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## ***NFIB's* New Spending Clause: Congress' Limited Authority to Prevent Campus Sexual Assault Under Title IX**

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# NFIB's New Spending Clause: Congress' Limited Authority to Prevent Campus Sexual Assault Under Title IX

RAVIKA RAMESHWAR\*

*“Too many girls and women still confront ‘No Trespassing’ signs throughout educational institutions,” read the introduction to the Report Card of Gender Equity written twenty-five years after the passing of Title IX.<sup>1</sup> Now, forty-three years after the passing of Title IX of the Education Amendment Act, the ‘No Trespassing’ signs have not been removed. As of 1972, females can participate in federally funded education programs—but it comes at a cost.<sup>2</sup> A 2007 study revealed that one out of every five female college students is sexually assaulted.<sup>3</sup> The alarming rate of sexual assault on college campuses interferes with students’ autonomy to attend a university in a non-hostile environment.*

*Title IX has the potential to be a powerful tool to end sexual assault on campus, or at least severely reduce the prevalence*

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\* B.A. University of Florida; J.D. Candidate 2016, University of Miami School of Law. I would like to thank Professor Frances R. Hill for her guidance and feedback while writing this Comment. I would also like to thank Professor Donna Coker for her invaluable insight on gender-based violence and for prompting my interest in Title IX issues. A special thank you to my parents, Robbie and Vashtee Rameshwar, for their continued love and support.

<sup>1</sup> REPORT CARD ON GENDER EQUITY, A REPORT OF THE NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION (1997), <http://www.ncwge.org/PDF/TitleIXReport.pdf>.

<sup>2</sup> Title IX was passed in 1972. See Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2012).

<sup>3</sup> CHRISTOPHER P. KREBS ET AL., CAMPUS SEXUAL ASSAULT STUDY 94 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

*of it. However, Congress' ability to expand Title IX may depend on its spending authority. This Comment addresses Congress' authority to expand Title IX both before and after the Supreme Court's National Federation of Independent Business. v. Sebelius decision.*

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## INTRODUCTION

Title IX aims to promote access to higher education, including the protection of students from sexual harassment and sexual assault.<sup>4</sup> Title IX lays out procedural safeguards for universities to follow to ensure victim protection, and it shifts responsibility to the university to create a discrimination-free environment.<sup>5</sup> Schools that receive federal funding must comply with Title IX or risk losing their federal funds.<sup>6</sup>

The Department of Education's Office for Civil Rights ("OCR"), which enforces Title IX compliance, has jurisdiction over all schools that receive federal funds.<sup>7</sup> To date, one hundred and six colleges are currently under investigation for violating Title IX.<sup>8</sup> Yet, no school has ever had its federal funding revoked by the OCR.<sup>9</sup> Legislation proposed by both sides of the congressional floor calls

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<sup>4</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2012).

<sup>5</sup> *Id.*

<sup>6</sup> *ED Act Now*, KNOW YOUR TITLE IX: EMPOWERING STUDENTS TO STOP SEXUAL VIOLENCE, <http://knowyourix.org/i-want-to/take-national-action/> (last visited June 14, 2015); Taylor Maycan, *Putting the U. Va. Scandal Into Perspective*, USA TODAY (Nov. 26, 2014 8:50 PM), <http://college.usatoday.com/2014/11/26/putting-the-u-va-scandal-into-perspective/> (stating that "[s]chools are expected to 'respond promptly and effectively' to any sexual violence complaints on penalty of losing federal funding, according to the statute's requirements").

<sup>7</sup> See Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assaults on Campus*, 40 N. Kentucky L. Rev. 49, 55–56 (2013).

<sup>8</sup> Tyler Kingkade, *106 Colleges Are Under Federal Investigation For Sexual Assault Cases*, HUFFINGTON POST (Apr. 6, 2015, 3:03 p.m.), [http://www.huffingtonpost.com/2015/04/06/colleges-federal-investigation-title-ix-106\\_n\\_7011422.html](http://www.huffingtonpost.com/2015/04/06/colleges-federal-investigation-title-ix-106_n_7011422.html).

<sup>9</sup> See *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82, 88 n.2 (D.D.C. 2003); see also *ED Act Now*, *supra* note 6 (rationalizing that poor enforcement of Title IX may be because the OCR's only enforcement mechanism is to revoke all federal funding, which would be detrimental to students on financial aid).

for change on how the OCR can enforce Title IX.<sup>10</sup> The Campus Accountability and Safety Act aims to impose a penalty of one percent of the college's operational budget for universities found not compliant, as opposed to all federal funding.<sup>11</sup>

Recently, the Barack Obama Administration created a White House Task Force to combat campus sexual assault.<sup>12</sup> As its first step, the Task Force plans to introduce legislation that will require universities to conduct Climate Surveys, which will be used to assess the extent and environment of sexual assault on college campuses.<sup>13</sup> Many campus sexual assaults are not reported, and the Climate Survey intends to find out the *actual* prevalence of sexual assault on campuses as well as the culture that contributes to it.<sup>14</sup> One reason sexual assaults are underreported is because the policies are vague.<sup>15</sup> Without a policy that clearly and unambiguously spells out what constitutes consent and sexual assault, students have no notice as to what they can report.<sup>16</sup> The Task Force also suggests that universities implement different educational programs to create awareness of sexual assault and the social responsibility to end it.<sup>17</sup>

With sexual assault being a widespread issue on college campuses, amending Title IX to require more services or programs would help address the issue. By amending Title IX, Congress can require universities to administer the Climate Survey, offer appropriate educational programs to prevent sexual assault, and create minimum standards for an unambiguous misconduct policy.

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<sup>10</sup> Campus Accountability and Safety Act, S. 590, 114th Cong. § 124(b)(2) (2015).

<sup>11</sup> Press Release, *Bipartisan Bill Takes Aim at Sexual Assault on College and University Campuses* (July 30, 2014), <http://www.mccaskill.senate.gov/media-center/news-releases/campus-accountability-and-safety-act>.

<sup>12</sup> WHITE HOUSE TASK FORCE, *THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT* ii (2014).

<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.*

<sup>15</sup> See Justin Neidig, *Sex, Booze, and Clarity: Defining Sexual Assault On A College Campus*, 16 WM. & MARY J. WOMEN & L. 179, 198–200 (2009) (arguing that colleges should create bright-line policies to avoid underreporting).

<sup>16</sup> *Id.* at 189–94 (arguing that the failure to define policies for students deprives them of notice and fails under the void-for-vagueness doctrine).

<sup>17</sup> WHITE HOUSE TASK FORCE, *supra* note 12, at 9–10.

However, Congress' ability to amend Title IX is grounded in its spending authority.<sup>18</sup> Congress historically had broad powers to create conditions for States to comply with in order to receive federal funding.<sup>19</sup> Prior to *National Federation of Independent Business v. Sebelius*, Congress had very specific limitations on its spending authority.<sup>20</sup> However *NFIB* narrowed Congress' authority under the Spending Clause. Under *NFIB*, the limitations on Congress are ambiguous, and it is difficult to discern what is left of Congress' spending authority.

If Congress were to amend Title IX to suit the needs of today's society, the amendments would have to withstand the limitations on Congress' spending power under *NFIB*. This note addresses how difficult it will be under *NFIB* for Congress to pass any amendments to Title IX without pushing States to the point where "pressure turns into compulsion."<sup>21</sup> Part I of this note will discuss Title IX's history, requirements, and recent expansions. Part II will address the transformation of the Spending Clause—from a broad power of Congress to its limited utility after *NFIB*. Part III will address if an expansion of Title IX will be unconstitutionally coercive under *NFIB*'s plurality opinion, finding that it likely will be. Part IV will address how Congress can move forward from here—by crafting an amendment that will withstand the *NFIB* coercion test or by trying to ground Title IX in the Fourteenth Amendment.<sup>22</sup>

Although the United States Supreme Court expressly stated that Title IX is rooted in Congress' spending authority,<sup>23</sup> the Court has yet to address whether Title IX can be upheld on any of Congress' other constitutional authorities. The Fourteenth Amendment, which

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<sup>18</sup> See generally *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 n.8 (1992).

<sup>19</sup> See Reeve T. Bull, *The Virtue of Vagueness: A Defense of South Dakota v. Dole*, 56 DUKE L. J. 279, 282–85 (explaining the historically broad scope of the Spending Clause).

<sup>20</sup> See generally *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (holding that a Medicaid expansion is unconstitutional under the Spending Clause).

<sup>21</sup> *S. Dakota v. Dole*, 483 U.S. 203, 211 (1987).

<sup>22</sup> U.S. CONST., amend. XIV, §§ 1, 5.

<sup>23</sup> See generally *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 n.8 (1992).

guarantees individual liberties and equal protection, might be the “Hail Mary” for Title IX.

## I: HISTORY, EXPANSION, AND CONSTITUTIONAL BASIS FOR TITLE IX

### A. *University Obligations Under Title IX*

In 1965, President Johnson issued an executive order that prohibited federal contractors from engaging in discriminatory employment practices based on race, color, religion, sex, or national origin.<sup>24</sup> This executive order served as the platform for what is known today as Title IX.<sup>25</sup>

Title IX was signed into law in 1972 as a part of a larger education bill, the Education Amendment Act.<sup>26</sup> Title IX was crafted to replicate the purpose of Title VI of the Civil Rights Act of 1964<sup>27</sup>—to make sure federal funds, coming from everyone, are not used in a manner that discriminates against a particular class of people.<sup>28</sup>

Title IX requires that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education

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<sup>24</sup> Executive Order 11246. The original bill in 1965 did not cover discrimination based on sex, but it was amended in 1968 to include sex discrimination. Lyndon B. Johnson, *Executive Order 11375 - Amending Executive Order No. 11246, Relating to Equal Employment Opportunity*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=60553> (last visited Jan. 24, 2015).

<sup>25</sup> Iram Valentine, *Title IX: A Brief History*, 2 HOLY CROSS J. L. & PUB. POL’Y 123, 124 (1997) (referring to Executive Order 11246 as the “origin” for Title IX). According to Valentine, after Executive Order 11246 was amended, Bernice R. Sandler, a part-time professor at University of Michigan, made the connection that universities and colleges were barred from discriminatory practices because universities and colleges had federal contracts. *Id.* This finding sparked the first speech in Congress about gender discrimination. *Id.* Soon after the speech, a politician began drafting Title IX. *Id.* at 124–25.

<sup>26</sup> *Id.* at 125. The bill went largely unnoticed when it was originally signed. *Id.*

<sup>27</sup> Title VI of the Civil Rights Act of 1964 is grounded in both Congress’ Spending Clause authority and Section 5 of the Fourteenth Amendment. *Title IX Legal Manual*, UNITED STATES DEP’T. OF JUSTICE, <http://www.justice.gov/crt/about/cor/coord/ixlegal.php#31> (last visited Jan. 24, 2015).

