UNDERSTANDING THE FAULTY PREDICTIONS REGARDING THE CHALLENGES TO HEALTH REFORM

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Professor David Hyman has provided a detailed and thoughtful exposition of two types of failures on the part of law school commentators regarding the constitutional challenges to the Patient Protection and Affordable Care Act ("ACA")[1]: (1) their failure to predict the outcome of the Commerce Clause and Necessary Proper Clause challenges to the ACA's individual mandate; and (2) their failure to take seriously, much less predict the outcome of, the states' challenge to the mandated expan-

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1. David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2014 U. ILL. L. REV. 805.

sion of Medicaid contained in the ACA. Professor Hyman does a thorough job in documenting these failures and then identifies factors that might have contributed to these failures. In his discussion, Professor Hyman expressly declines to discuss legal doctrine or the merits of the Supreme Court's decision in *NFIB v. Sebelius*[2]: "This Article does not examine whether or not the Supreme Court and lower courts 'got it right'. . . . Those inclined to argue that the nation's elite law professors were right and the Supreme Court was wrong should find someone else to argue with."[3]

This Essay will proceed differently. It will focus on doctrinal issues and concentrate on one of Hyman's contributory factors—that a law professor's prior beliefs influence how he or she perceives an argument or evolution of doctrine. It will consider both the individual mandate issue and the spending issue that underlay the mandated expansion of Medicaid in the ACA. And it will filter the discussion through the experiential prism of someone who had considerable involvement in the Medicaid component of the *NFIB* decision, advocating[4] and predicting its outcome.[5]

I. THE ACA CHALLENGERS' CONTENTIONS: THE VIEW FROM 20,000 FEET

Law operates and is influenced by broad conceptual themes or principles and by preexisting legal doctrine. In the context of the states' challenge to the ACA, three broad themes won the day. Their success was facilitated by the fact that preexisting doctrine, while suggestive, was not sufficiently or firmly developed so as to command a different outcome. This comment will focus on two of these—Broad Principles #1 and #3.

2. 132 S. Ct. 2566 (2012).

3. Hyman, *supra* note 1 at 807.

4. *See* Brief of James F. Blumstein as Amicus Curiae in Support of Petitioners (Medicaid Issue), NFIB v. Sebelius, 132 S. Ct. 2566 (No. 11-400) [hereinafter Brief of Blumstein, NFIB v. Sebelius]; Brief for James F. Blumstein as Amicus Curiae in Support of Cross-Appellants the State of Florida, et al., Florida v. United States Dep't of Health and Human Servs., No. 11-11067 (11th Cir. 2011); *Jim Patterson*, *Supreme Court Should Strike Down Medicaid Expansion: Vanderbilt Expert*, VANDERBILT NEWS (Jan. 20, 2012, 2:17 PM), http://news.vanderbilt.edu/2012/01/blumstein-medicaid/.

5. *See* James F. Blumstein, *Medicaid Mandate Is a Troubling Issue, Room for Debate*, N.Y. TIMES (Mar. 26, 2012), http://www.nytimes.com/roomfordebate/2012/03/25/on-the-health-care-law-is-the-court-being-thoughtful-or-partisan/medicaid-mandate-presents-troubling-issues?gwh2545F1ECDFC29C433AAFC4F0AB6E0952&gwt=pay; Alyssa Creamer, *James Blumstein, Vanderbilt University Law Professor, Has Medicaid Mandate Challenge Brief Cited In Supreme Court Ruling on Affordable Care Act*, HUFFINGTON POST (July 5, 2012, 4:14 PM), http://www.huffingtonpost.com/2012/07/05/james-blumstein-vanderbilt-health-care-law_n_1651919.html?show_comment_id=166370311#comment_166370311; *Outliers: Surprised by the ACA Ruling? This Prof Wasn't*, MODERN HEALTHCARE (July 14, 2012, 12:01 AM), http://www.modernhealthcare.com/article/20120714/MAGAZINE/307149970#; James F. Blumstein, *A New Look at the Constitutionality of Obamacare: Why the Expanded Medicaid Mandate in the Affordable Care Act Is Unconstitutional*, LAFFER ASSOCIATES NEWSLETTER, Apr. 4, 2011.

