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Don't Go Changing to Try to Please Me: Understanding Sebelius via the Unconstitutional Coercion of Medicaid Estate Recovery Programs

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DON'T GO CHANGING TO TRY TO PLEASE ME: UNDERSTANDING *SEBELIUS* VIA THE UNCONSTITUTIONAL COERCION OF MEDICAID ESTATE RECOVERY PROGRAMS

ABSTRACT

National Federation of Independent Businesses v. Sebelius *reshaped unconstitutional coercion jurisprudence: creating a three-part test for unconstitutional coercion while leaving the limits of the test undefined. Courts and commentators, faced with the confusion of applying* Sebelius*, have struggled to determine when and if* Sebelius *should apply. Stepping into this quagmire, this Comment applies the* Sebelius *rationale to Estate Recovery Programs (ERPs), a mandatory feature of Medicaid.*

Every year, millions of Americans are impacted by ERPs. The main feature of ERPs is the seizure of a Medicaid patient's estate following their death to repay the cost of providing medical care. When states effectuate recovery, decedents' families are often left shocked, unaware the state could take their family home. Notably, ERPs exacerbate existing wealth disparities and are linked to reduced access to healthcare, as knowing patients avoid Medicaid to escape the ERP.

ERPs are ideal for exploring the limits of Sebelius *because, to induce adoption of the ERP requirement, Congress and the Department of Health and Human Services threatened to end existing state Medicaid grants. This threat is the same inducement contemplated in* Sebelius *and held to be unconstitutionally coercive. To resolve the confusion about* Sebelius*, this Comment first presents a brief history of Medicaid. Then, it traces the development of ERPs and the impact of the requirement. The next section analyzes ERPs under the* Sebelius *coercion standard. Using this analysis, this Comment posits that the* Sebelius *coercion standard could apply to various federal programs and argues states should cease their ERPs.*

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INTRODUCTION

To lessen the burden of Medicaid's expenditures on federal coffers, the federal government requires that states recoup the cost of medical care via liens against, or seizures of, patients' homes.[1] For these families, homeownership, and all the financial benefits that accompany it, can be lost in the blink of an eye.[2] In the best cases, families must choose between costly medical care or keeping the family home.[3] In the worst cases, families are shocked to find, only after the death of a loved one, that the family home is now the property of the state.[4]

Congress designed Medicaid to provide a safety net for elderly, disabled, and poor Americans.[5] With estate recovery, it has earned the dubious distinction of being the only welfare program that expects recipients to pay back the government.[6] Take, for example, Edna Rhodes, a woman in Massachusetts who was diagnosed with Alzheimer's disease.[7] Ms. Rhodes had owned her home since 1979, but following her diagnosis, she was admitted to a nursing home and enrolled in Medicaid by a guardian of the state.[8] Tucked away on the twentieth page, in fine print, the Medicaid application noted, "[t]o the extent permitted by law, and unless exceptions apply, for any eligible person age 55 or older, or any eligible person for whom MassHealth helps pay for care in a nursing home,

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1 *See* Erica F. Wood & Charles P. Sabatino, *Medicaid Estate Recovery and the Poor: Restitution or Retribution*?, 20 GENERATIONS: J. AM. SOC'Y ON AGING, Fall 1996, at 84, 84–85.

2 *See id.*

3 *See id.* at 86.

4 *See id.*

5 Judith D. Moore & David G. Smith, *Legislating Medicaid: Considering Medicaid and Its Origins*, 27 HEALTH CARE FIN. REV., Winter 2005–2006, at 45, 45, 51 (2005); Christie Provost & Paul Hughes, *Medicaid: 35 Years of Service*, 22 HEALTH CARE FIN. REV., Fall 2000, at 141, 141.

6 *See What Is Medicaid Estate Recovery? And How Does It Work?*, NAT'L COUNCIL ON AGING (June 17, 2021), https://www.ncoa.org/article/what-is-medicaid-estate-recovery-and-how-does-it-work; Rachel Corbett, *Medicaid's Dark Secret*, THE ATLANTIC, Oct. 2019, https://www.theatlantic.com/magazine/archive/2019/10/when-medicaid-takes-everything-you-own/596671/.

