 2586 (“Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.”). Of course, the prospect of litigation under that narrow limit seems further reduced given the Court’s willingness to uphold the de facto regulation of inactivity under the taxation power.

128. The point of this discussion is not to evaluate the merits of these limits in an ideal world. It is to show that judicial capacity made it difficult or impossible for the Court to adopt them.

129. U.S. CONST. art. 1, § 8, cl. 1.

130. See *supra* notes 45–46.

teeth into the general welfare requirement.¹³¹ But as the Court has repeatedly recognized, general welfare represents such a malleable concept that any attempt to enforce it seems destined to cast a pall of uncertainty over a very large fraction of federal spending legislation.¹³² With uncertainty comes litigation.

A slightly more promising limitation on the spending power is the germaneness requirement recognized in *Dole*. As the *Dole* Court formulated this requirement, it mandates that the conditions imposed on federal grants to state governments be reasonably related to the broader purpose those grants are intended to serve.¹³³ As the Court has applied it, however, this requirement has simply amounted to another form of rational basis review.¹³⁴ It is easy to see why. Any attempt by the Court to make rigorous judgments of degree about the level of connection between particular conditions and particular federal purposes is likely to call a great deal of federal spending legislation into question.

Justice Sandra Day O'Connor's dissent in *Dole* proposed an apparently more rule-like version of the germaneness test, which has been further developed by Lynn Baker.¹³⁵ Their test would only permit Congress to impose conditions on the way that federal funds are spent, not as a means of "encouraging" unrelated policy choices.¹³⁶ While apparently clear-cut and categorical in principle, this standard seems likely to be subject to substantial uncertainty and manipulation in

131. See, e.g., John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 65 (2001); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 44-46 (1988). See generally Bagenstos, *supra* note 46, at 356-63 (reviewing scholarly treatment of the general welfare requirement).

132. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 207 n.2 (1987); *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

133. *Dole*, 483 U.S. at 207 ("[O]ur cases have suggested . . . that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs.").

134. See Baker, *supra* note 46, at 113 ("As applied by the Court, this requirement entails only the weakest form of 'rational basis' scrutiny of the relationship between the condition and the federal interest.").

135. *Dole*, 483 U.S. at 212-18 (O'Connor, J., dissenting). See generally Baker, *supra* note 42. There are differences between the two tests, but they are immaterial for my purposes.

136. See *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting) ("The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated."); Baker, *supra* note 42, at 1963 (arguing that conditional spending is unconstitutional unless "the offer of funds constitutes 'reimbursement spending' . . . [that] specifies the purpose for which the states are to spend the offered federal funds and simply reimburses the states, in whole or in part, for their expenditures for that purpose").

practice.¹³⁷ Quite apart from any uncertainty, it would also threaten a large fraction of federal spending legislation, much of which imposes conditions that go beyond “designating authorized uses or specifying accounting methods.”¹³⁸ In both of these respects, Justice O’Connor’s and Baker’s proposals are a far cry from *Lopez*, *Morrison*, and *NFIB*, and their categorical insulation of all economic regulation from serious Commerce Clause scrutiny.

A third potential limit on the spending power is the anti-coercion principle mentioned in *Dole* and applied to invalidate the Medicaid expansion in *NFIB*. I shall have more to say about this principle in Part III, which looks closely at the *NFIB* decision and attempts to predict the likely staying power of its anti-coercion principle. For now, suffice it to say that a test requiring the Court to distinguish between financial encouragement and coercion in any rigorous way would plunge a great deal of federal spending clause legislation into uncertainty and invite a correspondingly large volume of litigation.¹³⁹

Finally, at least one academic commentator, Ilya Somin, has advocated for categorically banning federal subsidies to state governments.¹⁴⁰ From the standpoint of judicial capacity, this rule does have the benefit of clarity. But even Somin himself recognizes it as impracticable. He attributes this impracticability to strong political support for Spending Clause legislation and hopes that this obstacle may be overcome in the long run.¹⁴¹ But even if the Court possessed the political will to impose such a rule, it would threaten such a large mass of federal legislation as to almost certainly bury the courts under an avalanche of litigation.¹⁴²

137. See, e.g., *Dole*, 483 U.S. at 212–16 (O’Connor, J., dissenting) (struggling to distinguish the spending condition challenged in *Dole* from the Hatch Act upheld in *Oklahoma v. U.S. Civil Serv. Comm’n*, 330 U.S. 127 (1947)); Bagenstos, *supra* note 46, at 371 (criticizing O’Connor’s efforts); *id.* at 370 (noting ambiguity in requirement that spending conditions “specify[] how the money should be spent”).

138. Engdahl, *supra* note 23, at 57 (paraphrasing Justice O’Connor’s proposed test).

139. See, e.g., *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937) (“[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.”); see also Baker & Berman, *supra* note 46, at 521 (describing the coercion standard as “just too amorphous to be judicially administrable”).

140. Ilya Somin, *Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 495 (2002) (“Ideally, the judiciary would adopt a categorical ban on federal subsidies to state governments.”).

141. *Id.* (“Because such a ban would be politically impossible in the near future . . . I instead recommend several more modest restrictions that the Court could adopt as initial steps towards the long-term goal of complete abolition.”).