A. Broad Principle #1: The Need for Constraints on Federal Power

Unlike state governments, which have inherent police powers to act in the public interest, the federal government is one of enumerated powers.[6] For the federal government to act, it must identify a source of authority under the Constitution.[7] That is, it "must show that a constitutional grant of power authorizes each of its actions."[8]

If the Commerce Clause and the Necessary and Proper Clause are interpreted to permit the regulation of inactivity[9]—forcing individuals to purchase a product in a market that they would not otherwise purchase[10]—then federal power becomes akin to the inherent police powers enjoyed by state governments.[11] That would fundamentally alter the nature of the federal government, transforming its powers from delimited and enumerated to far-reaching and inherent.

Federal power exists to regulate already-existing commercial activity, but, without transforming the nature and character of federal authority, it cannot extend to include forcing an unwilling buyer to purchase a product or engage in an economic activity.[12] In constitutional terms, that is not the regulation of commerce but the regulation of something else that is beyond the scope of federal power under the Commerce Clause. "Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority . . . bring[ing] countless decisions an individual could *potentially* make within the scope of federal regulation . . ." potentially "justify[ing] a mandatory purchase to solve almost any problem," and furnishing the federal government with "vast power" not only to "regulate much of what we do" but also "what we do not do."[13]

From a preexisting doctrinal point of view, one could certainly argue that the federal government has authority to regulate conduct, even noneconomic conduct, that has a substantial effect on commerce.[14] The line between economic and noneconomic subjects of regulation (with a

6. *NFIB*, 132 S. Ct., at 2577–78 (opinion of Roberts, C.J.) (noting that the "Federal Government 'is acknowledged by all to be one of enumerated powers'" so that "[i]f no enumerated power authorizes Congress to pass a certain law, that law may not be enacted" and distinguishing the power of states, which "do not need constitutional authorization to act") (internal citations omitted).

7. *Id.* at 2587–89.

8. *Id.* at 2578.

9. *Id.* at 2586 ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. . . . [T]he power to regulate assumes that there is already something to be regulated.") (emphasis in original).

10. *Id.* at 2587 ("The individual mandate . . . compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.") (emphasis in original).

11. *Id.* at 2586.

12. *Id*. at 2589 (noting that federal power under the Commerce Clause is "broad" but "has limits" and that the "Government's theory would erode those limits").

13. *Id*. at 2587–89 (emphasis in original).

14. *See* Gonzales v. Raich, 545 U.S. 1 (2005).

substantial effect on commerce) was supported by some cases[15] but rejected most recently in the case that allowed federal regulation of the growing and use of medical marijuana.[16]

But previous cases had all involved some form of negative prohibitions on private conduct, such as restrictions on growing wheat for home consumption[17] and on growing and using marijuana for medical purposes.[18] For a court to accept the broad 20,000 foot limiting principle, it would not have to overrule any preexisting precedent;[19] it would only have to draw a line that distinguished the regulation of economic activity from the regulation of inactivity. The Supreme Court could say, in effect, "no further erosion of limits on federal power under the Commerce Clause" without having to undo any specific, binding precedent.[20] Whether to draw such a line depends on broader, prior views about the worthiness and importance of Broad Principle #1 and can be (and was successfully) argued at that level.

B. Broad Principle #2: Judicial Deference Regarding Economic and Social Welfare Policy

The Supreme Court should not intrude in the political process on matters of social and economic policy[21] by invalidating signature, albeit far-reaching, legislation of political actors. This principle reflects the Court's modern response to perceived overreaching of judicial involvement in these areas under the aggressive substantive due process regime of *Lochner v. New York*.[22] Cases reflecting rejection of *Lochner* demonstrate a strong aversion to judicial intervention to override political choices by popularly elected public officials.[23] These substantive due process cases have their Commerce Clause counterparts.[24]

15. *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

16. *See Gonzales*, 545 U.S. at 17.

17. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

18. *See Gonzales*, 545 U.S. 1.