7 Corbett, *supra* note 6.

8 *Id*.

MassHealth will seek money from the eligible person's estate after death."[9] Ms. Rhodes, whether she was aware or not, mortgaged her home in exchange for medical care promised to her by the federal government.[10]

Ms. Rhodes's daughter moved to Massachusetts to care for her mother and return to the family home.[11] Five years later, Ms. Rhodes died, and the state sent a bill itemizing "every Band-Aid, every can of Ensure" that Medicaid paid for, totaling almost $200,000.[12] Ms. Rhodes's children had a choice: come up with the cash in six months or sell the home to cover the bill.[13] Notably, MassHealth representatives have said the "application and member notification materials provide notices related to estate recovery to ensure applicants are informed of this requirement."[14] Although her children did not enroll Ms. Rhodes in Medicaid, the high bill could have forced them to sell the family home.[15]

In a twist of political accountability, if Massachusetts did away with this requirement, the federal government could cease all Medicaid and Medicare funding, destabilizing the state's medical system.[16] Thus, to avoid destroying Massachusetts's medical system, the State is left with the albatross of Medicaid estate recovery.

Congress intended to stem rising healthcare costs by recovering from the assets of Medicaid recipients via estate recovery.[17] To further this goal, the Omnibus Budget Reconciliation Act of 1993 conditioned states' future receipt of federal Medicaid funds on the development of estate recovery.[18] Thus, all fifty states and D.C. have enacted such estate recovery.[19]

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[9] *Id*. The burying of such language is ripe for a challenge under contract law's doctrine against unfair surprises, but that is a topic for a future paper.

[10] *See id*.

[11] *Id*.

[12] *Id*.

[13] *See id.* Additionally, if a family cannot repay the State within the statutory period, the State may charge additional interest, ballooning the size of already large bills. *Id.*

[14] *Id*.

[15] *Id*.

[16] *See* West Virginia v. U.S. Dep't of Health & Hum. Servs., 289 F.3d 281, 285–86 (4th Cir. 2002).

[17] Wood & Sabatino, *supra* note 1, at 84.

[18] *Id*.

[19] Raymond C. O'Brien, *Selective Issues in Effective Medicaid Estate Recovery Statutes*, 65 CATH. U. L. REV. 27, 41 (2015).

However, some states, most notably West Virginia, challenged the estate recovery requirement as unconstitutionally coercive.[20] These arguments relied on Spending and Commerce Clause jurisprudence, which limits Congress's ability to interfere with the powers reserved for the states in the Constitution.[21] The challenges, all of which were decided before 2008, ended with courts holding Congress's estate recovery program requirement was constitutional because it was not certain that all Medicaid funding would be lost if a state failed to comply.[22] Consequently, every year, thousands of families are faced with a choice: lose their family home or provide medical care for their relatives.[23] However, those families are the fortunate ones, for they can choose. Unaware of estate recovery, families like the Rhodes have no choice: they must sell their family home to cover Medicaid costs.[24]

Since the initial estate recovery program challenges, the Supreme Court has cast doubt on the constitutionality of conditioning state grants on compliance with federal requirements.[25] In *National Federation of Independent Businesses v. Sebelius*, in a reversal from the wide latitude extended to previous federal programs, the Court established a three-pronged test for determining if congressional spending decisions were unconstitutionally coercive.[26] The decision, a messy mix of holdings,[27] created a fissure between the earlier jurisprudence that allowed virtually unlimited conditions on congressional spending and the Court's more limited view in *Sebelius*.[28]

Additionally, the Court was unclear about when the *Sebelius* test should apply, leaving appellate courts to struggle over when it was applicable.[29] Thus,

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[20] *See* West Virginia v. U.S. Dep't of Health & Hum. Servs., 289 F.3d at 283, 287; West Virginia v. Thompson, 475 F.3d 204, 208 n.1 (4th Cir. 2007).

[21] West Virginia v. U.S. Dep't of Health & Hum. Servs., 289 F.3d at 286.

[22] *Id.* at 293.

[23] *See generally* Corbett, *supra* note 6.

