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Title IX and the New Spending Clause

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At oral argument in the cases challenging the Affordable Care Act, when Paul Clement argued that the law's expansion of Medicaid exceeded Congress's Spending Clause powers because it left states with no realistic option of refusing to carry out the expansion, Justice Ginsburg seemed troubled. "Let me ask you another thing, Mr. Clement," she began:

Most colleges and universities are heavily dependent on the government to fund their research programs and other things, and that has been going on for a long time. And then Title IX passes, and a government official comes around and says to the colleges, you want money for your physics labs and all the other things you get it for, then you have to create an athletic program for girls. And the recipient says, I am being coerced, there is no way in the world I can give up all the funds to run all these labs that we have, I can't give it up, so I'm being coerced to accept this program that I don't want.

. . . [I]f your theory is any good, why doesn't it work any time . . . someone receives something that is too good to give up?¹

Many others have been asking the same question since the Supreme Court's decision in June, which held that Congress unconstitutionally coerced the states when it conditioned states' continued receipt of Medicaid funding on the states expanding Medicaid coverage to all adults under 133 percent of poverty. On SCOTUSBlog and NPR's All Things Considered, Kevin Russell, of the Supreme Court litigation boutique Goldstein & Russell, opined that one of the case's major impacts "will be to revive claims that several significant civil rights statutes, enacted under Congress's Spending Power, are unconstitutional."² In the *New York Times*, constitutional law expert Pamela Karlan wondered whether the decision would "hamstring" efforts by Congress to condition federal funding on nondiscrimination requirements.³ *Ed Law Challenges Loom After Health Care Ruling*, ran a headline in *Education Week*, identifying Title IX as a potentially affected statute.⁴

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¹ Transcript of Oral Argument at 21:18, *Nat'l Fed. Of Ind. Business v. Sebelius*, 132 S. Ct. 2566 (No. 11-393), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-400.pdf.

² Kevin Russell, *Civil rights statutes put at risk by health care decision*, SCOTUSBLOG (Jun. 29, 2012, 9:54 AM), <http://www.scotusblog.com/2012/06/civil-rights-statutes-put-at-risk-by-health-care-decision/>; Carrie Johnson, *All Things Considered: How the Health Care Ruling Might Affect Civil Rights*, NATIONAL PUBLIC RADIO (NPR radio broadcast July 10, 2012), available at <http://wgbhnews.org/post/how-health-care-ruling-might-affect-civil-rights>.

³ Pamela S. Karlan, *No Respite for Liberals*, N.Y. TIMES, at SR 1 (July 1, 2012).

⁴ Mark Walsh, *Ed. Law Challenges Loom After Health-Care Ruling*, TEACHHUB (Oct. 8, 2012, 2:33 PM); <http://www.teachhub.com/ed-law-challenges-loom-after-health-care-ruling>; See also Mark Walsh, *Health-Care Ruling Has Implications for Education Spending*, EDUCATION WEEK SCHOOL L. BLOG (Jun. 28, 2012, 4:44 PM), http://blogs.edweek.org/edweek/school_law/2012/06/medicaid_ruling_has_implicatio.html.

This issue brief surveys the legal landscape in which Title IX finds itself in the wake of the Supreme Court’s Spending Clause analysis in *NFIB v. Sebelius*.⁵ It analyzes the structure and function of Title IX and sets out the key legal distinctions between Title IX and the ACA’s Medicaid expansion, providing a roadmap for litigators who inevitably will confront challenges to Title IX’s constitutionality by defendants facing Title IX claims. It demonstrates why Title IX remains a wholly constitutional exercise of Congressional authority.⁶

I. The Supreme Court’s New Spending Clause Jurisprudence

In March 2010, the 111th Congress passed The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010,⁷ commonly known as the Affordable Care Act (ACA). Among many other provisions, the ACA significantly expanded the reach of the cooperative state-federal Medicaid program.⁸ Beginning in 2014, the ACA requires states to provide Medicaid coverage to all adults under age 65 with incomes below 133 percent of the federal poverty level (FPL).⁹ Previously, federal law did not require that adults’ eligibility for Medicaid be based solely on income level. Instead, states were required to cover low-income children and certain categories of low-income adults: primarily pregnant women below 133 percent of the FPL, very low-income parents, and elderly and disabled Supplemental Security Income beneficiaries.¹⁰ In addition, states were required to provide a limited form of Medicaid coverage to certain low-income Medicare beneficiaries, covering costs that they would otherwise be required to share under Medicare.¹¹ As a result, many states currently do not provide Medicaid to childless adults at all and cover parents only at income levels far below 133 percent of the FPL.¹² The ACA further provides that the federal government will bear the entire cost of this coverage expansion for the first two years; the federal share thereafter will be reduced gradually to 90 percent.¹³

Since 1982, every state has participated in Medicaid, but the federal Medicaid statute makes such participation optional—though, of course, a state will only receive federal Medicaid funding if it participates in the program. The federal government generally pays between 50 and 83 percent of a state’s Medicaid costs, depending on income levels in the state¹⁴—far less than the federal share of the ACA Medicaid expansion. In order to provide insurance to low-income individuals, each state can accept federal funding to operate and design its own Medicaid program within the parameters set by the federal government, including the expansion of

⁵ *Nat’l Fed. Of Ind. Business v. Sebelius*, 132 S. Ct. 2566 (2012) [hereinafter *NFIB*].

⁶ While this issue brief focuses on Title IX, its analysis regarding the Spending Clause can be applied in key respects to Title VI of the Civil Rights Act of 1964, § 504 of the Rehabilitation Act, and the Age Discrimination Act of 1975, all antidiscrimination laws that apply to federally funded programs and activities and all of which Title IX mirrors in structure.

⁷ Patient Protection and Affordable Care Act, § 2005, Pub. L. No. 111–148, 124 Stat. 119-1025 (2010).