19. NFIB v. Sebelius, 132 S. Ct. 2566, 2590 ("Each one of our cases . . . involved preexisting economic activity.").

20. Judge Sutton of the United States Court of Appeals for the Sixth Circuit concluded that existing doctrine warranted upholding the individual mandate of the ACA but recognized that existing doctrine pushed the limits of federal power pursuant to the Commerce Clause. As a Court of Appeals judge, his approach was to rule in accordance with a reasonable interpretation of existing doctrine but to note that the Supreme Court might wish to cabin existing doctrine; such a decision, in his judgment, was for the Supreme Court to make. *See* Thomas More Law Ctr. v. Obama, 651 F.3d 529, 555–66 (6th Cir. 2011) (Sutton, J., concurring).

21. Ferguson v. Skrupa, 372 U.S. 726, 730–32 (1963).

22. 198 U.S. 45 (1905).

23. *See* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487 (1955) (deferring to legislative judgment in area of health and welfare policy).

24. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964) (upholding under the Commerce Clause federal racial anti-discrimination law as applied to a neighborhood restaurant that did not cater to interstate travelers but purchased some of its food in interstate commerce).

This insight is historically associated with the scholarship of Professor Alexander Bickel[25] and exalts what are described as the "passive virtues."[26] The ACA was President Obama's first and major priority and a far-reaching social welfare initiative; thus, consideration of the "passive virtues" should give the Supreme Court pause before it enters into the political arena to undo the results of the political process regarding legislation of this type and magnitude.[27]

Chief Justice Roberts' decision for a majority of the Court virtually admits that he and his colleagues in the majority[28] were seeking out a way to avoid invalidating the individual mandate of the ACA.[29] The Chief Justice and four other colleagues were of the strong conviction that Broad Principle #1 dictated drawing a line against federal regulation under the Commerce Clause of inactivity.[30] But, acting under Broad Principle #2, the Chief Justice gave what he acknowledged to be an unnatural interpretation of the individual mandate as a tax[31] (despite Congressional use of the term "penalty" and its arguable disavowal of the "tax" label by substituting the term "penalty" for the earlier-used term "tax" in the legislative drafting process).[32]

But, again, the Court majority did not have to overrule any preexisting case(s) to reach its conclusion—only to stretch an interpretation of what Congress actually did in imposing a penalty on those who failed to

25. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1957).

26. *See* Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

27. The "passive virtues" have their "subtle vices," as they politicize legal decisionmaking in the name of depoliticizing the Supreme Court. *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 13 (1964) (describing the prudential considerations underlying the passive virtues as "law debasing"); *see also* James F. Blumstein, *The Supreme Court's Jurisdiction – Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895, 914 (1973) (describing the passive virtues, in the context of screening for discretionary review, as "suffer[ing] from the notion that there is a single well-defined end for society").

28. Justices Ginsburg, Breyer, Kagan, and Sotomayor joined this component of the Chief Justice's opinion. NFIB v. Sebelius, 132 S. Ct. 2566, 2609 (2012) (Ginsburg, Breyer, Kagan, and Sotomayor, JJ., concurring) (joining Section III.C of the Chief Justice's opinion upholding the individual mandate under the federal government's taxing power).

29. *Id.* at 2600–01, 2594 (opinion of Roberts, C.J.) (finding the individual mandate in the ACA justifiable as a tax by adopting a "saving construction" since the Court should "construe a statute to save it, if fairly possible," since "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality" (quoting Hooper v. California, 155 U.S. 648, 657 (1895)), and since the individual mandate could not be constitutionally justified under the Commerce Clause or the Necessary and Proper Clause).

30. *Id.* at 2584–2591, 2600–01; *id*. at 2643 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

31. *Id.* at 2600–01 (opinion of Roberts, C.J.) (noting that the ACA "reads more naturally as a command to buy insurance than as a tax" but nevertheless interpreting the statute as a tax "as a saving construction" because of the Court's "duty to construe a statute to save it, if fairly possible").