<sup>28</sup> *Id.*

program or activity receiving Federal financial assistance.”<sup>29</sup> Universities are obligated to comply with Title IX because they receive federal financial funds.<sup>30</sup> Title IX’s sex discrimination protections extend to protecting students from sexual harassment, including sexual violence.<sup>31</sup> Under Title IX, schools are required to give out notice of nondiscrimination, to appoint at least one Title IX Coordinator to investigate sexual discrimination claims, and to adopt and publish grievance procedures to remedy student and employee sexual discrimination complaints.<sup>32</sup>

Ambiguities over the obligations of educational facilities under Title IX prompted a “Dear Colleague Letter” from the Office for Civil Rights.<sup>33</sup> The “Dear Colleague Letter” of 2011 laid out schools’ obligations under Title IX.<sup>34</sup> Schools are obligated to protect students from a hostile environment on campus.<sup>35</sup> The “Dear Colleague Letter” clarified that schools are required to immediately take action to prevent and address sexual harassment.<sup>36</sup> When a school knows, or reasonably should know, about sexual harassment, the school is required to “promptly investigate” the situation.<sup>37</sup> Schools must train employees so that employees know where to report sexual harassment.<sup>38</sup> Additionally, schools should equip employees with practical information about recognizing sexual harassment and violence.<sup>39</sup>

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<sup>29</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2012).

<sup>30</sup> *Title IX Legal Manual*, *supra* note 27.

<sup>31</sup> UNITED STATES DEP’T. OF EDUCATION OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER 1 (2011) [hereinafter, DEAR COLLEAGUE LETTER].

<sup>32</sup> 34 C.F.R. § 106.9; *Id.* § 106.8(a); *Id.* § 106.8(b); *Id.* § 106.9(a).

<sup>33</sup> DEAR COLLEAGUE LETTER, *supra* note 31.

<sup>34</sup> *Id.* at 3–19. The letter acts complimentary to a 2001 Guidance Letter. *Id.* at 2.

<sup>35</sup> *Id.* at 3. Even when sexual harassment or assault occurs off campus, schools must account for whether the off-campus conduct creates a hostile environment for the complainant on campus. *Id.* at 4.

<sup>36</sup> *Id.* at 2.

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* Note that it is not required that schools train their employees with more than just the information necessary on how to report sexual harassment; equipping employees with practical information, such as dealing with student victims and recognizing warning signs of sexual assault, is just a recommendation.



Universities are left discretion to create a misconduct procedure as long as sexual harassment cases are handled promptly, thoroughly, and impartially.<sup>40</sup> The “Dear Colleague Letter” also made it clear that the misconduct procedure must use a preponderance of the evidence standard to be in compliance with Title IX.<sup>41</sup> Schools are required to give notice of the outcome of the sexual harassment complaint to both parties.<sup>42</sup> Schools must also account for the accused perpetrator’s due process rights.<sup>43</sup>

Although Title IX requires only a few pivotal procedural safeguards, the Office of Civil Rights suggests, sometimes strongly, that other steps be taken.<sup>44</sup> For example, the Office of Civil Rights suggests that schools prohibit parties from personally cross-examining one another because of the possible trauma to the alleged victims.<sup>45</sup> Additionally, the Office of Civil Rights requires schools to educate Title IX Coordinators on issues of sexual harassment and sexual violence, but only recommends that schools educate everyone else.<sup>46</sup> The “Dear Colleague Letter” suggests that schools address sexual violence and what constitutes sexual violence at orientation programs, resident hall adviser trainings, student athlete and coach trainings, and school assemblies.<sup>47</sup> The Office of Civil Rights suggests that schools tell students that the school’s primary focus is on safety, and all other disciplinary violations will be dealt with separately.<sup>48</sup> Additionally, schools are recommended to tell students that

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<sup>40</sup> *Id.* 4–7. The “Dear Colleague Letter” said schools will handle investigations differently based on the circumstances; however, the school’s investigation must meet the requirements of being “prompt, thorough, and impartial.” *Id.* at 4–5.

<sup>41</sup> *Id.* at 11. Previously, some schools used a “clear and convincing” evidence standard, which is a higher evidentiary standard for the complainant to meet. The “Dear Colleague Letter” made it clear that any standard other than a “preponderance of evidence” standard is in violation of Title IX.

<sup>42</sup> *Id.* at 13.

<sup>43</sup> *Id.* at 12. The Office of Civil Rights suggests that schools not allow the accused’s due process rights to cause delays in the Title IX investigation.

<sup>44</sup> The word “should” is used 71 times in the “Dear Colleague Letter.” *Id.*

<sup>45</sup> *Id.* at 12.

<sup>46</sup> *Id.* at 4, 14–15. However, the Violence Against Women Reauthorization Act requires schools to offer new students programs on awareness and prevention of sexual violence.

<sup>47</sup> *Id.* at 14–15.

<sup>48</sup> *Id.* at 15.

alcohol or drug consumption does not make a victim at fault.<sup>49</sup> A school's failure to offer any of this information will not, by itself, mean the school is in violation of Title IX because the suggestions are not mandatory.

Additionally, in 2013, the Violence Against Women Reauthorization Act included suggestions for schools to end sexual violence on campus; however, schools are under no obligation to comply because they are merely suggestions.<sup>50</sup> The suggestions included bystander education and better information outlets.<sup>51</sup>

### B. Recent Developments in Title IX

In January 2014, President Barack Obama created a White House Task Force ("Task Force") with the purpose of addressing sexual assault on college campuses.<sup>52</sup> The first thing on the Task Force's agenda is to use Climate Surveys to assess the extent of sexual assault on campuses, including students' attitudes toward and awareness of sexual assault.<sup>53</sup> Schools may conduct the Climate Surveys voluntarily now, but the surveys will possibly be required by 2016.<sup>54</sup> The Task Force will explore legislative or administrative options to mandate that schools conduct the Climate Survey.<sup>55</sup>

The Task Force made a number of suggestions for schools as well. The Task Force provided a suggested sexual misconduct policy, which schools are not obligated to adopt.<sup>56</sup> Along with that, the Task Force published samples of "promising policy language" to address certain issues.<sup>57</sup> Although the sample sexual misconduct

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<sup>49</sup> *Id.*

<sup>50</sup> See UNITED STATES DEP'T. OF EDUCATION OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 44-45 (2014) (clarifying that the Violence Against Women Reauthorization Act only amended the Violence Against Women Act and the Clery Act).

<sup>51</sup> See generally Violence Against Women Reauthorization Act, Pub. L. No. 113-4 (2013).

<sup>52</sup> WHITE HOUSE TASK FORCE, *supra* note 12.

<sup>53</sup> *Id.* at 8.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 12.

<sup>57</sup> WHITE HOUSE TASK FORCE, NOT ALONE, RESOURCE GUIDE TO PREVENT AND IMPROVE RESPONSES TO SEXUAL VIOLENCE AT COLLEGES AND UNIVERSITIES (2015), <https://www.notalone.gov/assets/task-force-resource-guide-sep-15.pdf>.

policy and policy language are only suggestions, they have the potential to clear up ambiguities in many misconduct policies—notably, defining consent. Title IX is silent on a consent standard, leaving schools the flexibility to create their own definition of what constitutes consent.<sup>58</sup> If future legislation expands Title IX, there is potential that it could include a federally mandated policy on issues like consent.

Additionally, the Task Force is conducting research that will be disseminated to schools for their use.<sup>59</sup> The Task Force suggests comprehensive education for students on issues of sexual assault and bystander prevention programs<sup>60</sup> to create social responsibility on campus to end sexual assault.<sup>61</sup> However, these suggestions are also not mandatory.

The only portion of the Task Force's announcement that will be mandatory is the Climate Survey. However, the Task Force has stated that the "first step" is assessing the culture of sexual assault

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<sup>58</sup> Nothing in the White House Task Force Report, "Dear Colleague Letter," or Title IX itself mentions consent standards or policy on consent. However, defining consent is a hotly debated topic among universities. Antioch College adopted an affirmative consent policy in 1991, which caused a backlash in criticism against the consent standard to the extent that even Saturday Night Live made a parody about Antioch's policy. See *All Things Considered: The History Behind Sexual Consent Policy*, NPR (Oct. 5, 2014), <http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&is-list=false&id=353922015&m=353922016>. More recently, California has adopted a bill mandating universities to adopt an affirmative consent policy or risk losing state funding. Calif. SB-967, Student safety: sexual assault, [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967).

<sup>59</sup> WHITE HOUSE TASK FORCE, *supra* note 12, at 12–16.

<sup>60</sup> Bystander prevention programs seek to stop sexual assault by shifting the responsibility of intervening to third parties. While bystander intervention is only recommended, many schools have adopted bystander prevention programs. University of New Hampshire started a program called Bringing in the Bystander, which teaches safe methods of bystander intervention. Additionally, University of North Carolina Chapel Hill created a program called ONE ACTION, which trains third parties to recognize early signs of violence and safe prevention methods. See *Bringing in the Bystander*, UNIVERSITY OF NEW HAMPSHIRE COLLEGE OF LIBERAL ARTS, <http://cola.unh.edu/prevention-innovations/bringing-by-stander%C2%AE> (last visited Feb. 12, 2015); see also *One Act Student Wellness*, UNIVERSITY OF NORTH CAROLINA CHAPEL HILL, <https://studentwellness.unc.edu/oneact> (last visited Feb. 12, 2015).

<sup>61</sup> WHITE HOUSE TASK FORCE, *supra* note 12, at 9.

on campus, implying more steps are coming.<sup>62</sup> It would not be unexpected if some of the Task Force's suggestions become mandatory under Title IX in the future. The Task Force believes it is necessary to realize the actual extent of sexual assault on campus, which is otherwise unknown because students do not report assaults, partly caused by the prevalence of acquaintance assault on campus.<sup>63</sup> The Task Force compared assessing the climate of the needs for Title IX to when Vice President Joe Biden, a senator at the time, crafted the Violence Against Women Act ("VAWA") and recognized the need to understand the scope of the problems relating to violence against women.<sup>64</sup> From the conception of VAWA to now, including the reauthorization of the act in 2013, the act has expanded substantially, offering more coverage and services to women in need.<sup>65</sup> The steps the Task Force is taking inspire hope that Title IX will one day expand to include more relief for campus sexual assault victims, as well as more preventative methods, much like VAWA attempted to do for gender-based violence.

### C. Constitutional Grounding of Title IX

If Congress chose to expand Title IX, it would have to pass the legislation under one of its enumerated Article I powers.<sup>66</sup> The Supreme Court has recognized that Title IX was passed pursuant to Congress' Spending Clause authority.<sup>67</sup> The Court in *Gebser v. Lago Vista Independent School District* said "Congress attaches conditions to the award of federal funds under its spending power . . . as it has in Title IX."<sup>68</sup> Additionally, in *Franklin v. Gwinnett County*

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<sup>62</sup> *Id.* at ii.

<sup>63</sup> *Id.* at 7.

<sup>64</sup> *Id.* at 7.

<sup>65</sup> See Donna Coker, *VAWA @ 20: Roll Back "Prison Nation,"* CUNY L. REV. (Dec. 18, 2014), <http://www.cunylawreview.org/vawa-20-roll-back-prison-nation/#fn-1624-2> (explaining that VAWA increased funding for shelter services, civil legal representation, and youth prevention programs and has been expanded to extend relief to certain immigrant victims).

<sup>66</sup> U.S. CONST. art. 1.

<sup>67</sup> See generally *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 n.8 (1992).

<sup>68</sup> *Gebser*, 524 U.S. at 287.