142. This is true despite the categorical character of Somin’s proposed rule. Any rule that threatens such a massive quantity of popular legislation is certain to provoke

The point of reciting all these judicial capacity problems is to demonstrate the difficulty of imposing a narrow categorical limit on the federal spending power analogous to the limits imposed on the commerce power in *Lopez*, *Morrison*, and *NFIB*. This difficulty helps to explain the Court's historically deferential approach to the spending power. It also makes sense of the Court's failure for twenty-five years after *Dole* to put teeth in any of that decision's requirements despite the strong support on the Court during this period for limiting federal power.

C. Commandeering and Judicial Capacity

From the standpoint of judicial capacity, federal commandeering and the spending power are a study in contrasts. Like the spending power, the constitutional law of federal commandeering always involves the validity of a federal statute. The Court therefore feels compelled to grant review in an unusually large fraction of lower court decisions involving the anti-commandeering principle. But unlike the spending power, the federal commandeering power has been exercised very infrequently. This was true even before *New York* and *Printz* held commandeering to be unconstitutional.¹⁴³ Aggressive judicial review of federal commandeering therefore threatens only a very small quantity of legislation.

It was not always clear that this would be the case. As many commentators pointed out in the aftermath of *Printz* and *New York*, those decisions could be read—and were read by some—as threatening the entire body of direct federal regulation of state governments.¹⁴⁴ Had the Court adopted this reading, the anti-commandeering principle would have threatened a much larger quantity of federal legislation and the resulting litigation would likely have generated a much greater threat to the Court's capacity. Avoiding this outcome may or may not have been a principal motivation for the Court's decision to limit commandeering to the federal regulation of state regulation of private citizens. But the constraints of judicial capacity make it difficult to imagine the Court taking or sustaining any other course.

For all of these reasons, the anti-commandeering principle has more in common with the narrow categorical limits imposed on the federal commerce power in *Lopez*, *Morrison*, and *NFIB* than it does with the spending power. Like those limitations, the anti-commandeering

substantial resistance, and thus litigation, no matter how clear its application to individual cases.

143. See, e.g., Siegel, *supra* note 72, at 1653 & n.103 (noting that “the federal government has almost always chosen” to eschew commandeering).

144. See *supra* notes 63–65 and accompanying text.

principle—as refined in *Reno v. Condon*—clearly and categorically insulates the great majority of federal regulation of states from constitutional challenge. As a result, it has generated a remarkably small volume of litigation and seems unlikely to generate much more going forward.¹⁴⁵

D. Positive Implications

Applying the judicial capacity model to the spending power and anti-commandeering principle yields a number of important positive insights. First and foremost, it helps to resolve the conditional spending paradox. From the standpoint of federalism, the federal commandeering and the conditional spending power pose a very similar threat. This is true whether the threat in question is understood as one to political accountability, as the Court and most commentators would have it, or as a threat to state autonomy, as I argued briefly in Part I.¹⁴⁶ From the standpoint of judicial capacity, however, the two areas could not be more starkly different. The conditional spending power underwrites an enormous quantity of federal legislation and seems peculiarly resistant to narrow categorical limits. Federal commandeering has occurred very infrequently and, at least since *Reno v. Condon*, has been defined in sufficiently narrow and categorical terms as to insulate the great mass of direct federal regulation of states from constitutional challenge. Judicial capacity, therefore, provides a principled and compelling explanation for the Court's divergent approach to these areas in the two decades prior to *NFIB*.

Of course, judicial capacity is not the only possible explanation for this divergence, but it is a fully sufficient one. Given the enthusiasm on the Court during this period for limiting federal power and the calls of its academic allies for significant limits on the spending power,¹⁴⁷ capacity considerations seem likely to have played an important role in maintaining the Court's extremely deferential approach. Just how important a role can only be speculated. Perhaps some Justices were persuaded, contrary to the conventional wisdom, that commandeering and coercive conditional spending are meaningfully distinct.¹⁴⁸ Perhaps some were satisfied that no challenged spending legislation actually was coercive. Some may even have been cowed by the prospect of a

145. See Siegel, *supra* note 72, at 1641 (noting the paucity of commandeering litigation since *Reno v. Condon*).

146. See *supra* notes 78, 88, and accompanying text.

147. See *supra* notes 118–120 and accompanying text.

148. See, e.g., Hills, *supra* note 16.

sustained clash with Congress.¹⁴⁹ But even if other factors would have been sufficient to produce the same result, the judicial capacity model demonstrates that things could not have been otherwise without a radical shake-up of basic and widely held judicial norms.¹⁵⁰ This is an extremely important insight.

In addition to offering a backward-looking explanation for the Court's past decisions, the judicial capacity model provides a basis for making theoretically rigorous predictions about the Court's likely future course. With respect to the spending power, the model suggests that the Court is unlikely to impose sustained limits on federal spending authority that are not sufficiently narrow and categorical to insulate the vast majority of spending legislation from challenge. Given the difficulty that courts and commentators have experienced in formulating such limits, it seems likely that the Court will continue its historically deferential approach to the spending power going forward. This topic will, of course, receive more detailed treatment in Part III, which uses the model to assess the likely sustainability of *NFIB*'s anti-coercion principle.