⁸ 42 U.S.C. § 1396a.

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

¹⁰ *See* 42 U.S.C. § 1396a(a)(10)(A).

¹¹ *See id.*

¹² States currently must provide Medicaid to children under age 6 with family income up to 133 percent of the FPL and children ages 6 through 18 with family income up to 100 percent of the FPL. 42 U.S.C. §§ 1396a(a)(10)(A)(i)(IV), (VI), (VII), 1396a(l)(1)(B)-(D), 1396a(l)(2)(A)-(C).

¹³ Affordable Care Act, § 2005.

¹⁴ 42 U.S.C. § 1396d(b).

coverage required by the ACA, *or* turn down that funding and create a totally different program with state money only, or no program at all.

Following the enactment of the ACA, state attorneys general and others challenged the ACA's expansion of Medicaid eligibility, arguing that withholding Medicaid reimbursement to a state unless that state complies with the expansion of its Medicaid program exceeded Congress's powers under the Spending Clause and violated the Tenth Amendment. The plaintiff states argued that they would be coerced into contributing state funds toward the expanded Medicaid coverage because failure to comply with these increased requirements would expose them to a potential penalty loss of all Medicaid funding. Medicaid represents 40 percent of all federal funds that states receive, and the majority of states currently receive more than \$1 billion in Medicaid funding each year.¹⁵ Accordingly, the states argued, because they had no realistic option to turn down this funding, the federal government was unconstitutionally coercing them to undertake the ACA's Medicaid expansion by conditioning future Medicaid funding on implementation of the expansion.¹⁶

Seven Justices held that Congress's Spending Clause power did not permit it to condition all future Medicaid funds to a state on the state's implementation of the ACA's Medicaid expansion. Justice Roberts wrote the narrower (and thus controlling) opinion on this issue, which Justice Breyer and Kagan joined.¹⁷ While Justices Ginsburg and Sotomayor would have held that the Medicaid expansion was wholly constitutional, they joined Justices Roberts, Breyer, and Kagan in holding that an appropriate remedy for any constitutional violation was to sever the enforcement mechanism permitting all Medicaid funds to be withheld from a state that failed to implement the expansion from the Medicaid expansion itself—and this was the holding of the Court.¹⁸ (Justices Scalia, Thomas, Alito, and Kennedy would have struck down the entire ACA to remedy the violation.¹⁹)

As a result of the Supreme Court's decision, the ACA therefore still provides for the expansion of Medicaid, but states that fail to comply with that expansion may not be penalized by the loss of their existing Medicaid funding. Instead, the federal government may only withhold the federal funding associated with the Medicaid expansion.

An important basis for this result was Justice Roberts' view of the Medicaid expansion not as an enhancement of the existing Medicaid program, but rather as a new program layered on top of the existing Medicaid program.²⁰ Central to the Court's decision that Congress could not withhold all Medicaid funding if states did not undertake the Medicaid expansion, is Justice Roberts' conclusion that conditions that "take the form of threats to terminate other significant

¹⁵ KENNETH R. THOMAS, CONG. RESEARCH SERV., 7-5700, THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER *NFIB v. SEBELIUS 2* (July 17, 2012).

¹⁶ Brief of State Petitioners at 32-48, *State of Florida v. Dep't of Health and Human Services*, No. 11-400, (S. Ct. Jan. 10, 2012) (addressing coercion through Medicaid funding).

¹⁷ *NFIB*, 132 S. Ct. at 2601-08.

¹⁸ *Id.* at 2641-42.

¹⁹ *Id.* at 2667-76.

²⁰ *See id.* at 2605-06 ("The Medicaid expansion . . . accomplishes a shift in kind, not merely degree. . . . Indeed, the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program.").

independent grants . . . are properly viewed as a means of pressuring the States to accept policy changes.”²¹

The Court also emphasized the sheer size of Medicaid and its importance to state budgets in finding the enforcement mechanism unconstitutionally coercive. As noted by the Court, “Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of these costs.”²² It is by far the largest federal grant to states.²³ The size of the federal grant is such, the Court concluded, that no state could voluntarily turn it down, while “[t]he legitimacy of Congress’s exercise of the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”²⁴ Contrasting the Medicaid expansion to the Court’s 1984 decision in *South Dakota v. Dole*,²⁵ which concluded that Congress did not unconstitutionally coerce the states or exceed its Spending Clause powers when it conditioned a small portion of federal highway funds to a state on the requirement that the state adopt legislation setting the drinking age at 21, the Court reasoned:

It is easy to see how the *Dole* court could conclude that the threatened loss of less than half of one percent of South Dakota’s budget left that State with a ‘prerogative’ to reject Congress’s desired policy, ‘not merely in theory but in fact.’ The threatened loss of over ten percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.²⁶

No state has in fact ever been penalized with loss of its entire Medicaid funding for failure to meet program requirements, but the Court dismissed this fact as insignificant, characterizing the threat of loss of all Medicaid funding as “a gun to the head.”²⁷

The holding marked a dramatic departure from previous Spending Power jurisprudence. Never before in the nation’s history has legislation enacted pursuant to Congress’s Spending Power been found to unconstitutionally coerce the states. Indeed, the Court had previously expressed skepticism that the states, as sovereigns, could ever be coerced by a promise of federal funds, as it was always in their power to say no. In rejecting a coercion challenge to an unemployment insurance law passed pursuant to the Spending Power, for example, the Court noted in 1937, “Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can *ever* be applied with fitness to the relations between state and nation.”²⁸ As the Court stated in that case and reaffirmed in *Dole*, “[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. . . . Till now the law has been guided by a robust common sense which assumes the freedom of the will as a

²¹ *Id.* at 2604.

²² *Id.*

²³ *See id.* at 2605 (“The Federal Government estimates that it will pay out approximately \$3.3 trillion between 2012 and 2019 in order to cover the costs of *pre-expansion* Medicaid.”); *see also id.* at 2662 (“Medicaid has long been the largest federal program of grants to the States.”) (Scalia, J., et al, dissenting).