*Public School* the Court found that damages could be sought for Title IX claims even though Title IX is grounded in the Spending Clause.<sup>69</sup>

Therefore, in order for Congress to pass a future bill expanding Title IX—whether for something as minor as a Climate Survey, more progressive approaches to handling sexual assault on campus, or mandating a sexual misconduct policy—it would have to be within Congress' spending authority. Given the recent limitations placed on Congress' spending authority, discussed in Part III, any expansion of Title IX stands on shaky grounds.

## II: THE AMORPHOUS SPENDING CLAUSE

### A. *Breadth and Limitations of the Spending Clause*

Congress may “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.”<sup>70</sup> This constitutional provision is the authority for the Spending Clause.<sup>71</sup> Under the Spending Clause, Congress has the authority to grant money contingent on states compliance with a federal mandate.<sup>72</sup> Congress has broad authority under the Spending Clause, subject to a few limitations.<sup>73</sup>

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<sup>69</sup> *Franklin*, 503 U.S. at 75 n.8.

<sup>70</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>71</sup> Symposium, *Changing Images of the State*, 107 HARV. L. REV. 1419, 1428 (1994) (“Congress’s spending power derives from Article I, Section 8, Clause I of the Constitution . . .”).

<sup>72</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012).

<sup>73</sup> The Court recognized the breadth of Congress’ broad authority under the Spending Clause in *United States v. Butler*, 297 U.S. 1, 66 (1936) (where, in analyzing the scope of the Spending Clause, the Court stated “. . . that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”). The Court again recognized Congress’ broad authority under the Spending Clause in *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (where the Court stated that Congress has “employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives”).

Under the Spending Clause, Congress' authority to grant federal money is not limited to its enumerated Article I powers.<sup>74</sup>

The Supreme Court explained the limitations to Congress' authority under the Spending Clause in *South Dakota v Dole*.<sup>75</sup> In *Dole*, the Court held that it was within Congress' powers to condition the receipt of federal highway funds upon adherence to a minimum drinking age.<sup>76</sup> At the time, South Dakota permitted nineteen-year-olds to purchase beer with an alcohol content of 3.2 percent.<sup>77</sup> However, in 1984 Congress enacted a law enabling it to withhold a percentage of federal highway funds from States that did not have a minimum drinking age of twenty-one.<sup>78</sup> If South Dakota refused to comply with the federal mandate, the State would have lost 5 percent of the federal funds that it could have obtained under highway grants.<sup>79</sup>

While recognizing that Congress had broad authority under the Spending Clause, the Court laid out four express limitations to Congress' spending authority.<sup>80</sup> First, Congress can only exercise its spending power in the pursuit of general welfare, as provided by the Constitution.<sup>81</sup> The Court noted that to determine whether an expenditure is in pursuit of the general welfare, substantial deference should be given to Congress' judgment.<sup>82</sup> Second, if Congress creates a condition for the States to receive federal funding, the condition must be unambiguous so that States can knowingly exercise their choice while being cognizant of the consequences of not complying with the condition.<sup>83</sup> Third, if the conditional grant is not re-

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<sup>74</sup> *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987) (where Chief Justice Rehnquist explains that Congress may achieve objectives outside of its enumerated Article I powers through the Spending Clause).

<sup>75</sup> *Id.* at 207–12.

<sup>76</sup> *Id.* at 212.

<sup>77</sup> *Id.* at 205.

<sup>78</sup> *Id.*

<sup>79</sup> *See id.* at 211.

<sup>80</sup> *Id.* at 207–08.

<sup>81</sup> *Id.* at 207; U.S. CONST. art. I, § 8, cl. 1. provides that Congress may “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for . . . general Welfare of the United States.”

<sup>82</sup> *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987).

<sup>83</sup> *Id.* at 207. The Court in *Dole* gets the contractual-based language of knowingly consenting to the terms Congress laid out from *Pennhurst State School and*

lated to the federal interest in a particular national program, the condition may be illegitimate.<sup>84</sup> Finally, the conditional grant may be barred by another constitutional provision.<sup>85</sup>

In *Dole*, the Court focused its analysis on the fourth and final requirement—an “independent constitutional bar.”<sup>86</sup> The Court concluded that the condition of a mandatory minimum drinking age was related to the general welfare<sup>87</sup> and is clearly stated.<sup>88</sup> Additionally, given studies that illustrated the benefits of a uniform drinking age, the dangers of drinking and driving, and the desire to decrease the incentives for young people to drink and drive, the Court concluded that raising the minimum drinking age is reasonably calculated to address the problem.<sup>89</sup> However, under the fourth limitation, South Dakota claimed that Congress exceeded its Spending Power because the Twenty-First Amendment barred the condition.<sup>90</sup> The State argued that the Twenty-First Amendment excluded Congress from directly regulating the drinking age.<sup>91</sup> The Court instead found that the Twenty-First Amendment did not independently bar Congress’ condition.<sup>92</sup> The “independent constitutional bar,” as defined by the Court, “is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly.”<sup>93</sup> The Court instead defines the fourth limitation to mean that States

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*Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (where the Court said that “[t]he legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts to the terms of the “contract.”).

<sup>84</sup> *Dole*, 483 U.S. at 207.

<sup>85</sup> *Id.* at 208.

<sup>86</sup> *See id.* at 208 (where the Court noted that South Dakota does not contest the first three limitations). *See generally* Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428 (1989) (discussing the intricacies of the “unconstitutional condition doctrine”).

<sup>87</sup> *Dole*, 483 U.S. at 208.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 208–09. The Presidential Commission of Drunk Driving, Final Report 11 (1983) was cited in *Dole*, and found that a patchwork of drinking ages incentivized drinking and driving because younger people would commute to a border State with a lower drinking age.

<sup>90</sup> *See id.* at 209.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 210.

<sup>93</sup> *Id.*

cannot be induced to engage in activities that would themselves be unconstitutional.<sup>94</sup> The Court proceeded to describe examples of inducing States to comply with unconstitutional measures, such as discrimination and cruel and unusual punishment.<sup>95</sup> However, States complying with Congress' condition would not violate anyone's constitutional rights.<sup>96</sup>

After addressing the limitations to Congress' spending authority, the Court briefly evoked federalism principles of coercion.<sup>97</sup> The Court mentioned that in some circumstances Congress' financial inducement may be coercive "as to pass the point at which 'pressure turns into compulsion.'"<sup>98</sup> The Court found that Congress did not coerce the States because South Dakota only stood to lose five percent of its federal highway funding.<sup>99</sup> The Court said Congress merely "offered relatively mild encouragement" to raise the minimum drinking age to twenty-one.<sup>100</sup>

Under *Dole*, Congress' authority to spend was interpreted broadly. Without expressly stating so, the Court analyzed the limitations on the Spending Clause narrowly. Under the analysis of an "independent constitutional bar," the Court stated extreme examples of constitutional infringements and emphasized the constitutional rights of individuals who would be affected, rather than States liberties.<sup>101</sup> Additionally, the Court handled the issue of coercion briefly, almost as an afterthought to the analysis of the limitations on the Spending Clause. The Court, seemingly unconvinced by the Petitioner's coercion argument,<sup>102</sup> cited back to a case that said

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 210–211.

<sup>96</sup> *Id.* at 211.

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* (citing to *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

<sup>99</sup> *Dole*, 483 U.S. at 211.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 208–211. However, the "unconstitutional conditions doctrine" is not as simple as the *Dole* opinion made it seem. *See Sullivan, supra* note 86 ("Yet the Court's unconstitutional conditions rulings display serious inconsistencies in their account of coercion . . . Court has never developed a coherent rationale for determining when such offers rise to the level of 'coercion.'").

<sup>102</sup> The Court says the argument of coercion is one of rhetoric rather than fact, given that South Dakota only stood to lose five percent of its federal highway funding. *Id.* at 211.



equating Congress' motives with coercion would "plunge the law into endless difficulties."<sup>103</sup> The Court deferred to Congress' general welfare rationale and qualified its action of conditioning a minimum drinking age as encouragement, rather than coercion.<sup>104</sup>

### B. Coercion as Principle of Federalism

Although coercion is only mentioned briefly in *Dole*, the underpinning concerns about whether States are being coerced to comply with federal regulation strikes to the heart of federalism issues. To provide a healthy nexus between States and the Federal Government, the Constitution reserves powers to the States that are not delegated or prohibited elsewhere in the Constitution.<sup>105</sup> Included in federalism is the notion that the Federal Government may not act upon States to enforce a federal regulatory program.<sup>106</sup>

In *New York v. United States*, the Court held that a provision of a federal act violated Congress' power under the Commerce Clause because the States would be coerced to comply with the act.<sup>107</sup> In *New York*, Congress passed an act regulating radioactive waste and offered incentives to States that complied.<sup>108</sup> One of the incentives, called the "Take Title Provision," said that States would have to take title over the radioactive waste generated within their respective State, as an alternative to complying with Congress' regulations.<sup>109</sup> Justice O'Connor, writing for the majority, reasoned that Congress

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<sup>103</sup> *Id.* (citing *Charles. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937) (where the Court held that a Social Security tax did not coerce the states)). The Court in *Charles. C. Steward Machine Co.* said, "every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Id.* The case is again cited in a landmark Supreme Court decision regarding the Affordable Care Act, which is discussed later.

<sup>104</sup> *S. Dakota v. Dole*, 483 U.S. 203, 211 (1987).

<sup>105</sup> U.S. CONST. amend. X.

<sup>106</sup> *New York v. United States*, 505 U.S. 144, 188 (1992) (where the Court states, "The Federal Government may not compel the States to enact or administer a federal regulatory program"); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress exceeded its authority by passing a bill that commandeered local law enforcement to perform tasks required by a federal statute).

<sup>107</sup> *New York v. United States*, 505 U.S. 144, 176 (1992).

<sup>108</sup> *Id.* at 152–54.

<sup>109</sup> *Id.* at 174–75. States would also be liable for all damages resulting from a failure to take possession of the radioactive waste. *Id.* at 153.

“crossed the line distinguishing encouragement from coercion”<sup>110</sup> because Congress asked the states to “choose” between two things that Congress, standing alone, did not have the authority to do.<sup>111</sup> Congress on its own would not be able to force a State to implement legislation.<sup>112</sup> Additionally, Congress, on its own, would not be able to force States to take title to radioactive waste because it would be commandeering the States to comply with federal regulatory schemes.<sup>113</sup> Therefore, Congress could not ask States to comply with the act or, as a consequence of choosing not to comply, take title to waste in service of federal regulation.<sup>114</sup> The Court said the Take Title provision coerced the States by not providing an alternative path to following Congress’ regulation—either States comply with the act or States comply with taking title to the waste.<sup>115</sup>

Although the Take Title provision was not held unconstitutional under the Spending Clause, the Court did recognize Congress’ authority under the Spending Clause.<sup>116</sup> The Court said that Congress could influence a State’s legislature by creating conditions that attach to federal funds.<sup>117</sup> However, the Court noted that when the Federal Government compels a State to regulate, there is no political accountability.<sup>118</sup> The Court explains that when a State official acts contrary to the beliefs of his or her constituents, the individuals can vote for him or her out of office.<sup>119</sup> However, when the federal government forces the States to regulate, constituents may disapprove

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<sup>110</sup> *Id.* at 175.