With respect to commandeering, the judicial capacity model is somewhat less helpful. Because the anti-commandeering principle is fully consistent with the limits of judicial capacity, its long-term survival will be driven primarily by other factors—principally, the ideological disposition and respect for precedent of future justices. If the Court's disposition shifts away from the anti-commandeering principle, its consistency with the limits of judicial capacity will do nothing to save it. Of course, the Court could just as well shift in favor of an even broader version of the principle, along the lines proposed by South Carolina in *Reno v. Condon*.¹⁵¹ About this scenario, the judicial capacity does generate a prediction: any attempt to widen the definition of

149. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) (arguing that the Supreme Court frequently trims its sails to avoid conflict with the political branches). Note, however, that this concern may be at least partially endogenous to judicial capacity. See Coan, *supra* note 9, at 457 (“One reason [fears of political recalcitrance] have bite is that sustained recalcitrance would bury the courts under an avalanche of litigation.”). The complex relationship among judicial capacity and other constraints on and explanations of judicial behavior is one I intend to explore further in future work.

150. See *supra* Part II.A (describing the role of judicial norms in defining the limits of judicial capacity). To be clear, I do not mean that no individual case could have come out differently, only that sustained limitation of the spending power was never in the cards in light of the limits of judicial capacity. For further discussion of this point, see *infra* Part III.

151. *Reno v. Condon*, 528 U.S. 141, 149–50 (2000) (“South Carolina contends that the DPPA violates the Tenth Amendment because it ‘thrusts upon the States all of the day-to-day responsibility for administering its complex provisions,’ and thereby makes ‘state officials the unwilling implementors of federal policy.’” (citations omitted)).

commandeering in this manner is likely to fail because it would threaten too large a quantity of federal legislation.¹⁵²

E. Normative Implications

Application of the judicial capacity model to the spending power and anti-commandeering principle also has important normative implications. With respect to the spending power, the model suggests that advocates of more stringent limits would benefit from greater sensitivity to the effects of their proposals on judicial capacity for at least three reasons. First, to the extent that these advocates are motivated to produce lasting constitutional change, the model suggests that the spending power is an unpromising vehicle. Even if they succeed in a case or two, capacity constraints will create strong pressure on the Court to defer to the political process in the long run. Second, the increased litigation that any effort to meaningfully limit the spending power would generate is a cost in its own right, both a financial cost and an opportunity cost, given the Court's finite capacity reserves. If the best conceivable long-run result is a narrow, categorical limit along the lines of *Lopez* and *Morrison*, the Court's capacity and litigants' resources might be better spent elsewhere. Finally, judicial capacity creates significant pressure to cast constitutional limitations in hard-edged categorical terms. This is likely to make any decision limiting the spending power substantially over- and underinclusive with respect to its underlying purpose.¹⁵³

The judicial capacity model also has implications for proponents of reform to the anti-commandeering principle. First, so long as commandeering remains narrowly defined and relatively rare, the model suggests that Neil Siegel's proposal to replace the Court's categorical approach with a more nuanced balancing test should be feasible.¹⁵⁴ Because it is confined to the narrow category of commandeering, such a test would still insulate the mass of direct federal regulation of states from rigorous scrutiny. It would thus pose little danger of inviting more litigation than the Court could handle, while making the law more sensitive to case-by-case variance in the costs and benefits of commandeering. There is a parallel to the Court's approach in *Lopez*, which clearly and categorically insulates congressional regulation of

152. See *supra* note 63 and accompanying text.

153. See Coan, *supra* note 9, at 446.

154. See Siegel, *supra* note 72, at 1635 (“[I]nstances of commandeering should carry a presumption of unconstitutionality when preemption is not a feasible alternative in the short run, the federal mandate is unfunded and expensive, and the federal government makes little effective effort to alleviate reasonable accountability concerns. Only a substantial governmental interest should suffice to overcome this presumption.”).

economic activity from stringent constitutional review, while subjecting the regulation of noneconomic activity to a mushy, multi-factor test.¹⁵⁵ Siegel's approach seems consistent with the limits of judicial capacity for largely the same reasons.¹⁵⁶

Finally, in both the spending power and anti-commandeering contexts, judicial capacity adds a new and important dimension to discussions of comparative institutional competence, which in much of the constitutional literature tend to proceed by rote. Somin's and Siegel's analyses are a good illustration. In otherwise rigorous accounts, their treatment of the comparative competence of courts stands out as peculiarly pro forma. Somin emphasizes the insulation of courts from problematic incentives produced by democratic politics, but fails to consider anything beyond this insulation in assessing the comparative advantage of courts.¹⁵⁷ Siegel, for his part, waves off objections to his complicated balancing proposal with the standard line that courts routinely engage in more complex balancing than his proposal would require.¹⁵⁸ In the end, I believe that Siegel is correct that courts are capable of employing his more nuanced version of the anti-commandeering principle, but he arrives at this conclusion without considering the significant impact that such balancing tests often have on judicial capacity. Somin's analysis of comparative institutional

155. See Coan, *supra* note 9, at 443–44. In subsequent decisions, the Court has tended to treat the regulation of noneconomic activity as per se prohibited, but so long as economic regulations remain categorically insulated from serious review, judicial capacity does not compel this approach. *Id.*

156. It is worth emphasizing the proviso mentioned at the beginning of this paragraph—“so long as commandeering remains narrowly defined and relatively rare.” If the Court adopted a broader definition of commandeering like the one it rejected in *Reno v. Condon* or if commandeering became suddenly, dramatically more common, the uncertainty entailed by Siegel's approach might generate a substantial and possibly unsustainable volume of litigation. Both of these possibilities seem quite unlikely.