32. *Id.* at 2594–98 (recognizing Congress' use of the term "penalty" not "tax," but declining to be bound by Congress' labeling in the constitutional context, concluding that "labels should not control here"). The tax component of the Chief Justice's opinion was a majority holding of the Court, joined by Justices Ginsburg Breyer, Sotomayor, and Kagan. *Id.* at 2628–29 (Ginsburg, J., concurring).

comply with the individual mandate to purchase medical insurance.[33] And a traditional canon of construction supported the stretching—courts should interpret a statute in such a way as to avoid a finding of unconstitutionality if such an interpretation is reasonably available.[34]

C. Broad Principle #3: States Must Receive Clear Notice of Their Obligations When They Sign Up For Medicaid, and They May Not Be Coerced by the Imposition of Costly, After-the-Fact, and Unforeseeable Conditions on Their Preexisting Medicaid Programs

1. Coercion and the Anti-Commandeering Principle

Under the Anti-Commandeering Principle,[35] states cannot be forced to sign up for federal spending programs,[36] such as Medicaid, which are conceived of as analogous to contracts[37] between the federal government and participating states.[38] States must be induced to participate, by entering into a contract with the federal government.[39] The new Medicaid terms of the ACA,[40] which states had to embrace or else risk all funding of their preexisting Medicaid programs,[41] constituted coercion[42]—excessive or predatory leveraging in the context of contract modification, violating the functional limit on federal commandeering[43] that applied in the context of the federal spending power.[44]

The Court had long recognized that there was a line to be drawn between financial inducement and coercion,[45] but it had never operationalized the coercion concept or applied it to invalidate a new term in a cooperative federalism program. The critical doctrinal move was to apply

33. *Cf.* Judge Sutton's analysis of the tax issue, declining to find the ACA's individual mandate to be a tax under the federal taxing power. Thomas Law Ctr. v. Obama, 651 F.3d 529, 550–54 (6th Cir. 2011) (Sutton, J., concurring).

34. *See* Clark v. Martinez, 543 U.S. 371, 381–83 (2005) (discussing canon of statutory construction that counsels interpretation of a statute so as to avoid potential constitutional concerns).

35. *See* New York v. United States, 505 U.S. 144 (1992).

36. *Id.* at 188.

37. Barnes v. Gorman, 536 U.S. 181, 186 (2002); James F. Blumstein, NFIB v. Sebelius *and Enforceable Limits on Federal Leveraging: The Contract Paradigm, The Clear Notice Rule, and The Coercion Principle*, 6 J. HEALTH & LIFE SCI. L. 123, 129–30 (Feb. 2013).

38. James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011-2012 CATO SUP. CT. REV. 67, 71–73 (2012).

39. *See generally New York*, 505 U.S. 144.

40. States were obliged to cover all citizens with incomes up to one hundred thirty-three percent of the federal poverty level, or face the loss of their entire federal Medicaid program. NFIB v. Sebelius, 132 S. Ct. 2566, 2601 (2012). Since five percent of income was disregarded, the effect was to obligate states to expand their Medicaid coverage to encompass all citizens with incomes under one hundred thirty-eight percent of poverty. *Id.*

41. *Id*. at 2604.

42. Blumstein, *supra* note 37, at 135–43.

43. "The limit against 'coercion' in federal-spending cases indicates that anti-commandeering has a functional dimension in conditional-spending cases that is a counterpart to its more formalistic sibling in the regulatory context." Brief of Blumstein, *supra* note 4, at 21.

44. Blumstein, *supra* note 38, at 92–93.

45. South Dakota v. Dole, 483 U.S. 203, 211 (1987).

the anti-commandeering concept, a formal rule in the regulatory context, in the spending context as a functional counterpart[46]—something that *Pennhurst* ostensibly had already done without explicitly saying so.[47]

The use of contract doctrine also provided a doctrinal framework for operationalizing the coercion concept as a form of excessive leveraging in the context of the Medicaid expansion. Consider the following contracts case as an illustration of the problem—in the nature of an allegory of the coercion at stake in the ACA's expanded Medicaid provision:

> A fishing vessel goes out to sea. Once the ship is in fishing waters, the crew demands a substantial wage increase as a condition of performing its work. That is predatory leveraging and unenforceable at contract modification. In contrast, it is entirely permissible for the crew to demand higher wages before the ship sets sail—i.e., during the contract-formation stage.[48]