[24] *Id.*

[25] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (holding the individual mandate for health insurance was unconstitutional).

[26] *Id.* at 580–84. There is some disagreement within the academy about the exact contours of the test. This piece will use the three-pronged test discussed throughout. Special thanks to Professor Matthew Lawrence for help understanding *Sebelius*.

[27] The decision includes the following quote: "Chief Justice Roberts announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III-C, an opinion with respect to Part IV, in which Justice Breyer and Justice Kagan join, and an opinion with respect to Parts III-A, III-B, and III-D." *Id.* at 529. This reads more like the Logic Games section of the LSAT than an opinion from the High Court.

[28] Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 3 (2013).

[29] *See id*. at 32.

while *Sebelius* seemingly limited congressional spending power, the exact limits of that power were undefined. Filling the vacuum, the appellate courts have fashioned varied responses to the correct limits of congressional power, compounding confusion.[30] The correct application of *Sebelius* is a critical question because it can affect billions of dollars of federal spending and reconfigure the budgets of every state.[31]

One area ripe for *Sebelius*'s analysis is the estate recovery program requirement. Estate recovery programs are largely unexamined in legal literature, despite their effects on millions of Americans, every state in the Union, and the American Dream of homeownership. Furthermore, while Congress intended to reduce federal outlays for healthcare via estate recovery,[32] the programs are expensive to enforce, with the most successful states recovering less than one percent of their Medicaid expenditures and netting even less due to the high costs associated with recovery.[33] In sum, estate recovery programs are ineffective at their intended purpose of reducing federal healthcare spending and instead blindside many families. However, states are unable to remove the requirements because of pre-*Sebelius* rationale.[34]

This Comment provides a framework for the proper limits of congressional power using estate recovery programs as a case study, concluding that the estate recovery framework is unconstitutionally coercive and impermissible. Part I offers an overview of Medicaid and Medicaid Estate Recovery, with historical and economic context. Part II outlines the *Sebelius* decision and the accompanying confused applications of the *Sebelius* framework. Next, Part III discusses the implications of estate recovery program's unconstitutionality. Part IV presents potential solutions, advocating for states to abandon state recovery or the Secretary of Health and Human Services to declare the requirement unconstitutional, with a discussion of the probable impacts of each. Finally, this Comment concludes by discussing the implications of these arguments and advocating for the end of the estate recovery requirement.

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[30] *Id.* at 55 ("What will the effects of *NFIB* be? What are the implications of the unusual pattern of opinions and reasons offered in this supremely important case?").

[31] *See* Ctrs. for Medicare & Medicaid Servs., *NHE Fact Sheet*, CMS.GOV (June 12, 2024, 4:01 PM), https://www.cms.gov/data-research/statistics-trends-and-reports/national-health-expenditure-data/nhe-fact-sheet (finding Medicaid spending to be $805.7 billion in 2022).

[32] Wood & Sabatino, *supra* note 1, at 84.

[33] *See* MEDICAID & CHIP PAYMENT & ACCESS COMM'N (MACPAC), REPORT TO CONGRESS ON MEDICAID AND CHIP: MARCH 2021, at 89–91, 122 (2021).

[34] *See* discussion *infra* Part II.

I. An Overview of Medicaid

Since its inception, Medicaid has played a critical role in the American healthcare system, providing care to populations that would otherwise lack access.[35] To do this, the federal government provides large grants to every state while requiring compliance and extensive oversight.[36] Congressional legislation has been a critical driver of programmatic changes to Medicaid's scope and delivery.[37] Among these changes is the requirement that each state have an estate recovery program.[38] However, these changes have been controversial.[39] Numerous states have objected to Medicaid changes, sued to challenge them, or refused to enforce them. Chief among these challenges is *Sebelius*, in which Florida and the National Federation of Independent Businesses challenged the Affordable Care Act's Medicaid expansion, which would have provided coverage to all Americans with income less than 133% of the federal poverty limit.[40]

This section first provides an overview of Medicaid, including the history and evolution of the program. Next, it explores the history of Medicaid Estate Recovery Programs and the impact of such programs on patients' finances and access to care. Finally, this section presents and analyzes state challenges to the estate recovery program.