157. See Somin, *supra* note 140, at 495–97.

158. See Siegel, *supra* note 72, at 1690–91 (“The Tenth Amendment inquiry recommended above seems less institutionally demanding and open-ended than many modes of analysis that govern distinct areas of constitutional doctrine, including federalism.”). To make matters worse, three of the four examples Siegel supplies are clearly less institutionally demanding than his proposed test. That test requires courts to determine: (1) how feasible preemption is as an alternative to commandeering, (2) how burdensome commandeering would be to state interests, (3) whether the federal government has undertaken “effective effort” to overcome “reasonable accountability concerns,” and (4) whether commandeering serves a “substantial governmental interest.” *Id.* at 1688–89. *Lopez* and *Morrison*, by contrast, are essentially broad categorical rules of deference toward regulations of economic activity, coupled with what has become a per se rule of invalidity for regulations of noneconomic activity and economic inactivity. See Coan, *supra* note 9, at 444. *Dole* would be a closer case were it not completely toothless in practice (or at least it was when Siegel was writing). See *supra* notes 45–46. That someone of Siegel's sophistication can treat questions of comparative institutional competence this casually is evidence of a broader disciplinary neglect.

competence is somewhat more rigorous, but he also fails to consider the limits of judicial capacity. As a result, Somin overlooks a major—and probably a decisive—obstacle to his proposed constitutional reforms.

III. FORECASTING *NFIB*'S FUTURE

The foregoing analysis provides a framework to analyze and predict the sustainability of *NFIB*'s spending power holding. Because the spending power is a high-stakes, high-volume domain, the judicial capacity model predicts that the Court will be strongly constrained to defer to the political process, to cast its decisions in the form of hard-edged categorical rules, or both. *NFIB*'s anti-coercion principle is neither deferential nor cast in the form of a hard-edged categorical rule. If the Court adheres to this rule in its current form, it will cast a pall of uncertainty over a great deal of federal legislation and an avalanche of litigation seems likely to follow. The judicial capacity model therefore predicts that the Court is likely to retreat and retrench from *NFIB*'s anti-coercion principle in relatively short order, replacing that principle with either a rule of categorical deference or a narrow categorical limit on the spending power.

To substantiate these predictions, this Part closely analyzes the spending power holding of Chief Justice Roberts's controlling opinion, as well as the spending power discussion in the joint dissent of Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito, explaining why each seems likely to invite a great deal of litigation. It then identifies signals in both opinions that the justices were aware of this risk, at least on some level, and laid the groundwork for a future retreat. Finally, the Part concludes with an analysis of *NFIB*'s implications for the judicial capacity model.

A. The Roberts Opinion

Chief Justice Roberts's opinion for himself and Justices Stephen Breyer and Elena Kagan holds the Affordable Care Act's Medicaid expansion unconstitutional as a violation of *Dole*'s anti-coercion principle, but it invalidates only the authority of the Secretary of Health and Human Services to terminate the preexisting Medicaid funds of states that choose not to participate in the Medicaid expansion.¹⁵⁹ The expansion itself, therefore, remains valid and operative, and the Secretary remains free to withhold funds provided for the Medicaid expansion

159. *Nat'l Fed'n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012).

from states that decline to participate in the expansion.¹⁶⁰ What the Secretary may not constitutionally do is threaten states that refuse to participate in the Medicaid expansion with withdrawal of their preexisting Medicaid funds. In effect, the Roberts opinion holds the Secretary's termination authority unconstitutional as applied to the termination of a state's preexisting Medicaid funds.¹⁶¹

The rationale for this holding is more than a little murky. Chief Justice Roberts clearly holds that the withdrawal of a state's preexisting funds would violate the anti-coercion principle recognized in *Dole*, but his grounds for this conclusion are anything but clear. At least four factors appear to receive some weight in Chief Justice Roberts's analysis. First is the lack of clear notice in the Medicaid statute as it stood before the enactment of the Affordable Care Act that Congress might undertake such a radical expansion of Medicaid.¹⁶² Second, and closely related, is the dramatic size of the expansion, which Chief Justice Roberts holds to be not a change merely of degree but of kind. In effect, Chief Justice Roberts suggests, the Act's Medicaid expansion amounts to the creation of an entirely new federal program and requires states to participate in that program on pain of losing their funding for the separate and qualitatively distinct preexisting Medicaid program.¹⁶³ Third, Chief Justice Roberts emphasizes the degree to which states have come to rely on Medicaid funds over time.¹⁶⁴ Fourth, and finally, he emphasizes the sheer magnitude of the funds that states stand to lose by refusing to participate in the Medicaid expansion.¹⁶⁵ Together these factors render

160. *Id.* Justices Ruth Bader Ginsburg and Sonya Sotomayor disagree with Chief Justice Roberts that the Medicaid expansion is unconstitutional, but, given the contrary conclusion of seven other justices, vote with Chief Justice Roberts and Justices Breyer and Kagan to hold the unconstitutional portions of the Act severable. *Id.* at 2641–42 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

161. Here it is important that the Act authorizes, but does not require, the Secretary to terminate the preexisting Medicaid funds of participating states. *See id.* at 2607.