2. The Clear Notice Rule

In addition, when states accept the federal offer and sign up for Medicaid, their conduct must be knowing and voluntary.[49] This is the Clear Notice Rule. The very legitimacy of the use of the federal spending power rests on whether a state voluntarily and knowingly accepts the terms of the Medicaid program/contract.[50] States cannot knowingly accept the terms of the deal if they are unaware of the conditions imposed or unable to ascertain in advance what is expected of them.[51] To protect state interests in deciding whether to sign up for a spending program,[52] the Clear Notice Rule requires that the federal government provide clear and unambiguous notice of what conditions attach to federal spending.[53] This enables states to "exercise their choice knowingly, cognizant of the consequences of their participation."[54] It also protects states against after-the-fact blind-siding; that is, against "surprising participating States with postacceptance or 'retroactive' conditions."[55] The contention in

46. *See supra* note 43 and accompanying text; Blumstein, *supra* note 37, at 135 (noting that *NFIB* "expressly applied the anti-commandeering principle, developed in the context of Commerce Clause regulation, to the federal spending context").

47. Blumstein, *supra* note 38, at 88–93.

48. Brief of Blumstein, *supra* note 4, at 8–9 (referencing Alaska Packers Ass'n v. Domenico, 117 F. 99 (9th Cir. 1902)).

49. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

50. *Id.*; NFIB v. Sebelius, 132 S. Ct. 2566, 2602 (2012); *see* Brief of Blumstein, NFIB v. Sebelius, *supra* note 4, at 20 (noting that, under *Pennhurst*, "the very 'legitimacy' of federal spending-power programs turns on states' authority to decide whether to participate or not").

51. *NFIB*, 132 S. Ct. at 2602 (opinion of Roberts, C.J.) (quoting *Pennhurst*, 451 U.S. at 17).

52. The state and its officials must "clearly understand" the conditions that attach to a state's decision to enter into a cooperative federalism contract. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 298 (2006). The relevant perspective is that of a state official "engaged in the process of deciding" whether to enter into a federal-state contract with its attendant conditions. *Id.* at 296.

53. *Pennhurst*, 451 U.S. at 17; Blumstein, *supra* 38, at 93–105.

54. *Pennhurst*, 451 U.S. at 17.

55. *Id.* at 25.

NFIB (accepted by the Supreme Court) was that to be effective the notice to states had to take place when they signed up for Medicaid (contract formation), not when the ACA added substantial and unforeseeable terms and conditions that had substantial financial consequences for states (*i.e.* at contract modification).[56]

The Clear Notice Rule has been applied since it was announced in 1981 in *Pennhurst*.[57] The issue confronted in the ACA litigation (*NFIB*) was when the Clear Notice Rule should attach—at contract formation (when states signed up for Medicaid) or at contract modification (when the ACA's new terms applied).[58] *NFIB* concluded that in the context of the ACA's "transformation" of preexisting Medicaid, the *Pennhurst* Clear Notice Rule applied when the states signed up for Medicaid since 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."[59]

* * *

These three Broad Principles are critical to an understanding of the challenges to the ACA. Preexisting doctrine was able to accommodate these principles without overruling precedent. So, the intellectual battle was and could be doctrinally waged at the level of broad principle and its implications. To be able to handicap the outcome of the challenges to the ACA, a commentator not only had to be aware of these broad themes but also had to be sensitive to the seriousness of the principles themselves. Not taking the principles seriously, or, worse, treating them dismissively or derisively, is not conducive to good handicapping. Professor Hyman provides examples of these phenomena, which in my judgment furnish a strong part of the explanation of the predictive lapses of the commentators.

II. THE DOCTRINAL DEFENSES OF ACA: A THREAT TO BROAD PRINCIPLES #1 AND #3

Sometimes one is known by the company one keeps. In the case of the challenges to the ACA, one can see how some defenses—of the individual mandate and of the Medicaid expansion—were threatening to the existence of the Broad Principles #1 and #3. Their serious assertion by the federal government and their seeming acceptance by commentators indicated that the advocates and the commentators were not listening to or at least not being sufficiently attentive to the 20,000 foot claims. In

56. I. Glenn Cohen & James F. Blumstein, *The Constitutionality of the ACA's Medicaid-Expansion Mandate*, 366 NEW ENG. J. MED. 103, 104 (2012).