A. *The Medicaid Program*

Congress enacted Medicaid as a form of social insurance in the face of a rising need for public health insurance options.[41] Before Medicaid, a rudimentary program under the Kerr-Mills Act provided federal funds to states while allowing states to determine eligibility.[42] However, Kerr-Mills could not keep up with growing public concern about the aging population and rising healthcare costs.[43] Spurned by these concerns, Congress enacted Medicaid, expanding the covered services and population, equalizing coverage across

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[35] Moore & Smith, *supra* note 5, at 45.

[36] *See* Elizabeth Williams, Robin Rudowitz & Alice Burns, *Medicaid Financing: The Basics*, KAISER FAMILY FOUND. (Apr. 13, 2023), https://www.kff.org/medicaid/issue-brief/medicaid-financing-the-basics/.

[37] Provost & Hughes, *supra* note 5, at 144–45.

[38] Wood & Sabatino, *supra* note 1, at 84.

[39] *See generally id*.

[40] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 542 (2012).

[41] *See* Moore & Smith, *supra* note 5, at 45, 47.

[42] *Id*. at 46.

[43] *See id*. at 47–48.

covered groups, and ensuring the neediest people could receive the medical care they required.[44] Over time, eligible populations have expanded, while the benefit package available to participants has remained the same.[45]

Medicaid is a cooperative state and federal program wherein the federal government grants financial assistance to states so long as states reimburse the costs of medical care for needy people.[46] Once a state chooses to participate in Medicaid, the state must comply with the requirements of Title XIX of the Social Security Act,[47] including submitting plans to the Department of Health and Human Services (HHS) to qualify for reimbursement.[48] If HHS approves a state plan, the state is eligible for reimbursement of the Federal Medical Assistance Percentage (FMAP), a percentage of the costs of providing care to qualified people.[49] If a state fails to comply with requirements in the Medicaid Act or regulations established by HHS, the federal government can revoke parts or all of the funds.[50]

Additionally, Congress reserved the power to "alter, amend, or repeal any provision" of the Medicaid statute.[51] This is a critical reservation of power used to change eligibility requirements and ensure states comply with the federal regulatory framework as it evolves.[52] However, this reservation has been a source of litigation.[53] States argue that changes to Medicaid are beyond Congress's statutory powers to amend the program, because federalism, under the Constitution, prohibits the usurpation of state power.[54] In response, HHS and various presidential administrations have argued that changing requirements are merely alterations.[55] Thus, Congress can alter Medicaid, but any alterations must be limited in scope.[56]

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[44] *See id.*
[45] Provost & Hughes, *supra* note 5, at 144–45.
[46] Harris v. McRae, 448 U.S. 297, 301–02 (1980).
[47] *Id.*
[48] *See* 42 U.S.C. § 1396b(a)(1).
[49] *Id.*
[50] 42 U.S.C. § 1396c.
[51] 42 U.S.C. § 1304.
[52] *See* Mayhew v. Burwell, 772 F.3d 80, 83 (1st Cir. 2014).
[53] *See e.g.*, Florida v. U.S. Dep't of Health & Hum. Servs., 716 F. Supp. 2d 1120, 1153 (N.D. Fla. 2010).
[54] *See e.g.*, *id.*
[55] *See Mayhew*, 772 F.3d at 89.
[56] *See id.* at 86; *Florida*, 716 F. Supp. 2d at 1161.

States can establish eligibility criteria to determine who qualifies for Medicaid, but they are required to cover four mandatory populations.[57] The mandatory populations include: (1) children under eighteen in families below the federal poverty level, (2) pregnant women who are similarly impoverished, (3) seniors, and (4) people with disabilities who qualify for Supplemental Security Income.[58]

Even if a patient qualifies for Medicaid, they are required to spend their assets before they can enroll.[59] For example, a person living in Tennessee can have a maximum of $2,000 in countable assets; otherwise, they are ineligible for Medicaid.[60] The asset limit requirement is intended to prevent wealthy people from taking advantage of Medicaid when they can afford the care.[61] Notably, a person's home is excluded from the mandatory spending, making it the primary (and the biggest) asset most Medicaid recipients retain before they enroll.[62] However, this initial protection for the home is stripped following the recipient's death, when estate recovery programs come into play.[63]

Despite this stringent means testing, Medicaid remains extremely expensive, accounting for thirty percent of states' budgets[64] and exceeding $805 billion in federal expenditures.[65] The federal government pays a large share of Medicaid costs via the FMAP, funded through annual congressional appropriations.[66] However, states must still cover the remainder, subtracting the FMAP from the total cost of furnishing care.[67] Most states cover their portion of Medicaid via

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[57] 42 U.S.C. § 1396a(a)(10).