<sup>111</sup> *Id.* at 177.

<sup>112</sup> *Id.* at 176–77.

<sup>113</sup> *Id.* at 175.

<sup>114</sup> *Id.* at 175–76.

<sup>115</sup> *Id.* at 177.

<sup>116</sup> Congress offered three incentives in *New York*. The first incentive for complying with Congress’ act was monetary, and the Court held it to be constitutional under Congress’ spending and commerce power. *Id.* at 152–53, 171. Specific to the Spending Clause, the Court held that conditioning federal grants on States achieving benchmarks set out by Congress was constitutional under the four limitations in *Dole*. *Id.* at 171–72 (citing to *S. Dakota v. Dole*, 483 U.S. 203, 207–08 (1987)).

<sup>117</sup> *New York v. United States*, 505 U.S. 144, 167 (1992).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 168.

of the state official, rather than the federal officials responsible for the regulation.<sup>120</sup>

However, although coercion is a proper concern to analyze when Congress acts upon the States, Congress must cross the line between encouragement and coercion, or to the point where “pressure turns into compulsion.”<sup>121</sup> In *Charles C. Steward Machine Co. v. Davis*, the Court explained that to reach the point where “pressure turns into compulsion . . . would be a question of degree, at times, perhaps, of fact.”<sup>122</sup> But the Court seemed skeptical of ever reaching this point, even airing skepticism at whether the Federal Government could compel a State to act.<sup>123</sup> Although the Court in *New York* found Congress’ Take Title provision to be coercive, the first time a provision was struck down as coercive under the Spending Clause was in *National Federation of Independent Business v. Sebelius* (“*NFIB*”).<sup>124</sup>

### C. Coercion and Economic Dragooning under NFIB

Even with Congress’ broad spending power authority, the Court held that Congress exceeded its spending power in *NFIB*.<sup>125</sup> In *NFIB*, the Court addressed Congress’ authority in passing the Patient Protection and Affordable Care Act of 2010 (“Affordable Care Act”).<sup>126</sup> Congress passed the Affordable Care Act to increase the number of Americans with health insurance and to make health care more affordable.<sup>127</sup> The Court addressed: 1) individual mandate,

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<sup>120</sup> *Id.* at 167.

<sup>121</sup> *S. Dakota v. Dole*, 483 U.S. at 211 (citing to *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937)).

<sup>122</sup> *Davis*, 301 U.S. 548 at 590.

<sup>123</sup> *Id.* at 590 (the Court had to assume for purposes of the argument that the Nation could compel the State, saying, “[n]othing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation.”).

<sup>124</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2630 (2012) (Ginsburg, J., dissenting) (Justice Ginsburg, joined only by Justice Sotomayor, emphasized that this is “*the first time ever*” the Court has ruled that Congress exceeded its authority under the Spending Clause by coercing the States). Eric Turner, *Protecting from Endless Harm: A Roadmap for Coercion Challenges After N.F.I.B. v. Sebelius*, 89 CHI.-KENT L. REV. 503, 508 (2014) (discussing coercion as a dormant analysis for the Spending Clause up until *NFIB*).

<sup>125</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603 (2012).

<sup>126</sup> *Id.* at 2577.

<sup>127</sup> *Id.* at 2580.

which required individuals to purchase health care coverage; and 2) a Medicaid expansion, which required States to offer health care to individuals who fell below a certain poverty bracket.<sup>128</sup>

The Court held that the Affordable Care Act was constitutional based on Congress' authority to tax.<sup>129</sup> The Court also held that the Anti-Injunction Act did not bar the suit.<sup>130</sup> Additionally, the Court held that the individual mandate violated Congress' authority under the Commerce Clause because the Commerce Clause regulates existing commercial activity.<sup>131</sup> Chief Justice Roberts said the individual mandate does not regulate existing commercial activity, but rather compels individuals to purchase health care and "become active in commerce."<sup>132</sup>

Additionally, the Court in *NFIB* narrowed Congress' authority under the Spending Clause, holding that States were coerced to comply with a Medicaid expansion provision. Although *NFIB* was a plurality decision, seven Justices concluded that Congress did not have the authority to pass the Affordable Care Act's Medicaid expansion under the Spending Clause.<sup>133</sup> The Court saw the Medicaid expansion to be far more than mild encouragement, instead calling the expansion "a gun to the head."<sup>134</sup>

Prior to the Affordable Care Act, the Medicaid program only required States to cover "needy individuals."<sup>135</sup> The program covered pregnant women, children, needy families,<sup>136</sup> the blind, the elderly,

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<sup>128</sup> *Id.* at 2580–81.

<sup>129</sup> *Id.* at 2593–2600.

<sup>130</sup> *Id.* at 2582–84.

<sup>131</sup> *Id.* at 2587.

<sup>132</sup> *Id.*

<sup>133</sup> Chief Justice Roberts, Justice Breyer, Justice Kagan and the dissenting Justices—Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito agreed the Affordable Care Act exceeded the Spending Clause. *Id.* at 2666–67. The only dissenting Justices on the issue were Justice Ginsburg, who wrote the concurring and dissent, and Justice Sotomayor, who joined her. *Id.* at 2609, 2629–44 (Ginsburg, J., dissenting).

<sup>134</sup> *Id.* at 2604.

<sup>135</sup> *Id.* at 2601.

<sup>136</sup> States had discretion in exercising coverage levels for needy families. States, on average, covered unemployed parents who were thirty-seven percent below the poverty line and employed parents who were sixty-three percent below. *Id.*

and the disabled.<sup>137</sup> Whereas States were required to provide health care to those who fell below a specific income level in order to receive their federal funding for Medicaid, the Medicaid expansion required States to offer coverage to all individuals under the age of sixty five that have incomes below 133 percent of the poverty line.<sup>138</sup> Failing to meet the new requirement under the Medicaid expansion would result in a State losing all of its Medicaid funding.<sup>139</sup> The average State allocates twenty percent of its spending to Medicaid programs, and the federal funds cover fifty to eighty-three percent of that Medicaid funding.<sup>140</sup> Revoking all federal Medicaid funding could amount to over ten percent of a State's overall budget.<sup>141</sup>

#### 1. FEDERALISM ISSUES: INDIVIDUAL LIBERTIES, POLITICAL ACCOUNTABILITY

Whereas in *Dole*, the Court expressly listed the limitations on the Spending Clause and then briefly mentioned the threat of coercion, here, Chief Justice Roberts started off with the discussion of coercion.<sup>142</sup> According to the plurality opinion,<sup>143</sup> Congress' threat to revoke all of the Medicaid funding to a State coerces the States to comply with the federal regulation because it deprives the States of "a genuine choice" to accept the condition.<sup>144</sup> The plurality acknowledged Congress' power to attach conditions to federal grants to create incentives for States to comply under the Spending Clause; however, the opinion quickly juxtaposed those spending powers against Congress' spending limitations.<sup>145</sup> Rather than discussing Congress' Spending Clause limitations as outlined in *Dole*, the Court explained that Congress' authority is limited when its acts

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 2601.

<sup>139</sup> *Id.* at 2604.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 2605.

<sup>142</sup> *See id.* at 2602.

<sup>143</sup> Chief Justice Roberts, Justice Kagan and Justice Breyer signed onto the plurality opinion.

<sup>144</sup> *See id.* at 2608.

<sup>145</sup> *See id.* at 2602.

run contrary to the federalism system.<sup>146</sup> The Court said that there is a heightened danger of federalism issues arising under the Spending Clause because of Congress' authority to implement policies that it otherwise could not be able to under its enumerated powers through conditional grants.<sup>147</sup> Without limiting Congress to the confines of federalism, the Court warned that too much power would be vested in a central government and individual liberties would suffer.<sup>148</sup>

The Court held that Congress was commandeering States to act on its behalf.<sup>149</sup> By forcing states to regulate, Congress threatened individual liberties and created an issue of political accountability, Chief Justice Roberts pointed out.<sup>150</sup> The problem of political accountability presented itself in *New York v. United States*, as mentioned earlier.<sup>151</sup> According to the plurality, if States are forced to regulate on behalf of the federal government, then constituents might wrongly place the blame on state politicians if they are displeased.<sup>152</sup> In this scenario, the Court said the federal government is "insulated" from criticism.<sup>153</sup> However, if States have the right to choose whether or not to comply to a condition in order to receive funds, then the blame constituents might place on the State would be warranted since those elected officials chose to comply.<sup>154</sup>

By focusing on federalism issues, the Court's analysis shifted from analyzing the few, and otherwise widely accepted, limitations on Congress' constitutional authority under the Spending Clause and instead focused on a state sovereignty argument, rooted in the

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<sup>146</sup> See *id.* at 2602 (where the Court focuses on federalism issues limiting the Spending Clause).

<sup>147</sup> *Id.* at 2603. Note that the Court expressly said Congress' authority under the Spending Clause is not limited to its enumerated Constitutional powers; yet, here the Court says Congress using power outside of its enumerated power is a danger to the federalism structure. See *S. Dakota v. Dole*, 483 U.S. 203, 204 (1987); compare *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2603.

<sup>148</sup> *Id.* at 2602.

<sup>149</sup> *Id.* at 2602. Here, the Court cites back to *New York v. United States*, 505 U.S. 144, 188 (1992) and *Printz v. United States*, 521 U.S. 898, 935 (1997).

<sup>150</sup> *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2602–03.

<sup>151</sup> *New York*, 505 U.S. at 167–68.

<sup>152</sup> See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2603.

<sup>153</sup> *Id.* at 2602 (citing back to *New York v. United States*, 505 U.S. at 169).

<sup>154</sup> *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2602–03.

Tenth Amendment.<sup>155</sup> Although *Dole* mentioned compulsion, the Court barely touched on federalism issues of state sovereignty, individual liberties, and political accountability.<sup>156</sup>

## 2. COERCION AND ECONOMIC DRAGOONING

Nevertheless, the Court said that the Medicaid expansion is an instance of Congress commanding the States to regulate and surpasses the point where “pressure turns into compulsion.”<sup>157</sup> The Court explains that in *Dole*, South Dakota only stood to lose five percent of its federal highway funds by not complying with Congress’ condition.<sup>158</sup> Here, in contrast, a non-complying State would lose all of its federal Medicaid funding, as opposed to only a small percentage of the funding being at risk.<sup>159</sup> Whereas in *Dole*, Congress only threatened to withhold the amount of less than one-half percent of the State’s total budget, here a State could lose over ten percent of its overall budget by not complying.<sup>160</sup> The hefty risk of funding being revoked, the plurality says, is “economic dragooning” and States have no option other than to comply with the federal condition to the grant, even in acquiescence.<sup>161</sup>

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<sup>155</sup> See generally Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 592, 592–93 (2013) (discussing that the plurality citing back to *New York* and *Printz* implies that it merged the Spending Clause analysis with a Tenth Amendment argument of state sovereignty).

<sup>156</sup> See generally *S. Dakota v. Dole*, 483 U.S. 203, 203–11 (1987).