57. 451 U.S. 1 (1981).

58. *See* Brief of Blumstein, *supra* note 4, at 22–25 (noting that the Clear Notice Rule is "constitutionally-derived," protects state decisionmaking through unambiguous disclosure, and guards against "federal bait-and-switch tactics—after-the-fact imposition of conditions on federal spending programs").

59. NFIB v. Sebelius, 132 S. Ct. 2256, 2606 (2012) (opinion of Roberts, C.J.).

this regard, Professor Hyman's report that "law professors were openly contemptuous of the suggestion that [ACA] raised serious constitutional issues" is particularly revealing, especially the suggestion of some commentators to the effect "that the lawyers who had signed briefs challenging the constitutionality of [ACA] would be subjected to Rule 11 sanctions."[60] This is really over-the-top stuff,[61] and a commentator who embraces that type of position is unlikely to be attuned to the depth and earnestness of the arguments undergirding the Broad Principles.

Commerce Clause. The government contended that a decision not to purchase medical insurance was a form of activity; at some point, we all will need some type of medical care, and a decision not to insure is an economic activity with implications in the market.[62]

At oral argument, the government deemphasized this argument, and with good reason, but the intellectual damage had been done.[63] When one confronts such a fundamental contortion of analysis[64] and doctrine,[65] an advocate of Broad Principle #1 recognizes the depth of the potential threat to the notion that the Commerce Clause delimits the scope of federal power in some meaningful manner.[66] As recognized by the joint opinion of Justices Scalia, Kennedy, Thomas, and Alito, "if every person comes within the *Commerce Clause* power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end."[67] Although it is fair to ask whether the distinction between action and inaction is as bright a line as proponents would argue, equating action and inaction in the Commerce Clause context would leave open broad and uncharted federal powers, eroding the paradigm of the federal government as one of enumerated powers.[68] Seeming to understand how off-putting and poten-

60. Hyman, *supra* note 1, at 812.

61. Professor Hyman even quotes a commentator who drew parallels between the ACA's challengers and defenders of slavery and segregation. *Id.*

62. The government's position was that "the uninsured as a class are active in the market for health care, which they regularly seek and obtain." *NFIB* 132 S. Ct. at 2589 (opinion of Roberts, C.J.) (internal citation omitted).

63. Chief Justice Roberts noted his concern about the far-reaching character of the government's "active in the market for health care" argument: "The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States." *Id.* at 2591 (emphasis in original).

64. "[O]ne is not now purchasing the health care covered by the insurance mandate simply because one is likely to be purchasing it in the future." *Id.* at 2649 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). "Such a definition of market participants is unprecedented, and were it to be a premise for the exercise of national power, it would have no principled limits." *Id.* at 2648.

65. "[O]ne does not regulate commerce that does not exist by compelling its existence." *Id*. at 2644 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). And federal power "to *regulate* commerce presupposes the existence of commercial activity to be regulated." *Id*. at 2586 (opinion of Roberts, C.J.) (emphasis in original).

66. *See supra* text accompanying note 13.

67. *NFIB*, 132 S. Ct. at 2648 (emphasis added).

68.

> The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other constitutional con-

tially threatening this argument was, the federal government seemed to play down the approach at oral argument, but the justices would not allow the Solicitor General to walk it back.

Advocates and commentators who could not see the analytical concerns underlying the blurring of the action/inaction distinction, which has parallels in varied areas of constitutional law such as state action,[69] anti-commandeering,[70] and euthanasia[71] could not be expected to understand the concerns raised by this type of argument for those who take Broad Principle #1 seriously. This is especially true when other, less threatening arguments were available.[72] The government emphasized those other positions at oral argument, but the Solicitor General was stuck defending the broader, less sensitive position that called Broad Principle #1 into question.

Expanded Medicaid. The government's broad argument against the states' challenge to the mandated expansion of Medicaid, advanced by Justice Ginsburg in her dissent,[73] was this: a judicially enforceable "coercion" limitation on federal conditional spending was a standardless, non-justiciable principle.[74] The "coercion" limitation in earlier cases was dictum, had never been applied in a Supreme Court case,[75] and should not be the source of judicially enforceable restraints on overreaching federal conditions on preexisting spending programs, such as Medicaid.