162. *Id.* at 2606 (“A State could hardly anticipate that Congress’s reservation of the right to ‘alter’ or ‘amend’ the Medicaid program included the power to transform it so dramatically.”).

163. *Id.* at 2601 (“There is no doubt that the Act dramatically increases state obligations under Medicaid. . . . [T]he Federal Government estimates that its Medicaid spending will increase by approximately \$100 billion per year, nearly 40 percent above current levels.”).

164. *Id.* at 2604 (“[T]he States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid.”).

165. *Id.* at 2605 (“The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”).

the Secretary's authority to terminate a state's preexisting Medicaid funds unconstitutionally coercive.

Exactly what role each of these four factors plays in driving the Court's ultimate conclusions is difficult to discern.¹⁶⁶ But I believe the most sympathetic reading is that Chief Justice Roberts establishes a two-part test for establishing unconstitutional coercion. This test requires the Court first to ask whether a challenged spending condition is one governing the way particular funds are spent. If the answer is no, and only if the answer is no, the test then requires the Court to ask whether states have a practical option to refuse the funds in question.¹⁶⁷ The rationale is that Congress is fully entitled to ensure that federal funds are used in the way that it intends.¹⁶⁸ But it is not entitled to use the conditional offer of federal grants to coerce states into enacting unrelated federal policies.¹⁶⁹

Of course, Chief Justice Roberts concludes that the Affordable Care Act fails at both stages. The requirement that states participate in a qualitatively distinct Medicaid expansion in order to remain eligible to receive funds under the preexisting Medicaid program is not a condition

166. The opinion gives the distinct impression that it was written in haste. If the popular media reports are correct, it may have been. See Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 1, 2012, 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law (reporting that Chief Justice Roberts switched his vote sometime in May 2012).

167. Note that this supplements, but does not supersede, *Dole's* requirement that conditions must be reasonably related to the purpose for which the federal funds in question are appropriated. See *Nat'l Fed'n Indep. Bus.*, 132 S. Ct. at 2604–05 (distinguishing the two tests).

168. *Id.* at 2603–04 (“We have upheld Congress’s authority to condition the receipt of funds on the States’ complying with restrictions on the use of those funds because that is the means by which Congress ensures that the funds are spent according to its view of the ‘general Welfare.’”). Chief Justice Roberts appears to endorse this authority without regard to whether states have a practical option to refuse the funds or conditions in question, though he does not do so explicitly. See *id.* at 2604 (describing *Dole* as proceeding from germaneness to the coercion inquiry *because* the challenged “condition was not a restriction on how the highway funds . . . were to be used”). The strong implication is that, had *Dole* involved a restriction on how highway funds were to be used, that would have ended the case in the government’s favor.

169. The resemblance to Justice O’Connor’s and Baker’s proposed tests is striking. See *supra* notes 135–138 and accompanying text. The difference is that Justice O’Connor and Baker would uphold only conditions on how federal funds are spent, while Chief Justice Roberts is willing to uphold other spending conditions so long as they are not coercive. For a broadly similar reading of Chief Justice Roberts’s opinion, see Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause after NFIB*, 101 GEO. L.J. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128977 (last visited Feb. 6, 2013).

on how those preexisting funds are spent.¹⁷⁰ It is a requirement that states participate in a new and unrelated program. The Court is therefore compelled to ask—as it would not be with conditions on the way that preexisting Medicaid funds are spent—whether states have a practical option to refuse to participate in the Medicaid expansion. Under the conditions established by the Affordable Care Act, the Court answers in the negative, partly on the basis of the states’ long historical reliance on federal Medicaid funds and partly on the basis of the sheer magnitude of the conditional grant involved.¹⁷¹

From the standpoint of judicial capacity, there are several important things to note about this opinion. First, the basic lack of clarity about the content of the Court’s test itself seems likely to generate substantial uncertainty and, at least until that uncertainty is resolved, to generate a substantial increase in the volume of spending power litigation.¹⁷² Second, the Roberts opinion’s threshold germaneness inquiry makes its spending power holding both murkier and more deferential than a more straightforward anti-coercion principle. It makes it murkier because the question of whether a challenged condition governs how particular funds are spent requires significant and difficult judgments of degree, as *NFIB* itself illustrates. Under Chief Justice Roberts’s analysis, any major change to an existing federal spending program might be challenged as not merely an ordinary amendment, but the effective creation of an entirely new program, barring Congress from conditioning funds for the old program on participation in the new.¹⁷³ Surely not all such challenges

170. *Nat’l Fed’n Indep. Bus.*, 132 S. Ct. at 2575 (The Medicaid “expansion accomplishes a shift in kind, not merely degree.”); *id.* at 2606 (“[W]hile Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program.”); *id.* at 2605 (accepting states’ contention that “the expansion is in reality a new program and that Congress is forcing them to accept it by threatening the funds for the existing Medicaid program”).