²⁴ *Id.* at 2602 (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

²⁵ *South Dakota v. Dole*, 483 U.S. 203 (1987).

²⁶ *NFIB*, 132 S.Ct. at 2605, *quoting Dole*, 483 U.S. at 211-12.

²⁷ *Id.* at 2604.

²⁸ *Chas. C. Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937) (emphasis added).

working hypothesis in the solution of its problems.”²⁹ In *Dole*, the Court noted that a state’s sovereignty was not compromised when a state could “adopt the simple expedient of not yielding” to the alleged federal coercion.³⁰ Based on these statements, federal courts of appeals consistently rejected claims that Spending Power laws such as Medicaid coerced the states into accepting the terms on which the federal funds were offered, concluding that states in fact were just presented “hard political choices” by these laws, which did not implicate the Constitution.³¹

While seven justices agreed that enforcement of the Medicaid expansion through the threatened loss of all Medicaid funding was unconstitutionally coercive, and thus dramatically changed Spending Power jurisprudence, the Court did not clearly identify a test to apply in future cases.³² As a result, observers and commentators, soon, no doubt, to be joined by litigants, are raising questions about the constitutionality of a host of other Spending Power laws and programs, including Title IX.

II. Title IX’s Powerful Antidiscrimination Mandate

Forty years ago, Congress enacted Title IX of the Education Amendments of 1972, providing that entities receiving federal funding may not discriminate on the basis of sex in education programs or activities. Modeled on Title VI of the Civil Rights Act of 1964, which prohibits race and national origin discrimination by recipients of federal funds, Title IX has had a revolutionary effect in opening educational opportunities to women and girls over the past forty years. It swept away the once common practice of holding women to higher standards in higher education admissions and artificially capping their enrollment in elite colleges and universities. While women received less than 20 percent of Ph.D.’s in life sciences in 1972, today they receive slightly more than half, and the percentage of engineering Ph.D’s received by women, although still far too low, has increased from zero percent in 1972 to about 20 percent today.³³ Only seven percent of high school athletes were girls in 1972, but today girls are 41 percent of those playing high school sports.³⁴ Six times as many women participate in college athletics as did at the time of Title IX’s passage.³⁵ As the result of Title IX, students facing sexual harassment now have a legal remedy.³⁶ Pregnant students are no longer routinely expelled from high school.³⁷

²⁹ *Dole*, 483 U.S. at 211 (quoting *Steward Machine*, 301 U.S. at 589-90).

³⁰ *Id.* at 210.

³¹ *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997); *see also, e.g.*, *Van Wyhe v. Reisch*, 581 F.3d 639, 652 (8th Cir. 2009); *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc); *Kansas v. United States*, 214 F.3d 1196, 1203-1204 (10th Cir. 2000); *Padavan v. United States*, 82 F.3d 23, 28-29 (2d Cir. 1996); *Nevada v. Skinner*, 884 F.2d 445, 448-49 (9th Cir. 1989); *Oklahoma v. Schweiker*, 655 F.2d 401, 413-14 (D.C. Cir. 1981).

³² *See, e.g., NFIB*, 132 S. Ct. at 2606. (“We have no need to fix a line It is enough for today that wherever that line may be, this statute is surely beyond it.”).

³³ NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX: WORKING TO ENSURE GENDER EQUALITY IN EDUCATION, CELEBRATING 40 YEARS, at 22 (2012), <http://www.ncwge.org/PDF/TitleIXat40.pdf>.

³⁴ *Id.* at 8.

³⁵ *Id.*

³⁶ *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

³⁷ *See* 34 C.F.R. § 106.40 (2012).

Title IX's nondiscrimination guarantee reaches all of the operations of any educational institution that receives federal funding.³⁸ For example, Title IX extends not only to the "traditional educational operations" of a college receiving federal funding, but also to "faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities," of the college, as well as its other operations.³⁹ In addition, any education program or activity operated by an entity that receives federal funding is also covered by Title IX. For example, if a hospital receives federal funding for a particular clinic, then any educational programs operated by the hospital are covered by Title IX.⁴⁰

Title IX is enforceable not only by a private right of action, which provides a vehicle for injunctive relief and damages,⁴¹ but also by the federal agencies providing the financial assistance to the relevant institution, with the Department of Justice playing a coordinating role, in close consultation with the Department of Education.⁴² Federal agencies investigate and resolve administrative Title IX complaints against funding recipients.

When an agency concludes that a federal funding recipient has violated Title IX, it must first seek to resolve the violation through voluntary compliance by the recipient.⁴³ If attempts to achieve voluntary compliance are unsuccessful, the matter may be referred to the Justice Department, which has the authority to bring litigation to resolve the violation.⁴⁴ Alternatively, an agency has the power to terminate federal funding based on a Title IX violation, but only after it determines that "compliance cannot be secured by voluntary means."⁴⁵ A formal hearing, an express finding of failure to comply, and an approval of fund termination by the agency head must precede any termination of funds.⁴⁶ In addition, prior to any termination of funds, the agency must also file a report providing the grounds for the decision to terminate funds with the House and Senate legislative committees having jurisdiction over the relevant program and wait 30 days before terminating funds.⁴⁷ Funding can be terminated only when the particular funding

³⁸ 20 U.S.C. § 1687. This language was added to Title IX by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), which overturned the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984) (holding that Title IX's antidiscrimination rule applied only to the particular aspect of an institution's operations that actually received federal funding), and restored Title IX's broad reach, as well as the broad reach of other antidiscrimination laws tied to federal funding.

³⁹ S. REP. NO. 64 at 17 (1988), *reprinted in* 1988 U.S.C.C.A.N. 19.