A commentator who would embrace such a position of judicial non-enforcement would not foresee how threatening such a stance is to those who take seriously Broad Principle #3. Medicaid is the single largest

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> trols) could *not* be justified as necessary and proper for the carrying out of a general regulatory scheme. It was unable to name any. . . . [T]he proposition that the Federal Government cannot do everything is a fundamental precept.

Id. at 2647 (citations omitted) (emphasis in original).

69. Lugar v. Edmondson Oil Co., 457 U.S. 922, 926 (1982); Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978).

70. Blumstein, *supra* note 38, at 107–08.

71. Washington v. Glucksberg, 521 U.S. 702, 725-26 (1997); Vacco v. Quill, 521 U.S. 793, 800-02 (1997).

72. The more promising arguments were those linked to the special problem of an insurance market when insurance issuers must guarantee issuance of a policy and disregard preexisting conditions (guaranteed issue). Regulation of the insurance market would be permissible regulation of commerce, and the individual mandate is arguably related to the guaranteed issue provision, a means under the Necessary and Proper Clause to achieving a legitimate Commerce Clause objective. *See*, *e.g.*, United States v. Darby, 312 U.S. 100, 121 (1941) (upholding federal minimum wage and maximum hour legislation as reasonably related to federal prohibition on shipping goods in interstate commerce if manufactured in violation of federal wage and hour standards). During the oral argument, the Solicitor General sought to lead with those arguments but was derailed by the justices, who focused on and were troubled by the far-reaching implications of the Commerce Clause contentions. Transcript of Oral Argument at 3–10, NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398).

73. *NFIB*, 132 S. Ct. at 2641.

74. "Justice Ginsburg's position, in essence, was that no legal, judicially enforceable limitations should apply so as to constrain federal conditions on the expenditure of federal funds since the issues 'involve political judgments that defy judicial calculation.'" Blumstein, *supra* note 38, at 91–92 (citation omitted).

75. "Prior to today's decision, . . . the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion." *NFIB*, 132 S. Ct. at 2634 (Ginsburg, J., dissenting).

federal cooperative spending program, accounting for about 20% of a typical state's budget (and more in many states).[76] Threatening withdrawal of all those funds if a substantial and unforeseeable new condition is tacked on to the preexisting Medicaid program would, as a practical matter, deprive states of any real choice but to accept the new terms. And, the very architecture of the ACA seemed to count on states not having any real choice; the proverbial straw, which influenced how I viewed the issue in the context of the ACA, was that subsidies did not accrue to persons with incomes below 100% of poverty. How to justify subsidies for those in the 100%–400% income category but deny federal subsidies to those below poverty? It seems utterly irrational, unless one understands that no state had a real choice to opt out of its entire Medicaid program.[77]

And, more formally, states in the context of this modification of the preexisting Medicaid program were unable to refrain from acting.[78] The cooperative federalism model is well adapted to the anti-commandeering principle at the contract formation stage—when states decide whether to act affirmatively to enter into an ongoing federal spending program. States' rights not to act and not to suffer financial harm as compared to the status quo are preserved at contract formation. If a state does not sign up, it does not get the federal benefit, but it suffers no incremental harm compared to the status *quo ante*. Not so at contract modification, as in the case of the ACA's Medicaid conditions. If states did not act, they would remain liable to pay for preexisting eligible beneficiaries under state law, but the state payments would no longer qualify for federal matching. That is, 100% of Medicaid expenditures would be the fiscal responsibility of the noncomplying states. To avoid that unforeseeable and fiscally impossible circumstance, states must have acted affirmatively, either to embrace the new ACA conditions or to stop participating in Medicaid entirely. Inaction and sustenance of the preexisting status quo without financial hardship (other than losing the additional federal benefits)—the core values of the anti-commandeering principle—were not viable options for the states.[79]

The federal government understood that reality. In explaining why no subsidy attached to those with incomes under 100% of poverty, the Internal Revenue Service expressly stated that those persons would not be in need of subsidies since they would be covered by state Medicaid programs.[80]

76. *Id.* at 2662–63 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

77. *See* Brief of Blumstein, *supra* note 4, at 31–33 (noting that excessive leveraging was a risk in the context of contract modification and that political accountability was threatened because of the very architecture of the ACA's Medicaid provisions regarding those eligible for subsidy).