171. *Id.* at 2605 (surveying these factors and concluding that the Medicaid expansion “leaves the States with no real option but to acquiesce”).

172. See, e.g., Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1, 6 (2013) (“*NFIB* invites a host of new coercion challenges to federal conditional spending programs, but the Court has crafted little guidance for lower courts . . .”).

173. Indeed, there is nothing in Chief Justice Roberts’s opinion to suggest that this issue will be limited to statutory amendments. Many federal spending programs already on the books have multifarious components and require states to participate in all of them as a condition for funding eligibility. See, e.g., Individuals with Disabilities Education Act, 20 U.S.C. § 1416 (2006). If Congress’s styling of these programs as unitary is “irrelevant,” as Chief Justice Roberts holds, what is to stop states from challenging them to protect their ability to participate à la carte? See *Nat’l Fed’n Indep. Bus.*, 132 S. Ct. at 2605. If a state wishes to provide Medicaid only to the elderly and the disabled, but not to needy families, could it not make effectively the same argument that Chief Justice Roberts makes against the Affordable Care Act? Pushed to its logical

would or should prevail under Chief Justice Roberts's analysis. But what matters for judicial capacity purposes is the number that would be called into question to the point of generating litigation.¹⁷⁴ Given the vagueness of what constitutes "in reality a new program,"¹⁷⁵ not just in articulation but in concept, this number seems likely to be substantial.

This impact is likely to be offset, at least to some degree, by the greater deference that Chief Justice Roberts's threshold germaneness inquiry represents as compared to a one-step coercion analysis. Reading between the lines, one major purpose and effect of employing such a threshold inquiry is to insulate important existing programs from coercion challenges. Indeed, had the Court rested its coercion holding solely on the magnitude of the funds that the Affordable Care Act threatens to withhold from nonparticipating states, it would have rendered Medicaid itself constitutionally vulnerable. After all, even before the Affordable Care Act, Medicaid gave the Secretary of Health and Human Services the authority to withhold the entirety of a state's Medicaid funds for noncompliance with many of Medicaid's myriad conditions.¹⁷⁶ To the extent that a threat to withhold these funds is in and of itself coercive—because states lack the practical option to refuse—Medicaid itself would clearly be unconstitutional. Scores of other spending statutes would be called into serious question.

In theory, Chief Justice Roberts's threshold germaneness inquiry would eliminate this risk for any spending program that merely limits the way in which particular federal funds can be spent. Many programs might be described in this way and, at first blush, this might seem to greatly reduce the uncertainty associated with Chief Justice Roberts's test. For reasons already described, however, the germaneness inquiry is too vague to effectively insulate the great mass of spending programs from constitutional challenge. In almost every case, it leaves would-be plaintiffs with a plausible argument that what looks on paper like a unitary federal program is in fact multiple programs and that Congress therefore may not require across-the-board participation as a condition for funding eligibility.

conclusion, this approach would produce the same death by a thousand cuts—for the Court and the *United States Code*—as Justice O'Connor's proposal in *Raich* that the Court make case-specific determinations about Congress's justification for including particular classes of activity in broadly drawn economic regulations. *Gonzales v. Raich*, 545 U.S. 1, 48 (2005) (O'Connor, J., dissenting); see also Coan, *supra* note 9, at 445.

174. Coan, *supra* note 9, at 437 n.39 ("For purposes of judicial capacity, what matters is not how many government actions are actually invalidated but how many are called into question to the point of generating serious litigation.").

175. *Nat'l Fed'n Indep. Bus.*, 132 S. Ct. at 2605.

176. *Id.* at 2607 (citing 42 U.S.C. § 1396c (2006)).

The upshot is that the Roberts opinion's controlling formulation of the anti-coercion principle seems likely to generate very substantial litigation. The judicial capacity model, therefore, predicts that the Court is unlikely to adhere very long to this holding. Instead, the Court is likely to engage in the same kind of retreat and retrenchment it undertook in *Reno v. Condon* after it became clear that its initial articulation of the anti-commandeering principle threatened a much broader swathe of federal legislation than the Court was prepared to review.¹⁷⁷

B. The Joint Dissent

Chief Justice Roberts's opinion expresses the controlling holding of *NFIB* on the spending power. The four dissenting justices would have gone even further. Because the composition of the Court is fluid and because there seems likely in future cases to be significant variation of opinion among the three justices who joined Chief Justice Roberts's opinion,¹⁷⁸ it is worth looking closely at the position of the joint dissenters and considering the implications of that position for judicial capacity.

The spending power analysis of the joint dissenters is simpler and more straightforward than that of the Chief Justice. Where the Chief Justice would ask two questions to determine whether a challenged spending condition is unconstitutionally coercive, the joint dissenters would ask only one. Namely, do the states have any practical option to refuse compliance with the condition in question?¹⁷⁹ This approach avoids the murkiness of Chief Justice Roberts's germaneness inquiry. In *NFIB*, it spared the dissenters from inquiring whether the Affordable Care Act's Medicaid expansion was truly a new federal program as opposed to a change or amendment to an existing program. All the dissenters asked was whether states have a practical option to refuse participation in the Medicaid expansion when the entirety of their federal Medicaid funding is at stake.¹⁸⁰ The dissenters did not find this to be a difficult question. In answering it in the negative, they focused mostly on

177. Cf. Coan, *supra* note 9, at 443–45 (explaining *Raich*'s declawing of *Lopez* and *Morrison* in similar terms).

178. Chief Justice Roberts and Justices Kagan and Breyer do not exactly see eye-to-eye on most issues, including issues of federal power.