⁴⁰ 20 U.S.C. § 1687; *see also, e.g.,* *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994) (holding that educational activities operated by prisons receiving federal funds were bound by Title IX); U.S. DEP'T OF JUSTICE, CIV. RTS. DIV., TITLE IX LEGAL MANUAL at 53, n. 28 and accompanying text (Jan. 11, 2001), <http://www.justice.gov/crt/about/cor/coord/ixlegal.pdf>.

⁴¹ *See Cannon v. University of Chicago*, 441 U.S. 677 (1979) (finding an implied private right of action under Title IX); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (finding a right to recover damages for intentional violations of Title IX).

⁴² *See* Exec. Order No. 12,250, 3 C.F.R. 298 (1980), *available at* <http://www.archives.gov/federal-register/codification/executive-order/12250.html>.

⁴³ 42 U.S.C. § 2000d-1.

⁴⁴ *Id.* (authorizing compliance with Title IX to be effect "by any other means authorized by law"); 34 C.F.R. § 100.8 (2012).

⁴⁵ 42 U.S.C. § 2000d-1.

⁴⁶ Procedure for Effecting Compliance, 34 C.F.R. § 106.71 (2012); 34 C.F.R. § 100.8 (2012).

⁴⁷ *Id.*; 20 U.S.C. § 1682.

stream at issue is directly financing discrimination or financing an activity that is infected with discrimination.⁴⁸

III. Title IX and the New Spending Clause

As noted above, Justice Roberts' decision for the Court in *NFIB v. Sebelius* does not set out any precise test for determining whether a Spending Power program is unconstitutionally coercive,⁴⁹ but a fair analysis of the holding demonstrates that because Title IX is markedly different from the challenged Medicaid expansion in key ways, Title IX is constitutional, even under the Court's re-envisioning of Spending Power jurisprudence.

First, it is important to note that Title IX's mandate applies to private entities receiving federal money, as well as public entities, in contrast to the Medicaid program where the challenged provisions applied only to states. *NFIB*'s Spending Power analysis is driven solely by a professed concern for "ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."⁵⁰ Thus, the *NFIB* analysis has no applicability to Spending Power statutes as applied to private actors and casts no shadow whatsoever over Title IX's applicability to private federal funding recipients. Title IX also reaches local governments receiving federal money. Given that *NFIB* is singular as a case finding unconstitutional coercion in violation of the Spending Clause, it is unclear if coercion claims are even available to local governments, or whether such claims, if available, would be subject to the same legal standard as applied to claims by states, but there are potentially important differences between the two contexts.⁵¹

Even as applied to state governments, however, Title IX is sharply distinct from the Medicaid expansion. Much of the Spending Power analysis in *NFIB* suggests that Medicaid is uniquely situated in Spending Power jurisprudence because of the sheer size of the program as a percentage of state budgets. "Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs," Justice Roberts' opinion emphasized, concluding that the "threatened loss of over 10 percent of a State's overall budget" left states with no choice but to comply.⁵² The opinion of Justices Scalia, Kennedy, Thomas, and Alito (which provided the additional four votes to the three votes for Justice Roberts' opinion) further observed:

The States are far less reliant on federal funding for any other program. After Medicaid, the next biggest federal funding item is aid to support elementary and secondary education, which amounts to 12.8% of total federal outlays to the States, and equals only 6.6% of all state expenditures combined. . . . [E]ven in states with less than average federal Medicaid funding, that funding is at least

⁴⁸ 42 U.S.C. § 2000d-1.

⁴⁹ See *supra* note 32 and accompanying text.

⁵⁰ 132 S. Ct. at 2602.

⁵¹ Compare *Printz v. United States*, 521 U.S. 898, 931 n.15 (1997) (refusing to distinguish between state and local government for purposes of Tenth Amendment analysis) with *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 n.54 (1978) (distinguishing between state and local governments for purposes of sovereign immunity analysis).

⁵² *NFIB*, 132 S. Ct. at 2604, 2605 (Opinion of Roberts, C.J.).

twice the size of federal education funding as a percentage of state expenditures.⁵³

Four of the justices in the majority thus drew an explicit contrast between Medicaid funding (and states' ability to refuse it) and federal education funding. Given the Court's emphasis on the unique size of Medicaid, on its face *NFIB*'s Spending Clause analysis applies only to Medicaid, and indeed, only to the ACA's very particular type of Medicaid expansion.⁵⁴

Title IX's nondiscrimination rule, of course, attaches not only to aid to support elementary and secondary education, but to any federal funding received by an educational institution and to any federal funding received by an institution that operates an educational program or activity—a much more difficult to calculate category of federal outlays to states. Key differences between the design and operation of the Medicaid expansion and the design and operation of Title IX, however, mean that the size of the federal outlay to which Title IX's requirements attach is largely beside the point for the purposes of Spending Power analysis, even if the total amount of this funding were to rival federal Medicaid funding. The crucial difference lies in the structure of Title IX and the potential penalty for noncompliance.

When the Court considered Medicaid, it considered a funding stream structured as a single, large federally-funded program. Thus, the Court focused on the size of the entire Medicaid grant received by states and states' dependence on that entire Medicaid grant when it considered whether the ACA's expansion of Medicaid eligibility as a condition of future receipt of Medicaid funding was unconstitutionally coercive. Title IX is fundamentally different in its structure from Medicaid as it existed either before or after the ACA expansion. It is not a single federally-funded program, but rather a condition imposed on multiple, separate federal funding streams, each of which operates independently.

The relevance of this difference is made clear by the potential penalty faced by states that fail to comply with Title IX. Through language known as the "pinpoint provision," Title IX narrows and limits the adverse effects of federal fund termination. This provision states that when a federal agency terminates or refuses to grant funding based on a Title IX violation, "such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and *shall be limited in its effect to the particular program, or part thereof*, in which such noncompliance has been so found."⁵⁵

The seminal case interpreting this language is *Board of Public Instruction v. Finch*,⁵⁶ a case that arose under Title VI—the source of Title IX's identical pinpoint provision.⁵⁷ In *Finch*, a Department of Health, Education, and Welfare (HEW) hearing officer made findings that a school district had not made adequate progress toward racial desegregation, and that the district had instead sought to perpetuate a dual school system through its school construction program. Based on these findings, a final order was entered by the Commissioner of Education terminating

⁵³ *Id.* at 2663-64.