78. Blumstein, *supra* note 37, at 135–43.

79. Blumstein, *supra* note 38, at 105–10.

80. The Internal Revenue Service has acknowledged that the very architecture of the ACA contemplates that states have no choice but to embrace the ACA's expanded Medicaid terms: "Taxpayers with household incomes below 100 percent" of poverty "are not eligible for the premium tax credit"

Only insensitivity to the federalism values embraced by the anti-commandeering principle could explain the position that coercion (as reflected in the anti-commandeering principle) did not place an enforceable limit on excessive federal leveraging in the context of federal conditional spending—especially as applied to the context of Medicaid and its mandated expansion under the ACA. The advocacy of the nonjusticiability position regarding coercion limitations on federal conditional spending would not be compatible with a nuanced development of a functional anti-commandeering doctrine in the context of conditional federal spending. Advocates of the position that coercion principles should not constitute justiciable limitations on excessive federal leveraging in the context of the ACA's Medicaid expansion could not be expected to devote attention to the conditional spending issue or to seek to operationalize what the coercion doctrine meant in the context of the ACA's Medicaid expansion. If one does not take seriously the federalism problems associated with the ACA's Medicaid leveraging,[81] one can infer that the development of principles regarding a functional limitation in the conditional spending arena would not be something that such an advocate would prioritize—even when denial of enforceability in the context of expanded Medicaid under the ACA would likely eviscerate the principle or the viability of a coercion/anti-commandeering limitation on federal conditional spending.

III. CONCLUSION

A true story will bring this Comment to its conclusion. After the oral argument before the Supreme Court in the states' challenges to the ACA, I had a telephone conversation with a colleague from a top law school. I asked him about his evaluation of the argument regarding the expanded Medicaid component of the ACA. His response was that the ACA's Medicaid mandate would be upheld 8-1 or 9-0. My answer was "Wow," concluding that there was a sixty percent likelihood that the ACA's Medicaid mandate would be struck down, with a likelihood that states would be given an opportunity to opt in to the ACA's new terms without the threat of loss to preexisting Medicaid funding if they chose inaction. That is, a contract formation situation would be created, leaving states with protection of their inaction, so that they would not lose preexisting Medicaid funding if they chose not to accept the new ACA

(the federal subsidy) provided to persons with incomes in the 100–400 percent of poverty range "*because* they are eligible to receive assistance through Medicaid." Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,934 (proposed Aug. 17, 2011) (to be codified at 26 C.F.R. pt. 1) (emphasis added).

81. For a general discussion of these leveraging issues in the context of Medicaid, see James F. Blumstein & Frank A. Sloan, *Health Care Reform Through Medicaid Managed Care: Tennessee (TennCare) as a Case Study and a Paradigm*, 53 VAND. L. REV. 125, 139–42 (2000) (discussing political moral hazard and political lock-in). *See also* Blumstein, *supra* note 37, at 143–49 (discussing the problems of the displacement of political accountability and excessive leveraging associated with cooperative federalism programs such as Medicaid).

Medicaid terms—the outcome that occurred, with Justices Breyer and Kagan joining Chief Justice Roberts' opinion on that issue.

My colleague was ultimately quite surprised by the outcome. The difference in listening to the oral arguments and drawing such different conclusions stems from taking these priors—Broad Principles #1 and #3—seriously as important federalism-based constraints on the scope of federal power. My sense is that this intellectual nonengagement with values that attach to federalism[82] and constitutional restraints on federal overreaching—and nonengagement with the Supreme Court's emerging constitutional tapestry of placing doctrinal federalism-based constraints on federal authority—bear much of the explanatory power in understanding why commentators were so off in their predictions regarding the states' challenges to the ACA.

Professor Hyman has done an important service in documenting this record and offering thoughtful rationales for explaining the commentators' lack of predictive success.

82. *See* MALCOLM FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE (2008) (rejecting principles of federalism in favor of management principles of subsidiarity).