<sup>157</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2602. Although the Court discussed political accountability and individual liberties, which were not in *Dole*, discussion of the point where “pressure turns into compulsion” is in both *Dole* and *Charles. C. Steward Machine Co.*, although both cases held that the circumstances had not reached that point. *Dole*, 483 U.S. at 211; *Charles. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937).

<sup>158</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2604. Here, the Court also makes it a point to note that States in *Dole* did not receive “new money” for complying with the drinking age condition. This could be the Court alluding to their analysis of compulsion in *NFIB*. States were offered “new money” for complying with the Medicaid expansion then this would change the entire compulsion analysis, as States would have notice of the condition before agreeing and relying upon the money.

<sup>159</sup> See *id.* at 2604–05.

<sup>160</sup> *Id.* at 2605.

<sup>161</sup> *Id.*

### 3. THE CONDITION REQUIRED WOULD IMPLEMENT AN ENTIRELY SEPARATE PROGRAM

Additionally, the plurality said that the Medicaid expansion under the Affordable Care Act is not the same program as the existing Medicaid program, but a different program entirely.<sup>162</sup> Under *Dole*, Congress must make conditions to federal grants unambiguous.<sup>163</sup> In the act that contains the Medicaid provisions, Congress maintained the right to alter or amend the act.<sup>164</sup> Although the Government argued that the Medicaid expansion is just one of many examples of Congress altering the act, the Court says that the expansion cannot properly be viewed as a modification just because Congress titled it as one.<sup>165</sup> The Court argues that original Medicaid program protected categories of “needy” people—the disabled, the elderly, and families with independent children who fell below a designated income bracket.<sup>166</sup> In the past, Congress’ modifications to Medicaid were still confined to “needy” categories of people.<sup>167</sup> However, the Court found the Medicaid expansion to be “a shift” that “transformed” Medicaid into a “comprehensive national plan to provide universal health insurance coverage.”<sup>168</sup> Rather than just covering “the neediest among us,” the Court said the new program would cover a much broader population.<sup>169</sup> Additionally, the Court points

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<sup>162</sup> *See id.* (“The Medicaid expansion, however, accomplishes a shift in kind, not merely degree.”).

<sup>163</sup> *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987). The Court cites back to *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), where the Court likened a State accepting a condition under the Spending Clause to a contract’s offer and acceptance. *Dole* embodied the logic of that case in its third limitation: If Congress creates a condition for the States to receive federal funding, the condition must be unambiguous so that States can knowingly exercise their choice while being cognizant of the consequences of not complying with the condition. *Dole*, 483 U.S. at 207.

<sup>164</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605 (2012).

<sup>165</sup> *See id.*

<sup>166</sup> *Id.* at 2605–06.

<sup>167</sup> *See id.* at 2606. Justice Ginsburg argues that this is no different than previous Medicaid expansions, including expansions that covered pregnant women and more children; however, the Court said that those expansions were mere expansions of caring for “families with dependent children,” which was already covered. *Id.* at 2634–35.

<sup>168</sup> *Id.* at 2605–06.

<sup>169</sup> *Id.* at 2606.



to Congress' funding of the newly covered individuals and the fact that Congress allowed for less coverage for the newly covered individuals than the previously covered categories of people to show that Congress crafted a new health care program.<sup>170</sup> Unlike Congress' prior modifications to Medicaid, the Court finds this modification to be a major change.<sup>171</sup>

The Court said that States had no way of anticipating Congress' dramatic change to Medicaid.<sup>172</sup> Therefore, because States must knowingly and voluntarily agree to Congress' conditions on federal grants, States had no notice of the Medicaid expansion because it is an entirely new program.<sup>173</sup> The Court said that Congress would be able to offer separate funds for States to comply with the Medicaid expansion.<sup>174</sup> However, Congress may not take away funding from existing Medicaid funds for States who opt not to comply with Congress' new program.<sup>175</sup>

By arguing that the Medicaid expansion is an entirely different program than the Medicaid program prior to the Affordable Care Act, Chief Justice Roberts makes a coercion argument similar to the one in *New York*. In *New York*, the Court held that under either option States chose, they would be following Congress' regulatory scheme—either by accepting the radioactive act's terms and receiving the funding or by having to regulate waste themselves.<sup>176</sup> Similarly, here, Chief Justice Roberts argues that Congress will penalize the States for not accepting the condition.<sup>177</sup> If the States accept, they will have to cover more individuals and abide by Congress' regulation. However, if they choose not to accept the expansion—a new program, according to the plurality—they will lose funding for the original Medicaid plans, an entirely separate program.<sup>178</sup> The Court uses the premise that the Medicaid expansion is a separate program

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<sup>170</sup> *See id.*

<sup>171</sup> *Id.* (where the Court said “[p]revious Medicaid amendments simply do not fall into the same category as the one at stake here,” and that prior modifications “can hardly be described as a major change”).

<sup>172</sup> *See id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 2607.

<sup>175</sup> *Id.*

<sup>176</sup> *New York v. United States*, 505 U.S. 144, 175–76 (1992).

<sup>177</sup> *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2607.

<sup>178</sup> *Id.*

for dual purposes—to reach the conclusion that States could not have anticipated the expansion and to say that Congress is forcing the States to comply with a new program or risk losing funding from the original, separate program.<sup>179</sup>

#### 4. JUSTICE GINSBURG’S DISSENT

Although the Court determined that Congress’ Affordable Care Act Medicaid expansion overstepped Congress’ Spending Clause authority by reaching the point where “pressure turns into compulsion,” the Court made no attempt to define the crossing over point between pressure and compulsion.<sup>180</sup>

Justice Ginsburg and Justice Sotomayor dissented on the Court’s Spending Clause holding, pointing out that this is the first time the Court ever found that Congress abused its spending authority by compelling States to act.<sup>181</sup> Justice Ginsburg said that it is not outside of Congress’ authority to expand Medicaid in the manner that the Affordable Care Act calls for.<sup>182</sup> Congress can define the limits of the programs it gives federal funding to.<sup>183</sup> If Congress were to repeal the existing Medicaid and then reenact the law to include the new expansion, Congress would not be exceeding its authority, Justice Ginsburg said.<sup>184</sup> However, requiring Congress to repeal and reenact a law, when it could be amended in the alternative, would

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<sup>179</sup> *See id.* at 2605–07. Justice Ginsburg characterizes Chief Justice Roberts’ premises as follows: First, the Medicaid expansion is a new, separate program from the original Medicaid program. *Id.* at 2630 (Ginsburg, J., dissenting). Therefore, Congress is threatening States to take away funds from an old program in order to coerce them to accept the new program. *Id.* Second, the expansion was unforeseeable by the States because the expansion is so expansive. *Id.* Third, the amount States stand to lose by not accepting Congress’ condition leaves them no choice but to participate in the expansion. *Id.* Therefore, for all those reasons, the expansion is coercive. *Id.*

<sup>180</sup> *See id.* at 2606 (where the Court said that, similar to the Court in *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548, 589–90 (1937), it “did not attempt to ‘fix the outermost line’ where persuasion gives way to coercion” and that it was instead enough to reach the conclusion that the Medicaid expansion surpassed that line).

<sup>181</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2630 (Ginsburg, J., dissenting).

<sup>182</sup> *See id.* at 2629–47 (Ginsburg, J., dissenting).

<sup>183</sup> *Id.* at 2629 (Ginsburg, J., dissenting).

<sup>184</sup> *Id.* (Ginsburg, J., dissenting).

be ritualistic and serve no federal interest, according to the dissent.<sup>185</sup> Instead, allowing Congress to amend the law to include a larger covered population embraces cooperative federalism.<sup>186</sup> Justice Ginsburg asked, “[b]y what right does a court stop Congress from building up without first tearing down?”<sup>187</sup>

Additionally, where Chief Justice Roberts qualified the Medicaid expansion as an infringement on state sovereignty, Justice Ginsburg sees Medicaid as “a prototypical example of federal-state cooperation in serving the Nation’s general welfare.”<sup>188</sup> Instead of the federal government creating a uniform health care system, Medicaid gives States discretion to allocate the funding based on the State’s needs, so long as they are not in violation of the federal requirements.<sup>189</sup>

While the plurality maintains that Congress structured the expansion as a separate program, Justice Ginsburg wrote that the programs are the same, not separate.<sup>190</sup> At the crux of Chief Justice Roberts’ argument that the Medicaid expansion is coercive is the premise that the expansion is an entirely separate program.<sup>191</sup> By reaching the conclusion that the Medicaid expansion is a *separate* program from the existing Medicaid program, Chief Justice Roberts is able to establish that States could not anticipate the expansion.<sup>192</sup> Additionally, by arguing that the program is separate, Chief Justice Roberts is able to reach the conclusion that Congress is threatening to take funding away from *another* program for noncompliance with the new program.<sup>193</sup> Justice Ginsburg disagrees with the plurality’s

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<sup>185</sup> *Id.* (Ginsburg, J., dissenting).

<sup>186</sup> *Id.* (Ginsburg, J., dissenting) (where Justice Ginsburg explains that forcing Congress to repeal and reenact a law, rather than amending it, “would rigidify Congress’ efforts to empower States by partnering with them in the implementation of federal programs”). Additionally, she says that “Medicaid ‘is designed to advance cooperate federalism.’” *Id.* at 2632 (citing to Wisconsin Dept. of Health and Family Servs. v. Blumer, 534 U.S. 473, 495 (2002)).

<sup>187</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2636 (Ginsburg, J., dissenting).

<sup>188</sup> *Id.* at 2629 (Ginsburg, J., dissenting).

<sup>189</sup> *See id.* (Ginsburg, J., dissenting).

<sup>190</sup> *See id.* at 2630 (Ginsburg, J., dissenting).

<sup>191</sup> *Id.* at 2605.

<sup>192</sup> *Id.* at 2601–08.

<sup>193</sup> *Id.* at 2605–07.

initial premise that the programs are separate by looking to the purpose of both the original Medicaid program and the Medicaid expansion.<sup>194</sup> Both the original Medicaid program and the Medicaid expansion seek to provide health care coverage for those who need it.<sup>195</sup> In the past, Congress expanded the original Medicaid program to meet its purpose of providing health care to those who need it, amending the program over fifty times since its enactment in 1965.<sup>196</sup> Annual funding and services covered by Medicaid have increased since 1966, and services have been offered to a larger proportion of the population.<sup>197</sup> Notably, in the late 1980's, Congress expanded Medicaid to cover pregnant women and expanded the population of children covered.<sup>198</sup> Congress' past expansions of Medicaid extended Medicaid covered to millions of people.<sup>199</sup> Therefore, Justice Ginsburg reasoned, the Medicaid expansion under the Affordable Care Act is the *same* program as the original Medicaid program.<sup>200</sup>

The Chief Justice commented on Justice Ginsburg's argument in the plurality opinion, explaining that the prior expansions simply broadened the amount of needy families covered.<sup>201</sup> However, Justice Ginsburg maintains that the Affordable Care Act Medicaid expansion is no different.<sup>202</sup> She said Medicaid was developed to protect the "needy," and the Medicaid expansion simply expands the definition of whom Congress considers needy.<sup>203</sup> Congress has the authority to set these standards because Congress has the authority to set the limits to the programs it funds and to adjust spending programs accordingly to meet the needs of "the general welfare."<sup>204</sup>

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<sup>194</sup> *Id.* at 2630 (Ginsburg, J., dissenting).