⁵⁴ *See id.* at 2606 (distinguishing the ACA expansion of Medicaid from all previous Medicaid expansions and amendments).

⁵⁵ 20 U.S.C. § 1682 (emphasis added).

⁵⁶ 414 F.2d 1068 (1969).

⁵⁷ *See* 42 U.S.C. § 2000d-1.

“any class of Federal financial assistance” to the district “arising under any Act of Congress” administered by HEW, the National Science Foundation, or the Department of the Interior.

The Fifth Circuit vacated this termination of funding, holding that it exceeded the Commissioner of Education’s power under Title VI. The Commissioner’s order had terminated federal funding pursuant to three separate statutes—“one concern[ing] federal aid for the education of children of low income families; one involv[ing] grants for supplementary educational centers; [and] the third provid[ing] special grants for the education of adults who have not received a college education.”⁵⁸ But the Commissioner had made no specific findings as to whether each of these federal grants had been used to support unlawfully segregated education, or if discrimination in one federally funded activity caused discriminatory treatment in the other activities funded by separate federal streams.

The court held that in the absence of such findings, the termination of all three federal funding streams to the school district violated the pinpoint provision. The court focused on the provision’s requirement that a termination of funding be “limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found,” and concluded that the term “program” referred not to generic categories of programs operated by a recipient (for example, educational programs) but rather to the program of assistance administered by the federal government pursuant to a particular statute.⁵⁹ Thus, an agency’s fund termination order must be based on grant-statute-specific findings of noncompliance. As the court explained:

If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a state, within a county, within a district, even within a school (in short, within a “political entity or part thereof”), is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others. . . . Each [statutory program] must be considered on its own merits to determine whether or not it is in compliance with the Act. Schools and programs are not condemned *en masse* or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own “day in court.”⁶⁰

The *Finch* court made clear that a program should not be considered “in isolation from its context”; if discrimination has (for example) affected the make-up of the entire student body of the school, then a program offered within the school may in some instances be infected by discrimination, even if it is not itself actively discriminating.⁶¹ But by limiting the termination

⁵⁸ *Finch*, 414 F.2d at 1074.

⁵⁹ *Id.* at 1072 (quoting 42 U.S.C. § 2000d-1). Further, the court concluded, even if “program” was meant to refer to generic categories of aid, such as “aid to schools” the parenthetical phrase, “or part thereof,” must be given meaning. *Id.* at 1077.

⁶⁰ *Id.* at 1075, 1078 n.11. *See also* *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972).

⁶¹ *Id.* at 1079.

power to activities that are either actually discriminatory or infected by a discriminatory environment, vindictive terminations of funds are avoided and innocent beneficiaries of programs untainted by discrimination are protected.⁶²

The *Finch* holding has been consistently followed by courts and federal agencies and remains in effect today. While the Civil Rights Restoration Act of 1988 amended Title IX's definition of "program" to clarify that Title IX applies to all the operations of an educational institution that receives federal funding and all the educational operations of an institution if any part of the institution receives federal financial assistance,⁶³ this did not affect the pinpoint provision, which limits fund termination to the particular program "or part thereof" found to have discriminated or been infected by discrimination. Thus, to the extent the Civil Rights Restoration Act broadened Title IX's definition of "program," the "or part thereof" language of the pinpoint provision ensured that the federal power to terminate funds to states or other recipients remained unchanged, as legislative history and implementing regulations make clear.⁶⁴

Therefore, Title IX does not contemplate or permit a wholesale termination of (for example) federal education funding to a state in the absence of a showing of sex discrimination infusing and infecting the entirety of a state's federal education funds. As a result, Title IX is not unconstitutionally coercive under *NFIB*. After all, the opinion of the Court did not hold that the expansion of Medicaid was unconstitutionally coercive; rather, it held that the potential penalty of loss of all Medicaid funding for failure to comply with the expansion was unconstitutional. A majority of five Justices agreed that any constitutional violation in the Medicaid expansion was wholly cured by limiting the potential penalty states faced. In other words, as Justice Roberts' decision states, "Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing funding."⁶⁵ In the language of *NFIB*, Title IX is a condition that "govern[s] the use of the funds" provided to the state, rather than a condition that "take[s] the form of threats to terminate other significant independent grants."⁶⁶ Because Title IX requires that any termination of federal funds based on sex discrimination be specific to the grant money that funds the discrimination, it is in complete conformity with the *NFIB* holding requiring the penalty for refusing to expand Medicaid be limited to the loss of federal funding associated with the expansion of Medicaid.

⁶² *Gautreaux*, 414 F.2d at 1075.

⁶³ 20 U.S.C § 1687. *See supra* note 388 and accompanying text.

⁶⁴ *See* S. REP. NO. 100-64, at 20 (June 5, 1987) (noting that the CRRA leaves in effect the *Finch* rule that "Federal funds earmarked for a specific purpose would not be terminated unless discrimination was found in the use of those funds or the use of the funds was infected with discrimination elsewhere in the operation of the recipient"); Conforming Amendments to the Regulations Governing Nondiscrimination Under the Civil Rights Restoration Act of 1987, 65 Fed. Reg. 68050, 6805 (codified at 34 C.F.R. pts. 100, 104, 106, and 110) (Nov. 13 2000) ("It is important to note that these changes do not in any way alter the requirement of the CRRA that a proposed or effectuated fund termination be limited to the particular program or programs 'or part thereof' that discriminates or, as appropriate, to all of the programs that are infected by the discriminatory practices."); U.S. DEP'T OF JUSTICE, CIV. RTS. DIV., TITLE IX LEGAL MANUAL at 149, n. 124 and accompanying text (Jan. 11, 2001), <http://www.justice.gov/crt/about/cor/coord/ixlegal.pdf>.