179. *Nat'l Fed'n Indep. Bus.*, 132 S. Ct. at 2661 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting) (“[T]he legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States’ choice to accept or decline the offered package. Therefore, if States really have no choice other than to accept the package, the offer is coercive . . .”).

180. *Id.* at 2662 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting).

the same factors as Chief Justice Roberts.¹⁸¹ Most important among these was the enormous size of the Medicaid program.¹⁸²

If the joint dissent had stopped here, its approach would have posed exactly the same judicial capacity problem that prevented the Court from putting teeth in *Dole*'s anti-coercion principle at any earlier point in its history. A very sizeable fraction of conditional spending legislation can be plausibly thought to deny the states any practical option to refuse.¹⁸³ A rigorous application of a straightforward anti-coercion principle would invalidate much of this legislation and call even more of it into sufficiently serious question as to generate litigation. It would therefore produce a massive strain on the Court's capacity.

Portions of the joint dissent, however, appear to go even further.¹⁸⁴ In addition to emphasizing the enormous size of the Medicaid program, these portions of the opinion seem to flirt with the view that all federal taxation is a presumptively suspect appropriation of revenues that would otherwise belong to the states.¹⁸⁵ This well-known academic view casts a dark constitutional shadow on *any* federal spending program that requires states to take actions they would not otherwise wish to in order to qualify for access to federal funds. How, its adherents ask, can the government of Virginia or Texas be expected to stand by while federal tax revenues extracted from its citizens are distributed to the citizens of other states? Even if these states possess the fortitude to refuse the federal offer, this view of federal taxation suggests there is something coercive and illegitimate about the making of such an offer in the first place.¹⁸⁶ Indeed, its most prominent academic advocate has advocated a presumption of *unconstitutionality* for conditional spending

181. *Id.* at 2661–66 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting).

182. *Id.* at 2657 (“For the average State, the annual federal Medicaid subsidy is equal to more than one-fifth of the State’s expenditures.”).

183. *See supra* Part II.B.

184. What follows is a speculative interpretation of the gestalt of the joint dissent.

185. *See Nat’l Fed’n Indep. Bus.*, 132 S. Ct. at 2661–62 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting) (“Even if a State believes that the federal program is ineffective and inefficient, withdrawal would likely force the State to impose a huge tax increase on its residents, and this new state tax would come on top of the federal taxes already paid by residents to support subsidies to participating States.”); *id.* at 2662 n.13 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting) (accepting exclusive federal claim on the money state residents pay in federal taxes, but dismissing it as “a formal matter”); *see also* Baker, *supra* note 42, at 1937 (“[W]hen the federal government offers the states money, it can be understood as simply offering to return the states’ money to them, often with unattractive conditions attached.”).

186. *See* Bagenstos, *supra* note 46, at 376 (“In Baker’s view, *federal* taxation is theft—not from the taxpayers, but from the states (who are *really* entitled to the revenues).”).

legislation.¹⁸⁷ To be clear, this is just one possible, and admittedly speculative, reading of the dissenters' spending power analysis. But if accurate, it is one that would call into question even more spending legislation than their muscular version of *Dole's* anti-coercion principle.

Of course, being in dissent, the joint dissenters were under less pressure to consider the full consequences of their position. But the judicial capacity model strongly suggests that neither a straightforward anti-coercion principle nor the even more expansive version of that principle the dissent seems at times to flirt with would be sustainable in the long run, regardless of the composition or the ideological proclivities of the Court.

C. Lines of Retreat

The predictions of the judicial capacity model receive some support in portions of both the Roberts opinion and the joint dissent that are most naturally read as preparing for a retreat and retrenchment from the vague anti-coercion principles that these opinions endorse. There are several passages of this sort in both opinions. First, both opinions emphasize Medicaid's uniqueness. In particular, they emphasize the enormous size of federal Medicaid grants in comparison to the grants provided under any other federal program.¹⁸⁸ Second, both opinions sign onto precedents embracing a broad conditional spending power. The Roberts opinion goes so far as to endorse use of the spending power to "encourage a State to regulate in a particular way, and influence a State's policy choices" in ways Congress could not require directly.¹⁸⁹ Third, despite the breadth of its coercion analysis, the joint dissent appears to recognize the gravity of the issue and endorses an extremely deferential standard of review under the anti-coercion principle. Only when coercion is "unmistakably clear" does the dissent endorse the invalidation of conditional spending legislation.¹⁹⁰ Fourth, Chief Justice Roberts's opinion strongly implies that the conditions embodied in Medicaid itself, despite its enormous size

187. See Baker, *supra* note 42, at 1935 ("[T]he courts should presume invalid those offers of federal funds to the states which, if accepted, regulate them in ways that Congress could not directly mandate.").