<sup>195</sup> *Id.* (Ginsburg, J., dissenting).

<sup>196</sup> *Id.* at 2631 (Ginsburg, J., dissenting).

<sup>197</sup> *Id.* (Ginsburg, J., dissenting).

<sup>198</sup> *Id.* (Ginsburg, J., dissenting).

<sup>199</sup> *Id.* (Ginsburg, J., dissenting).

<sup>200</sup> *Id.* at 2630 (Ginsburg, J., dissenting) (emphasis added).

<sup>201</sup> *Id.* at 2606 (calling Medicaid expansions that covered pregnant women and more children an expansion of "families with dependent children," a category already protected under the original Medicaid program).

<sup>202</sup> *Id.* at 2630 (Ginsburg, J., dissenting).

<sup>203</sup> *Id.* at 2634–35 (Ginsburg, J., dissenting) (arguing that adults earning 133% of the poverty line or less are the needy).

<sup>204</sup> *Id.* at 2629, 2636 (Ginsburg, J., dissenting).

Additionally, Justice Ginsburg disagrees that States could not anticipate the Medicaid expansion.<sup>205</sup> In *Pennhurst* and later in *Dole*, the Court held that Congress must make conditions on federal grants unambiguous so that States can knowingly accept the terms of the condition.<sup>206</sup> Chief Justice Roberts argues that States could not anticipate a major shift in Medicaid that, under the plurality's opinion, forces a State to accept an entirely new Medicaid program.<sup>207</sup> However, Justice Ginsburg found that the Affordable Care Act has met the standard of unambiguously telling States what is required of them to receive future funding.<sup>208</sup> Through a statutory provision allowing Congress to modify the act, coupled with the past modifications of Medicaid, States had notice that the act could be changed, like it was under the Affordable Care Act.<sup>209</sup> She said the Affordable Care Act clearly tells States that they must extend eligibility of Medicaid to adults with incomes less than 133 percent of the federal poverty line.<sup>210</sup> Nowhere in *Pennhurst*<sup>211</sup> does the Court state that Congress is under the obligation to tell States about future modifications to an act before the State accepts the condition.<sup>212</sup> Justice Ginsburg finds that Congress was under no obligation in 1965, at the time Medicaid was enacted, to disclose what size and how expansive Medicaid might become.<sup>213</sup> Additionally, as discussed above, Congress has expanded Medicaid coverage and amended the act since 1966.<sup>214</sup> Congress also maintained “[t]he right to alter, amend, or repeal and provision of Medicaid” in the Social Security Act, which contains the Medicaid act.<sup>215</sup> Justice Ginsburg points out that the provision does not limit Congress to only “*somewhat*” alter or “amend, *but not too much*,” contrary to what she said the Chief

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<sup>205</sup> *Id.* at 2636–39 (Ginsburg, J., dissenting).

<sup>206</sup> *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981); *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987).

<sup>207</sup> *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2605–06.

<sup>208</sup> *Id.* at 2630 (Ginsburg, J., dissenting).

<sup>209</sup> *Id.* (Ginsburg, J., dissenting).

<sup>210</sup> *Id.* at 2637 (Ginsburg, J., dissenting).

<sup>211</sup> *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).

<sup>212</sup> *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2637 (Ginsburg, J., dissenting).

<sup>213</sup> *Id.* (Ginsburg, J., dissenting).

<sup>214</sup> *Id.* (Ginsburg, J., dissenting).

<sup>215</sup> *Id.* at 2605; *id.* at 2638 (Ginsburg, J., dissenting); 42 U.S.C. § 1304.

Justice would prefer.<sup>216</sup> Therefore, Congress unambiguously told States what is required of them in order to receive Medicaid funding, according to Justice Ginsburg's dissenting opinion. Additionally, States had constructive and expressed notice of Medicaid expansions.<sup>217</sup>

Justice Ginsburg reminded the Court that States still have the opportunity to receive Medicaid funds if they accept Congress' conditions.<sup>218</sup> Congress is not taking money from an existing fund, but requiring that States extend Medicaid coverage to more of their "needy population."<sup>219</sup> According to Justice Ginsburg, "Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation."<sup>220</sup>

Most importantly, Justice Ginsburg pointed to the inconclusive future of the Spending Clause following the *NFIB* holding.<sup>221</sup> She poses the question of how future litigants and judges are to assess whether a State has a legitimate choice to accept conditions of a federal grant without the Court fixing "the outermost line" and explaining how to determine whether "pressure gives way to coercion."<sup>222</sup> She argues that under the *NFIB* holding, courts will be left to determine the point where "pressure gives way to coercion" under a number of factors, all of which could lead to inconsistent answers.<sup>223</sup> Among the questions likely to be posed, she said, are whether the courts will measure the number of dollars at risk if the States do not

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<sup>216</sup> *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2639 (Ginsburg, J., dissenting).

<sup>217</sup> *See id.* at 2630 (Ginsburg, J., dissenting).

<sup>218</sup> *Id.* (Ginsburg, J., dissenting).

<sup>219</sup> *Id.* at 2632 (Ginsburg, J., dissenting).

<sup>220</sup> *Id.* at 2630 (Ginsburg, J., dissenting).

<sup>221</sup> *Id.* at 2640 (Ginsburg, J., dissenting).

<sup>222</sup> *Id.* (Ginsburg, J., dissenting). Once again, the terms "outermost line" is the language used in *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548, 589–90 (1937). Additionally, the point "where pressure turns into coercion" alludes to the point where "pressure turns into compulsion," is also from *Charles C. Steward Machine Co. Id.*

<sup>223</sup> *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2640–41 (Ginsburg, J., dissenting). Justice Ginsburg says that determining if there is coercion involves political assessments that are outside the scope of judicial calculation. Determining if a State feels coerced to accept funding and comply with conditions, she argues, might be indeterminable for judicial administration. *Id.* at 2641 (citing to Baker & Berman, *Getting off the Dole*, 78 IND. L.J. 459, 521–22, n. 307 (2003)).

comply, the portion the federal grant plays in the State's budget, and whether the Court will only look to the budget of the suing State or a group of States.<sup>224</sup> Or, she questioned, will it come down to the State officials' fear of misplaced political accountability?<sup>225</sup>

Another question left open after *NFIB* is how Congress will know whether it is within its limited confines of the Spending Power, and how can it craft legislation that does not coerce the States under the plurality's opinion. What we do know after *NFIB* is that the largest federally funded bill was, in part, knocked down as coercive. With education being the second highest federally funded item, behind Medicaid,<sup>226</sup> what will the future of education policy rooted in the Spending Clause be after *NFIB*?

### III: THE CONSTITUTIONALITY OF POTENTIAL TITLE IX AMENDMENTS AFTER *NFIB*

After *NFIB*, the Spending Clause is a conceptual minefield for Congress. Under *Dole*, limitations on Congress' spending authority were clearly laid out in a brief opinion. The Court provided a structure of limitations on Congress and it only briefly evoked issues of federalism. After *NFIB*, limitations on Congress' spending authority are ambiguous. While Chief Justice Roberts reached a conclusion, it is unclear which argument by itself, if any, would be enough to make legislation unconstitutional under the Spending Clause. Without a definition of the point where "pressure turns into compulsion,"<sup>227</sup> Congress is left in the dark when passing progressive bills under the Spending Clause.

With Title IX requirements expanding, through clarifications by the Office of Civil Rights, the White House Task Force, or legislation, Congress will have to be exceedingly careful when implementing any additional requirements because Title IX is rooted in the

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<sup>224</sup> *Id.* at 2640 (Ginsburg, J., dissenting).

<sup>225</sup> *Id.* at 2640–41 (Ginsburg, J., dissenting).

<sup>226</sup> *Id.* at 2663 (Ginsburg, J., dissenting). The dissenting Justices use education as an example of why the Federal Government's non-coercive arguments should fail. *Id.* at 2662 (Ginsburg, J., dissenting).

<sup>227</sup> *S. Dakota v. Dole*, 483 U.S. 203, 211 (1987) (citing to *Charles. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937)).

Spending Clause. Issues relating to Title IX expansion will hit Congress' floor as early as 2016, according to the White House Task Force Report.<sup>228</sup> The question turns to what the fate of Title IX legislation will be in the future.

*A. Amending Title IX is Within Congress' Spending Authority Under Dole*

Under *Dole*'s limitations on the Spending Clause, any of the proposed suggestions for schools would be constitutional if they were required under Title IX. The first limitation outlined in *Dole* is whether Congress is exercising its spending power pursuant to the general welfare, with deference given to Congress in that determination.<sup>229</sup> Here, anything Congress might pass under Title IX would be in pursuit of the "general welfare" of protecting students from sexual assault. Second, Congress' condition for the States to receive federal funding must be unambiguous so that States can knowingly exercise their choice of complying with the condition.<sup>230</sup> Under this requirement, Congress would have to clearly spell out the additional requirements when amending Title IX. Although Title IX originally posed a problem with ambiguities, the Office of Civil Rights added clarity through the "Dear Colleague Letter."<sup>231</sup> However, if any of the recommendations in the "Dear Colleague Letter" or in the Task Force were to become mandatory, universities would have notice. The "Dear Colleague Letters" and the White House Task Force Report clearly laid out how schools can implement suggested programs and provide research for schools to use when creating those programs.<sup>232</sup> If any of the suggestions became a requirement under an amendment to Title IX, universities already have instructive materials to look at.<sup>233</sup> Third, the conditional grant must be related to

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<sup>228</sup> WHITE HOUSE TASK FORCE FIRST, *supra* note 12, at 8.

<sup>229</sup> *Dole*, 483 U.S. at 207.

<sup>230</sup> *Id.* at 207.

<sup>231</sup> See DEAR COLLEAGUE LETTER, *supra* note 31.

<sup>232</sup> See DEAR COLLEAGUE LETTER, *supra* note 31; see also WHITE HOUSE TASK FORCE, *supra* note 12.

<sup>233</sup> DEAR COLLEAGUE LETTER, *supra* note 31, at 14–15; WHITE HOUSE TASK FORCE, *supra* note 12, at 12–16.



the federal interest in the particular national program.<sup>234</sup> Here, expansions of Title IX would meet the same federal interest as Title IX currently does. Fourth, the condition must be constitutional on its own.<sup>235</sup> In *Dole*, the Court listed egregious examples of constitutional bars, like requiring a State to discriminate.<sup>236</sup> Here, a Title IX expansion would be doing just the opposite—it would be requiring the States to *not* discriminate based on gender, which is perfectly constitutional. However, Congress would have to be cautious if amending Title IX in any manner that might abridge the alleged assaulter's due process rights because that would be an "independent constitutional bar."<sup>237</sup>

Essentially, under *Dole*, the constitutional analysis for expanding Title IX to encompass more services would not vary much from what the original discussion on passing Title IX under the Spending Clause would have been, if a discussion occurred. Even though *Dole* laid out limitations to Congress' spending authority, those limitations did little to abridge Congress' powers.<sup>238</sup> However, an analysis of Title IX and any expansions of it under *NFIB*'s plurality would reach an opposite conclusion. Even as *NFIB* evokes standards laid out in *Dole*, without expressly citing to each of them, the Court's approach to the analysis is starkly different. By focusing a Spending Clause analysis on federalism issues with undefined standards, like the point where "pressure turns into compulsion,"<sup>239</sup> the Court made it virtually impossible for Congress to know whether an amendment

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<sup>234</sup> *Dole*, 483 U.S. at 207.