⁶⁵ 132 S.Ct. at 2607.

⁶⁶ *Id.* at 2604.

IV. Title IX and the Fourteenth Amendment

Title IX is not only an appropriate exercise of Congress's Spending Power; as applied to states; it is also an appropriate exercise of Congress's authority to enforce the Equal Protection Clause under Section 5 of the Fourteenth Amendment. Even if a court were somehow to conclude, despite the differences in structure and scope between the Medicaid expansion and Title IX, that Title IX exceeded Congress's Spending Power when applied to states receiving federal funding, Title IX would nevertheless apply to these states as an appropriate exercise of Congress's Section 5 power.

The Equal Protection Clause protects against sex discrimination by state actors. Distinctions on the basis of sex are impermissible unless they are substantially related to an important state interest and based on an exceedingly persuasive justification.⁶⁷ Section 5 of the Fourteenth Amendment gives Congress the power to "'enforce,' by 'appropriate legislation'" this constitutional guarantee.⁶⁸ Title IX is just such an appropriate enforcement of the Equal Protection Clause's antidiscrimination mandate.

The Supreme Court has set out guidance for determining when a statute "appropriately" enforces the Equal Protection Clause. Congress determines what legislation is necessary to secure the guarantees of the Fourteenth Amendment, and "its conclusions are entitled to much deference."⁶⁹ In determining whether legislation is valid under Section 5, the Court has often asked whether Congress had evidence of a pattern of state constitutional violations that the legislation targeted,⁷⁰ although the Court has also noted that lack of such a legislative record "is not determinative of the § 5 inquiry."⁷¹ A legislative record is likely less relevant when Congress targets discriminatory practices that are otherwise amply demonstrated in the historical record and recognized in court decisions, as is the history of unconstitutional sex discrimination by states.⁷²

"Legislation enacted under § 5 must be targeted at 'conduct transgressing the Fourteenth Amendment's substantive provisions,'"⁷³ but Congress is not limited to narrowly prohibiting acts forbidden by the Fourteenth Amendment itself.⁷⁴ Instead, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and

⁶⁷ *E.g.*, *United States v. Virginia*, 518 U.S. 515 (1996).

⁶⁸ *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997).

⁶⁹ *Id.* at 536.

⁷⁰ *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

⁷¹ *Kimel v. Florida Board of Regents*, 528 U.S. 6, 91 (2000); *Florida Prepaid v. College Savings Bank*, 27 U.S. 627, 646 (1999); *see also City of Boerne*, 521 U.S. at 532.

⁷² *E.g.*, *Virginia*, 518 U.S. at 531-32 (observing that women "have suffered . . . at the hands of discriminatory state actors during the decades of our Nation's history"); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (concluding that "our Nation has had a long and unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 n. 10 (1982) ("History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function.").

⁷³ *Coleman v. Maryland Court of Appeals*, 132 S.Ct. 1327, 1334 (2012).

⁷⁴ "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81.

deter unconstitutional conduct.”⁷⁵ Legislation that goes beyond the Fourteenth Amendment’s own requirements is appropriate under Section 5 when there is “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁷⁶ The Supreme Court has noted that because gender-based classifications are subject to heightened scrutiny under the Constitution, it is “easier for Congress to show a pattern of state constitutional violations” justifying legislation under Section 5 when targeting sex discrimination than it is to show a pattern of state constitutional violations justifying Section 5 legislation when targeting discrimination subject only to rational basis review under the Equal Protection Clause. This is because classifications on the basis of sex are presumptively unconstitutional, so evidence of a history of such classifications by states will in general establish a history of constitutional violations.⁷⁷

Significant evidence of a pattern of unconstitutional discrimination on the basis of sex in education undergirds Title IX. The Supreme Court itself has taken judicial notice of the “volumes of history” documenting sex discrimination in education, including unconstitutional discrimination by states.⁷⁸ The exclusion of women from public education is part of the long history of states’ discrimination on the basis of sex that the Court has acknowledged on numerous occasions.⁷⁹

Moreover, when Congress passed Title IX in 1972, it had before it significant evidence of unconstitutional sex discrimination in public schools. For example, as summarized by the House Report on the bill:

During the course of extensive hearings on higher education, much testimony was heard with respect to discrimination against women in our institutions of higher education. Testimony revealed that women are required to meet higher admission standards than men. One instance cited to the Committee occurred at the University of North Carolina where admission of women at the freshman level was “restricted to those who are especially well qualified.” No similar restriction existed for male students. A 1964 report of the Virginia Commission for the Study of Educational Facilities in the State of Virginia pointed out that 21,000 women students were turned down for college entrance in the State of Virginia while not one male student was rejected. On the graduate level, testimony revealed that the situation worsens.⁸⁰

Senator Birch Bayh, the lead sponsor of Title IX, decried “an arbitrary and compulsory ration of 2 ½ men to every woman at a State university,” and noted the Department of Psychology at Berkeley had not hired a woman since 1924.⁸¹ Data before Congress showed that in higher education “women are under-represented or placed in positions with little power in decision

⁷⁵ *Hibbs*, 538 U.S. at 727.

⁷⁶ *Coleman*, 132 S.Ct. at 1334.

⁷⁷ *Hibbs*, 538 U.S. at 735.

⁷⁸ *Virginia*, 518 U.S. at 531; *Id.* at 536-38; 542-44.

⁷⁹ *See, e.g., supra* note 72.

⁸⁰ H.R. REP. NO. 92-554 (Oct. 9, 1971), *reprinted in* 2 U.S.C.C.A.N. 72-48, 2511.