188. See *Nat'l Fed'n Indep. Bus.*, 132 S. Ct. at 2604 ("The Federal Government estimates that it will pay out approximately \$3.3 trillion between 2010 and 2019 in order to cover the costs of *pre-expansion* Medicaid."); *id.* at 2662–63 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting) ("Medicaid has long been the largest federal program of grants to the States. In 2010, the Federal Government directed more than \$552 billion in federal funds to the States. Of this, more than \$233 billion went to *pre-expansion* Medicaid." (citations omitted)).

189. *Id.* at 2601–02 (quoting *New York v. United States*, 112 S. Ct. 2408, 2423 (1992)).

190. *Id.* at 2662 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting).

and the states' apparent inability to refuse participation, are perfectly constitutional.¹⁹¹ If the implication is accurate, it suggests a willingness to make peace with the largest and most practically coercive of the remaining conditional spending legislation.

All of these signals suggest that the Court is aware, on at least some level, of the difficulties it would encounter in rigorously enforcing a broad and standard-like anti-coercion principle in future cases. Past experience suggests that its retreat and retrenchment from the broad holding of *NFIB* will take place in one of two ways. First, lower courts on the front lines of the wave of litigation that *NFIB* seems sure to spawn might pick up on these signals and turn back all, or virtually all, new spending power challenges. The dynamic is given greater force by the Court's greater reluctance to grant review in cases where a federal statute is upheld than in cases where it is struck down.¹⁹² The end result is the transformation of a stringent and standard-like holding of the Supreme Court into a rule that all relevant parties understand as one resembling categorical deference. Something like this seems to have happened in the aftermath of *Lopez* and *Morrison*.¹⁹³

Alternatively, if lower courts run with the anti-coercion principle established in *NFIB*—as seems distinctly possible given the number of movement conservative judges appointed during President George W. Bush's two terms¹⁹⁴—the Court itself can point to the implicit limiting principles contained in its *NFIB* decisions. In doing so, it has essentially two choices. It can use these principles as a basis for crafting a narrower and more categorical limit on the spending power, or as a basis for converting *NFIB*, in effect, into another *Bush v. Gore*,¹⁹⁵ a constitutional ruling good for one case only. Given the emphasis on Medicaid's uniqueness in both Chief Justice Roberts's opinion and the joint dissent, and given the familiar difficulty of devising narrow, categorical limits on the spending power, the latter seems like the likelier course.

191. See *supra* notes 168, 170.

192. See Coan, *supra* note 9, at 439–40.

193. See Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369.

194. Robert A. Carp et al., *Right on: The Decision-Making Behavior of George W. Bush's Judicial Appointees*, 92 JUDICATURE 312, 315–16 (2009) (“President Bush was able to transform a lower court judiciary that was about evenly divided between Republicans and Democrats into one in which GOP-appointed judges clearly dominate.”).

195. 531 U.S. 98, 109 (2000) (“Our consideration is limited to the present circumstances.”).

D. Implications for the Judicial Capacity Model

NFIB illustrates an important point about the judicial capacity model. That model does not, and could not, purport to predict the outcomes in every individual case.¹⁹⁶ Rather, its aim is to predict general trends in the Supreme Court's constitutional decision making. In high-volume and high-stakes domains, the limits of judicial capacity create strong pressure on the Court to defer to the political process, adopt hard-edged categorical rules, or both. But the Court clearly retains some room in individual cases to depart from these approaches. The reason it retains this flexibility is that one decision does not, on its own, produce an avalanche of litigation. It takes time for the constitutional litigation bar and other stakeholders to digest and understand a ruling. Indeed, the full import of a ruling remains uncertain until it is fleshed out in subsequent decisions of the lower courts and eventually the Supreme Court. As a result, while a decision like *NFIB* is sure to generate significant litigation, that litigation is likely to remain within manageable bounds unless and until the Court makes clear in future cases that it is willing to apply its anti-coercion principle rigorously. Until that time, a constitutional litigation bar that is familiar with—has in some sense internalized—the Court's unwillingness to invite an avalanche of litigation is unlikely to mobilize to create one.

CONCLUSION

The judicial capacity model sheds important light on the spending power and anti-commandeering principle, and in turn these doctrinal areas shed important light on the judicial capacity model. The model explains the Court's historical deference to the spending power and the historical divergence between the Court's treatment of the spending power and the anti-commandeering principle. It also provides a theoretical framework for rigorously assessing the sustainability of *NFIB*'s spending power holding. In turn, the broad consistency of the Court's decisions with the judicial capacity model and the ability of that model to resolve a persistent doctrinal paradox provide further support for the model beyond the examples discussed in my earlier work. Much more work clearly remains to be done but even at this early stage, it seems possible to say that any attempt to predict the Court's

196. See Coan, *supra* note 9, at 453 (“I do not mean to claim that the Court will always recognize perfectly what kind of decisions would invite an overwhelming volume of litigation. I believe that judges generally have a strong intuitive understanding of what kinds of decisions invite large volumes of litigation. But judges obviously can and do make mistakes.”).

constitutional decisions or to urge a particular course on the Court must take account of the limits of judicial capacity.