<sup>235</sup> *Id.* at 210–11 (where the Court describes "individual constitutional bars" to be discrimination and cruel and unusual punishment).

<sup>236</sup> *Id.* at 207.

<sup>237</sup> While the accused's due process rights are a key component to crafting Title IX legislation, it is outside the scope of this paper. For more information on maintaining the due process rights of the accused, see Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assaults on Campus*, 40 N. KY. L. REV. 49, 60–61 (2013) (discussing how in an attempt to protect the rights of victim students, the OCR is trampling over the rights of the accused).

<sup>238</sup> Bull, *supra* note 19, at 284 ("[Dole's] four explicit limitations appear to be rhetorical flourishes and effectively give complete deference to Congress in placing conditions upon federal funds.").

<sup>239</sup> *Dole*, 483 U.S. at 211 (citing to *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937)); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606 (2012) (where the plurality opinion states that the Court does not intend "to 'fix the outermost line' where pressure gives way to coercion").

to Title IX will pass the invisible constitutional threshold of coercion. At best, Congress could assume that legislation expanding Title IX will be found unconstitutionally coercive, under *NFIB*'s plurality opinion.

B. *Amending Title IX Likely Will Not Be Within Congress'*  
*Spending Authority Under NFIB*

1. FEDERALISM ISSUES: INDIVIDUAL LIBERTIES, POLITICAL  
ACCOUNTABILITY

If Title IX is amended, the amendments must not abridge individual liberties or the sovereignty of the state.<sup>240</sup> In *NFIB*, Chief Justice Roberts began the discussion of the Spending Clause by addressing the federalism issues at stake.<sup>241</sup> Amending Title IX to include any of the recommended programs would pose no impediments on individual liberties for the complainant. In fact, amending Title IX to include better training, programs that raise awareness, bystander education programs, or a uniform consent standard could lead to less campus sexual assault. Therefore, amending Title IX would increase student victims' individual liberties because it will reinforce their autonomy by allowing them to attend a university and get an education absent the prevalent threat of being sexually assaulted.<sup>242</sup>

Although amending Title IX to include more protections and services for victim will not abridge individual liberties, it creates an issue of political accountability. Chief Justice Roberts mentioned political accountability, although he gave no insight on how much weight, if any, this had in his decision of finding the Affordable Care Act coercive.<sup>243</sup> The issue of political accountability poses a problem under Title IX as a whole, even without being amended. As opposed to the scenario of political accountability laid out in *New York*

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<sup>240</sup> See *id.* at 2602.

<sup>241</sup> *Id.*

<sup>242</sup> Again, an amendment to requirements for misconduct procedures or a consent standard that impedes on the alleged assaulter's due process rights would be an "independent constitutional bar." *Dole*, 483 U.S. at 207; see discussion at note 237. However, the "Dear Colleague Letter" states briefly that schools must be mindful about the accused's due process rights, while still investigating the Title IX claim. DEAR COLLEAGUE LETTER, *supra* note 31, at 12.

<sup>243</sup> See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2602–03.

or *NFIB*, where the federal lawmakers were “insulated” from being held accountable because State actors were forced to implement federal regulations, here there’s another party in the mix—the university.<sup>244</sup> A university’s change in policy might be the doing of the university, the state,<sup>245</sup> or the federal government. Therefore, constituents would be confused about whom to hold accountable under this regime.

Despite creating an issue of political accountability, Title IX is a prime example of cooperative federalism.<sup>246</sup> Cooperative federalism is not considered in the plurality of *NFIB*, but Justice Ginsburg mentions it in her dissent.<sup>247</sup> Just as Medicaid allows for States to create their own regulation, provided that those regulations meet federal standards, Title IX also allows for universities to regulate. Title IX gives discretion to universities in drafting their own misconduct policies, creating their own procedures for misconduct hearings, and implementing misconduct findings.<sup>248</sup> In fact, all that Title IX truly requires is that policies be disseminated so that students have notice, Title IX coordinators be trained and accessible, and complaints be handled promptly, thoroughly, and impartially.<sup>249</sup> Therefore, the federal government and universities work together to make Title IX effective. Under Title IX amendments, universities might have less discretion, just as how under the Medicaid expansion States had less discretion in *NFIB*; however, the university will

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<sup>244</sup> *Id.* at 2660 (Ginsburg, J., dissenting) (citing back to *New York v. United States*, 505 U.S. 144, 169 (1992)).

<sup>245</sup> As in the case of California passing a mandatory affirmative consent bill for its schools receiving state funding. *See Calif. SB-967*, *supra* note 58.

<sup>246</sup> Cooperative federalism is when States and the Federal Government act together. Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 723–27 (2006) (explaining the origin of cooperative federalism). According to one Supreme Court definition, cooperative federalism is when States have the authority to enact, administer, and structure their own regulations, subject to the limitations imposed by federal standards. *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 (1981).

<sup>247</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2629, 2632 (Ginsburg, J., dissenting).

<sup>248</sup> *See DEAR COLLEAGUE LETTER*, *supra* note 31, at 4–7 (addressing what schools can do to enforce Title IX, but leaving it to the discretion of the school to craft its own policy).

<sup>249</sup> *Id.* at 4–5.

still have discretion when enforcing regulations so long as it does not violate the federal requirements. Although cooperative federalism seems appealing because it creates a system where both the States and federal government work together to meet an end goal, the cooperative nature of Medicaid was not enough to save the expansion in *NFIB*. Accordingly, absent any mention of cooperative federalism in the *NFIB* plurality, the cooperative nature of Title IX will likely not be enough to save an expansion of Title IX. Therefore, although Title IX safeguards, rather than abridges, individual liberties and provides a platform for cooperative federalism, an amendment to Title IX could be unconstitutional because it could prevent political accountability.

## 2. COERCION AND ECONOMIC DRAGOONING

### a. *Unlike in NFIB, Title IX Expansions Are Not A Separate Program*

In order to reach the conclusion that the Medicaid expansion was coercive, Chief Justice Roberts argued that the expansion was a separate program, and therefore a State that refused to comply with a new, separate program could not be penalized by having its Medicaid funds revoked.<sup>250</sup> Chief Justice Roberts said that States were surprised by the expansion because the expansion was completely separate from the original Medicaid bill.<sup>251</sup> If any of the suggested Title IX policies or programs became required, Congress would have to argue that the programs are not different from Title IX. When Title IX was passed, it aimed to address “access to higher education, athletics, career education, employment, learning environment, math and science, sexual harassment, standardized testing, and treatment of pregnant and parenting students.”<sup>252</sup> Even in the most extreme case of a federally implemented consent standard, the requirement would still aim toward the goals of Title IX—promoting access to higher education and addressing sexual harassment. Therefore, it would be hard for universities, to argue that they are surprised by an amendment to Title IX. Additionally, if universities no longer wish to comply with Title IX requirements, they are

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<sup>250</sup> *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2607, 2629.

<sup>251</sup> *Id.*

<sup>252</sup> Valentine, *supra* note 25.

free to choose the option of not complying—so long as they are willing to lose their federal funding.

However, the consequence of violating Title IX is to lose *all* federal funding.<sup>253</sup> Therefore, although an amendment to Title IX might be viewed as the same program as Title IX, Title IX as it stands now might violate the Spending Clause because the federal government threatens to take away all federal funding from a university, rather than just funding conditioned on enforcing Title IX.<sup>254</sup> Unlike in the case of Medicaid, where a State receives additional money to fund its Medicaid programs, under Title IX a university does not receive additional funds—it simply retains the funds it already receives from the federal government, but stands to lose the funds if it is found in noncompliance. Therefore, under *NFIB* it can be similarly argued that Congress would be penalizing universities for not complying with one program, Title IX, by revoking funding received from unrelated, separate programs that have nothing to do with Title IX.

b. *Title IX Amendments Might Be Coercive Under NFIB*

Under *Dole*, the amount of money South Dakota stood to lose—a mere five percent of its federal highway funding—was noted in the case.<sup>255</sup> In *NFIB*, the loss of funding at risk became a pivotal factor. Similarly to *NFIB*, a university that does not comply with Title IX stands to lose *all* of its federal funding.<sup>256</sup> There has yet to be a university that has had its federal funding revoked for being in violation of Title IX; however, that fact should not be dispositive because it is the *threat* of having the money revoked that would compel the university to comply.<sup>257</sup>

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<sup>253</sup> *ED Act Now*, *supra* note 6.

<sup>254</sup> *Id.*

<sup>255</sup> *See* *S. Dakota v. Dole*, 483 U.S. 203, 211 (1987).

<sup>256</sup> *See generally* Civil Rights Restoration Act of 1988, *confirmed by* *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 n.8 (1992) (where the Court said the entire institute would be liable for violating Title IX, rather than an individual program at the institute).

<sup>257</sup> Tyler Kingkade, *85 Colleges Are Now Under Federal Investigation For Sexual Assault Cases*, HUFFINGTON POST (Oct. 15, 2014, 3:21 PM), [http://www.huffingtonpost.com/2014/10/15/colleges-federal-investigation-sexual-assault\\_n\\_5990286.html](http://www.huffingtonpost.com/2014/10/15/colleges-federal-investigation-sexual-assault_n_5990286.html).

Unlike Medicaid, which could amount to ten percent of a State's overall budget, an individual university losing its federal funding would likely have less of an impact on the entire State's budget, although a devastating impact on an individual university's budget. According to one scholar, Title IX is not coercive because the entire State's federal education funding is not at risk, but merely the amount of funding the individual school gets.<sup>258</sup> The argument is compelling; a State might not be compelled by amendments to Title IX because an individual university's federal funding is much less than the State's federal education budget, and therefore there will be only a small impact on the State's overall budget. On a strictly economic basis, there is less risk of "economic dragooning"<sup>259</sup> of an entire State with Title IX.

However, the analysis of compulsion should not end there. The plurality opinion in *NFIB* took many factors into consideration and did not end the analysis after only considering the economic impact on the States' overall budgets if Medicaid funding were revoked.<sup>260</sup> Chief Justice Roberts evoked the core federalism principles, arguing that Congress cannot commandeer the States to regulate for it.<sup>261</sup> Here, similarly to *Printz* and *New York*, if Congress expanded Title IX it would commandeer the individual universities, which are state agents, to comply with the amendments. An individual university, including private universities, relies substantially on funding from the state and the federal government. Yale University, for example, relied on \$512.6 million dollars from the federal government for grants and contract income.<sup>262</sup> Harvard University received \$610.6 million of federal funding for sponsored projects.<sup>263</sup> If the OCR

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<sup>258</sup> See Emily J. Martin, *Issue Brief: Title IX and the New Spending Clause*, AMERICAN CONSTITUTIONAL SOC'Y FOR LAW AND POLICY, at 10 (arguing that Title IX is still protected under the Spending Clause).

<sup>259</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2605 (2012).