⁸¹ 117 CONG. REC. 30,156 (Aug. 5, 1971).

making” and that “[t]his is particularly true in the large *public* institutions.”⁸² Reports relied on by Congress showed that leading public law schools had no or almost no women faculty members.⁸³

Congress also had evidence that both public and private colleges provided women with markedly lower levels of scholarship aid than men. A survey of students, more than half of whom were enrolled in public colleges or universities, found that men received larger scholarships and aid packages, while women took out more loans to attend college, despite the fact that the women reported receiving higher college grades than the men did.⁸⁴

The rampant discrimination uncovered by Congress included discrimination in elementary and secondary public education. A report on sex bias in the public schools entered into the Congressional Record in 1971 documented “women assigned to sex-segregated classes, teachers who favor[ed] their male students, and guidance counselors who discourage[d] [women] from many careers.”⁸⁵ It summarized the widespread practice of assigning girls to home economic courses and boys to shop courses. It described how the leading public high schools in New York City admitted only a handful of girls and had only admitted any beginning in the previous two years as the result of legal action, and noted that specialized public vocational high schools in New York City focusing on automobiles, aviation, and the electrical industries were closed to girls, who instead were offered courses in typing, stenography, and cosmetology.⁸⁶ Another report concluded that a survey of city boards of education found that sex segregation in high school vocational programs was “the rule rather than the exception,” with many more vocational programs being offered to boys than girls.⁸⁷

In short, evidence before Congress documented an overwhelming culture of sex stereotyping, gender steering, and sex discrimination in education in the United States, including both public and private institutions.⁸⁸ For example, a Ford Foundation-funded report on higher education relied on by Congress concluded, “Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community.”⁸⁹

⁸² 117 CONG. REC. 2658 (Feb. 11, 1971) (statement of Rep. Mink) (emphasis added).

⁸³ 118 CONG. REC. 3939 (Feb. 15, 1972) (data drawn from the Association of American Law Schools Directory of Law Teachers entered into the record by Sen. Bayh).

⁸⁴ 118 CONG. REC. 5759 (Educational Testing Service study entered into the record by Sen. Bayh).

⁸⁵ 117 CONG. REC. 25,507 (July 14, 1971) (statement of Rep. Abzug); see also 117 CONG. REC. 39,253 (Nov. 4, 1971) (statement of Rep. Sullivan) (noting discrimination against women in employment at state universities, including University of Connecticut, where 33 percent of instructors, but only 4.8 percent of full professors, were women, the University of Massachusetts, where only two out of 65 women on faculty had tenure, and the University of Michigan, where even in traditionally female courses of study, women professors were grossly underrepresented).

⁸⁶ *Id.* at 25,508.

⁸⁷ 118 CONG. REC. 3936 (Feb. 15, 1972) (report entered into the record by Sen. Bayh).

⁸⁸ This evidence included seven days of hearings on discrimination against women in education, which documented discriminatory practices ranging from public universities expressing preferences for males in job postings, to overt discrimination against women in admissions to public medical schools, to biased counseling discouraging women from pursuing certain fields and certain degrees. See generally *Hearings on Discrimination Against Women, Before the Special Subcmte. on Educ. of the House Cmte. on Education and Labor* (1970), available at http://repositories.lib.utexas.edu/bitstream/handle/2152/12878/_Chisholm_DiscriminationAgainstWomenI.pdf?sequence=2.

⁸⁹ 118 CONG. REC. 5803 (Feb. 28, 1972) (statement of Sen. Bayh).

In 1988, when Congress passed the Civil Rights Restoration Act, restoring the broad reach of Title IX after its coverage had been narrowed by the Supreme Court, Congress reinforced and updated these findings, again documenting ongoing, persistent sex discrimination in public education, including discrimination in athletics programs and employment, and sexual harassment of students.⁹⁰ In fact, a primary impetus for enacting the Civil Rights Restoration Act was Congress's concern about ongoing, invidious sex discrimination in college athletics, which included the athletic programs at public colleges and universities.⁹¹

Through this evidence and much more like it, the legislative history of Title IX and the Civil Rights Restoration Act reinforces the long pattern of sex discrimination in education, repeatedly recognized by the Supreme Court, and amply demonstrates widespread violations of the guarantee of equal protection of the law by state actors. Moreover, the forty years since passage of Title IX provide numerous examples of ongoing sex discrimination by states (as well as by localities and private actors), highlighting the continuing need for these protections.⁹² For these reasons, Title IX rests on a firm basis as a remedy for a pattern of constitutional violations.

The differences in scope between the Equal Protection Clause and Title IX as applied to state actors are relatively minor,⁹³ and so the statute easily meets the “congruence and proportionality” test. Title IX expressly targets discrimination on the basis of sex, discrimination that is presumptively unlawful under the Constitution when undertaken by state actors. Given the established history of unconstitutional sex discrimination in public education, little more is necessary to demonstrate that Title IX is a congruent and proportional response. As the Eighth Circuit noted in concluding that Title IX is Section 5 legislation, “Because the Supreme Court has repeatedly held that [the Fourteenth Amendment] proscribe[s] gender discrimination in education, . . . we are unable to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by § 5.”⁹⁴ The Supreme Court has soundly rejected the notion that in the face of evidence of gender discrimination by states, “Congress [can] do no more in exercising its sec. 5 power than simply proscribe such discrimination.”⁹⁵ Title IX's proscription of such discrimination, which is in some important

⁹⁰ *E.g.*, *Hearings on the Civil Rights Restoration Act of 1987 Before the Sen. Labor and Human Resources Cmte.*, S. Hrg. 100-374, at 264-78 (1987).

⁹¹ *See id.*

⁹² *E.g.* *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957 (9th Cir. 2010) (reversing and remanding district court dismissal of claims that state university discriminated in violation of Title IX and the Constitution based on denial of athletic opportunities to women wrestlers); *Jennings v. Univ. of N.C.*, 482 F.3d 686 (4th Cir. 2007) (en banc) (reversing district court's grant of summary judgment and finding that coach's alleged behavior to female soccer team member, if proven, constituted sexual harassment in violation of Title IX and possibly the Constitution); *Williams v. Bd. of Regents of Univ. Sys.*, 477 F.3d 1282 (11th Cir. 2007) (reversing dismissal of claim that state university violated Title IX based on its inadequate response to sexual assault of female student by male varsity athletes); *Communities for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006) (finding that state athletic association violated Title IX and the Constitution by scheduling high school sports seasons in a discriminatory manner).

⁹³ *See Fitzgerald v. Barnstable*, 555 U.S. 246, 257 (2009).

⁹⁴ *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997).

⁹⁵ *Hibbs*, 538 U.S. at 737.

respects *narrower* than the Equal Protection Clause,⁹⁶ does not dramatically depart from the Constitution's own and is clearly permissible under Section 5.

For example, Title IX protects against discrimination on the basis of pregnancy as a form of sex discrimination.⁹⁷ In *Nevada Department of Human Resources v. Hibbs*, upholding the Family and Medical Leave Act's family leave provisions as Section 5 legislation enforcing the Equal Protection Clause, the Supreme Court made clear that legislation protecting against gender stereotypes and discrimination that focused on women as "mothers or mothers-to-be" was permissible under Section 5.⁹⁸ Title IX's protections against pregnancy discrimination and discrimination on the basis of parental status similarly respond to and prevent unconstitutional practices based on gender stereotypes.

Indeed, multiple courts of appeals have recognized that Title IX is not only Spending Power legislation, but also Section 5 legislation.⁹⁹ As the Supreme Court recognized in *Hibbs*, Congress can rely on more than one source of constitutional authority in passing a single statute.¹⁰⁰ Congress did not explicitly identify Section 5 as a source of authority when it initially enacted Title IX, but the Supreme Court reiterated in *NFIB* itself that "[t]he 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'"¹⁰¹ As the Eighth Circuit explained when it determined that Title IX was Section 5 legislation, as well as Spending Clause legislation, the inquiry is an objective one: "As long as Congress had such authority [to legislate] as an objective matter, whether it also had the specific intent to legislate pursuant to that authority is irrelevant."¹⁰² Moreover, when Congress passed the Civil Rights Remedies Equalization Act in 1987 in order to abrogate states' Eleventh Amendment immunity in Title IX suits, it specifically relied not only on the Spending Clause, but also on Section 5.¹⁰³ Congress's explicit recognition that Section 5 empowered it to provide

⁹⁶ *E.g. Hogan*, 458 U.S. at 732 (noting that Title IX does not reach admissions policies of undergraduate institutions that have from their establishment admitted only students of one sex, while the Equal Protection Clause has no such exception).

⁹⁷ *Chipman v. Grant County School Dist.*, 30 F. Supp. 2d 975 (1998); 34 C.F.R. § 106.40(b).

⁹⁸ *Hibbs*, 538 U.S. at 736.

⁹⁹ *Crawford*, 109 F.3d at 1283; *Escue v. Northern Ok. College*, 450 F.3d 1146, 1152 (10th Cir. 2006); *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998); *see also Doe v. Univ. of Illinois*, 138 F.3d 653, 660 (1998), *vacated*, 526 U.S. 1142 (1999).

¹⁰⁰ *Hibbs*, 538 U.S. at 726-27 (noting that Congress relied on Commerce Clause Power and Section 5 power in enacting the FMLA).

¹⁰¹ *NFIB*, 132 S.Ct. at 2598 (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)); *see also EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18 (1983).

¹⁰² *Crawford*, 109 F.3d at 1283. The two court of appeals decisions holding or suggesting that Title IX is not Section 5 legislation were reversed or disapproved by the Supreme Court on other grounds. *See Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1398-99 (11th Cir. 1997), *rev'd*, 526 U.S. 629 (1999); *Rowinsky v. Bryan Ind. Sch. Dist.*, 80 F.3d 1006, 1012 (1996), *disapproved by* 526 U.S. 629 (1999). Moreover both courts holding or suggesting that Title IX was not Section 5 legislation based their analysis on the theory that Title IX's structure and legislative history indicate that Congress relied on its Spending Clause power in passing the statute; yet, Any argument that Congress can only rely on multiple sources of constitutional authority when it explicitly says it is doing so is impossible to reconcile with the Supreme Court's recent reiteration that Congress need not recite any magic words of intent in order to exercise available constitutional powers.

¹⁰³ *See* 131 CONG. REC. 22,346 (1985) (describing legislation as "clearly authorized" by the Spending Clause and Section 5); S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986).

remedies against states in Title IX cases provides strong reinforcement for the conclusion that Title IX, as applied to state actors, enforces the Equal Protection Clause.

For all these reasons, Title IX is not only valid Spending Clause legislation, it is also valid Section 5 legislation. Indeed, even Paul Clement, no friend to federal mandates, suggested as much when he responded to Justice Ginsburg's question regarding Title IX during the *NFIB* arguments. "I guess the question for this Court would be whether or not Section 5 of the 14th Amendment allowed Congress to do that," he concluded.¹⁰⁴ Section 5 most assuredly does permit Congress to do just that.

V. Conclusion

In the wake of the *NFIB* decision, defendants in Title IX litigation, and other litigation arising under Spending Power antidiscrimination laws, will no doubt seek to expand the Court's holding to undermine these crucial protections. Supreme Court precedent, including the *NFIB* decision itself, provides a clear roadmap for repelling these attacks. The fundamental principle that the federal government can ensure that its funds are not spent in support of invidious discrimination remains robust. Title IX remains strong.

¹⁰⁴ Transcript of Oral Argument at 22:10, *Nat'l Fed. Of Ind. Business v. Sebelius*, 132 S. Ct. 2566 (No. 11-393), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-400.pdf.