<sup>260</sup> See *id.* at 2601–03, 2605–09 (where the plurality discussed federalism issues and whether the Medicaid expansion was a new program before and after discussing the economic impact on State budgets).

<sup>261</sup> *Id.* at 2602 (here, the Court cites back to *New York v. United States*, 505 U.S. 144, 188 (1992) and *Printz v. United States*, 521 U.S. 898, 935 (1997)).

<sup>262</sup> YALE, FINANCIAL REPORT 2013-2014 19, [http://finance.yale.edu/sites/default/files/2013-2014%20Financial%20Report\\_Web%20Posting\\_FINAL\\_0.pdf](http://finance.yale.edu/sites/default/files/2013-2014%20Financial%20Report_Web%20Posting_FINAL_0.pdf).

<sup>263</sup> HARVARD UNIVERSITY, FINANCIAL REPORT: FISCAL YEAR 2014, [http://finance.harvard.edu/files/fad/files/har\\_fy14\\_financialreport.pdf](http://finance.harvard.edu/files/fad/files/har_fy14_financialreport.pdf)

pulled funding from universities that rely substantially on federal funding, those universities could be forced to close their doors. Therefore, like *Printz*, where the state municipal agencies were commandeered by a federal bill,<sup>264</sup> here the universities are being forced to comply with Title IX. Each university is therefore left with the choice of complying with Title IX and receiving Congress' federal grant or being found in violation of Title IX and having to close its doors. Similarly to *New York*, the universities are forced to "choose" between two decisions, both of which are prompted by Congress' regulation.

Without the Court explaining where the point is where "pressure turns into compulsion,"<sup>265</sup> there is no clear answer whether Congress would exceed its Spending Clause authority by expanding universities Title IX requirements. However, it seems that, under *NFIB*'s plurality, any path of considerations that leads to compulsion would violate the Spending Clause. When applying the considerations gathered from the plurality opinion of *NFIB* to the expansion of Title IX, some of the considerations are left unchecked. Title IX would not fall under an "independent constitutional bar," a limitation expressed in *Dole*, because it safeguards against gender discrimination. Additionally, Title IX provides a platform for cooperative federalism, allowing the universities to implement and enforce their own misconduct policies subject to minimum federal standards.

Despite the positives of Title IX, any amendments might exceed the point where "pressure turns into compulsion."<sup>266</sup> Title IX could confuse voters and create an issue of political accountability. Additionally, and most importantly, a university that chooses not to comply with Title IX would have *all* its federal funding revoked, rather than separate funds conditioned on its compliance.<sup>267</sup> Under *NFIB*, universities that rely heavily on federal funding will be coerced into complying with Title IX or risk having to shut down. Therefore, it

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<sup>264</sup> See generally *Printz v. United States*, 521 U.S. 898, 913 (1997) (where the Court found the federal government could not commandeer the state police officers to regulate on their behalf).

<sup>265</sup> *S. Dakota v. Dole*, 483 U.S. 203, 211 (1987) (citing to *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937)).

<sup>266</sup> Again, this language is from the brief federalism analysis in *Dole. Dole*, 483 U.S. at 211.

<sup>267</sup> *ED Act Now*, *supra* note 6.

is likely that Congress amending Title IX to make a more encompassing statute that meets the needs of society and addresses the issues that it originally intended to would be unconstitutional under *NFIB*.

### 3. GOING FORWARD

#### a. *Congress Could Create a Separate Fund That Attaches to Title IX Conditions*

If Congress wanted to amend Title IX, it could allocate a separate portion of funds for universities to receive when they comply with Title IX. An amendment would have a better chance of withstanding the *NFIB* coercion test if universities were only risking money specifically tied to Title IX, rather than all of their federal funds. By doing so, Congress would eliminate the threat of Title IX being interpreted as a separate program for which a State's noncompliance would lead to a revocation of separate funds, like the Medicaid expansion.

However, the danger of creating a separate fund for universities to receive upon meeting the conditions required in Title IX is rooted in the very "choice" of the States that the Court in *New York* and *NFIB* advocated for.<sup>268</sup> Although the right of a State to choose is the exact principle of federalism that the Court in *New York* and *NFIB* desired, there is a heightened risk of discrimination in a situation where a university does not comply with Title IX. The risk of losing all federal funding is a strong incentive for universities to comply with Title IX. Without such a strong incentives, universities might be less inclined to comply with Title IX. Therefore, any university could choose to not comply with Title IX and risk losing a smaller portion of money. A university that violates Title IX is subjecting its students to an environment absent basic procedural safeguards for sexual assault victims and creating a disparate impact on female students, who are sexually assaulted at a higher rate.<sup>269</sup> Allowing

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<sup>268</sup> See *New York v. United States*, 505 U.S. 144, 175–76 (1992). See also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605–07 (2012).

<sup>269</sup> CHRISTOPHER P. KREBS ET AL., *supra* note 3; *Statistics About Sexual Violence*, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, [http://nsvrc.org/sites/default/files/publications\\_nsvrc\\_factsheet\\_media\\_packet\\_statistics-about-sexual-violence\\_0.pdf](http://nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_statistics-about-sexual-violence_0.pdf) (last visited Feb. 12, 2015) (finding



universities the “right to choose” to comply with Title IX would not be appropriate because it would be allowing the universities the “right to choose” to subject their students to a discriminatory environment. Therefore, if Congress creates separate funding for universities to receive upon accepting the condition of an amendment to Title IX, Congress would risk universities rejecting Title IX amendments and fostering gender-based discrimination.

Additionally, under *NFIB*, one might argue that the only people affected by a State’s decision to not comply with the Medicaid expansion are the people living within that State. Therefore, if the people in that State disagree with that State’s decisions, they can elect new representatives and hold the current politicians accountable. However, if a university does not comply with Title IX, a student’s only remedy is to leave the university. Universities that choose not to comply with Title IX, while other universities do, will create a patchwork of sexual assault policies throughout the over 7,000 higher-education institutes in the United States.<sup>270</sup>

b. *The Fourteenth Amendment: Title IX’s Last Hope*

The Fourteenth Amendment provides that “[no] State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>271</sup> Under Section 5 of the Fourteenth Amendment, Congress has the power to pass legislation enforcing the Fourteenth Amendment.<sup>272</sup> If a constitutional question regarding Congress’ authority to pass Title IX or an amendment to Title IX graces the courts, the Fourteenth Amendment provides a strong basis for congressional authority to protect the liberty of an individual to be educated and the equal protection for all students to attend a university free of discrimination.

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that one out of five college females experience attempted or completed sexual assault, while one out of sixteen men experience attempted or completed sexual assault).

<sup>270</sup> Institute of Educational Sciences, *Fast Facts*, NATIONAL CENTER FOR EDUCATION STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=84> (last visited Jan. 24, 2014).

<sup>271</sup> U.S. CONST., amend. XIV, § 1.

<sup>272</sup> U.S. CONST., amend. XIV, § 5.

Assuming a university is an actor of the state, a university cannot deprive any person of his or her liberty. A university might argue that, by virtue of its acceptance policies, it has the right to deny someone access to education at its own facilities.<sup>273</sup> However, a university does not have the right to deny someone of his or her autonomy because that would be an abridgment of a person's liberty. Creating an environment, or allowing one to thrive, where students do not have the autonomy to move around freely without the threat of being sexually assaulted would abridge those students of their liberty. Therefore, it can be argued that Congress passing any legislation, including an expansion of Title IX, that protects a student's liberty to receive an education and to exist without fear of being sexually assaulted may be passed pursuant to the Fourteenth Amendment's protection of individual liberties.

Additionally, under Section 5 of the Fourteenth Amendment, Congress has the authority to enact laws that afford all people equal protection of the law.<sup>274</sup> Females are generally afforded equal protection of the law under the Fourteenth Amendment because sex-based regulations are subject to intermediate scrutiny.<sup>275</sup> Additionally, Title IX ensures equal access to education regardless of gender.<sup>276</sup> Campus sexual assaults have a disparate effect on female students. One out of five college females experience attempted or completed sexual assault, compared to one out of sixteen men.<sup>277</sup> Female

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<sup>273</sup> Education as a fundamental liberty has been debated. *See generally* Timothy D. Lynch, *Education As A Fundamental Right: Challenging The Supreme Courts Jurisprudence*, 26 HOFSTRA L. REV. 953 (1998) (arguing that education is a fundamental right protected by the Fourteenth Amendment, despite the Supreme Court's inconsistent jurisprudence); *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954) (where the Court seemed to recognize education as a fundamental right). *But see* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973) (where the Court reasoned that education was not a fundamental right that guarantees students from poor school districts the same quality of education as wealthier districts).

<sup>274</sup> U.S. CONST., amend. XIV, § 5.

<sup>275</sup> *See* *Craig v. Boren*, 429 U.S. 190 (1976) (holding applying intermediate scrutiny to a sex-based regulation).

<sup>276</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2014).

<sup>277</sup> CHRISTOPHER P. KREBS ET AL., *supra* note 3; *Statistics About Sexual Violence*, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, [http://nsvrc.org/sites/default/files/publications\\_nsvrc\\_factsheet\\_media\\_packet\\_statistics-about-sexual-violence\\_0.pdf](http://nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_statistics-about-sexual-violence_0.pdf) (last visited Feb. 12, 2015).

students are being sexually assaulted at alarmingly high rates on college campuses, creating an undue burden for female students to surpass in order to receive an education. If the Equal Protection Clause of the Fourteenth Amendment affords the same protections to males as to females, females should be able to attend universities without the undue burden of fearing that they will be sexually assaulted. While Title IX ensures equal access to education regardless of gender, gender has not yet been declared a protected class. However, because Title IX ensures equal access to education regardless of gender, including sex, Congress could uphold amendments to Title IX under the Equal Protection Clause of the Fourteenth Amendment, absent a substantial government interest.

While Congress' power under the Spending Clause is limited and uncertain, the Fourteenth Amendment provides a basis for Congress to enforce and amend Title IX. Title IX protects the liberty of education in a nondiscriminatory environment and creates equal access to education regardless of gender. Therefore, Congress could have enacted Title IX, and any subsequent amendments, pursuant to its powers under the Fourteenth Amendment.<sup>278</sup>

#### CONCLUSION

In conclusion, by analyzing the Spending Clause in *NFIB* under deep-rooted federalism principles, Chief Justice Roberts made it nearly impossible for Congress to strike a healthy nexus between the State and Federal Government under the Spending Clause. For Title IX to have the expansive success of VAWA and address the needs of college campuses today, Congress will have to cleverly work around the *NFIB* holding. It will be difficult and unlikely for Title IX to see progress under the new *NFIB* Spending Clause. Congress'

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<sup>278</sup> It is outside of the scope of this paper to discuss at length the intricacies of grounding Title IX in the Fourteenth Amendment. For more on the topic of Congress' powers to pass Title IX under the Fourteenth Amendment, *see generally* Melanie Hochberg, *Protecting Students Against Peer Sexual Harassment: Congress' Constitutional Powers to Pass Title IX*, 74 N.Y.U. L. REV. 235 (arguing that Title IX was passed pursuant to the Fourteenth Amendment based on legislative history of the bill).

strongest option to amend Title IX to include more services and protections for victims may be to root any Title IX legislation in the Fourteenth Amendment.