[58] *Id*.

[59] *Medicaid Eligibility*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/eligibility/index.html (last visited July 20, 2024). The spend down requirements differ by state. *See* Anthony Martin, *Medicaid Assets by State: Eligibility Guidelines*, CHOICE MUT. (June 1, 2024), https://choicemutual.com/blog/medicaid-asset-limits-by-state/.

[60] Martin, *supra* note 59. Notably, the asset limit only applies to "countable assets" (i.e., bank accounts, bonds, cash, and stocks). *Id.* If a person's assets exceed the limits established by their state, they must spend their assets to reach the limit. *Id.* But Medicaid's five-year lookback will consider any sales made in the past five years, so a patient could be penalized for transfers that were below market value. *Id.*

[61] *See id.*; Joanne Kaldy, *How to Spend Down Your Assets for Medicaid*, U.S. NEWS & WORLD REP. (July 21, 2023), https://health.usnews.com/best-senior-living/articles/what-is-medicaid-spend-down.

[62] Kaldy, *supra* note 61.

[63] *See* discussion *infra* Part I.B.

[64] Medicaid & CHIP Payment & Access Comm'n, *Medicaid's Share of State Budgets*, MACPAC (Mar. 3, 2020), https://www.macpac.gov/subtopic/medicaids-share-of-state-budgets/.

[65] Ctrs. for Medicare & Medicaid Servs., *supra* note 31.

[66] Williams et al., *supra* note 36.

[67] *See id*.

their general fund, which comprises income and sales-tax revenue.[68] Thus, all states rely on Medicaid reimbursements to finance their healthcare systems and to balance their budgets.[69]

Medicaid provides two core benefits to recipients: reduced out-of-pocket medical spending and improved access to needed care.[70] These benefits are critical to ensuring low-income people can receive needed medical care when it once would have been financially impossible.[71] Importantly, Medicaid also serves as a promise to the American public by the government. While many Americans rely on employer-provided insurance to cover healthcare costs, Medicaid ensures those with complex medical needs or without a job can be insured.[72] In fact, during economic downturns, Medicaid expands to cover impacted people, providing a vital stopgap.[73] The promise of Medicaid is, thus, lofty: when Americans require insurance and are eligible, Medicaid will meet their needs.

Research exploring the impact of Medicaid confirms its impact aligns with congressional goals. In comparing those who qualify for Medicaid with those who are near-poor (and do not qualify), research has found the near-poor population is highly price-sensitive and less likely to access needed outpatient services.[74] One study, based on Oregon's lottery that randomly selected people from the Medicaid waiting list to receive benefits, found Medicaid recipients had a near elimination of catastrophic medical expenses and were thirteen percent less likely than non-recipients to have medical debt.[75] Additionally, elderly recipients were more likely to be accurately diagnosed and access needed

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[68] Medicaid & CHIP Payment & Access Comm'n, *supra* note 64.

[69] *See id*.

[70] Eric T. Roberts, Alexandra Glynn, Nowell Cornelio, Julie Donohue, Walid Gellad, et al., *Medicaid Coverage "Cliff" Increases Expenses and Decreases Care for Near-Poor Medicare Beneficiaries*, 40 HEALTH AFFAIRS 552, 552 (2021). The near poor are "Medicare beneficiaries with incomes more than 100 percent but less than 200 percent of the federal poverty level (>$12,880 to <$25,760 for a single person in 2021)." *Id.* (footnotes omitted). They "account for nearly 30 percent of the Medicare population[and] exceed the income limit for Medicaid supplemental coverage but are less likely to have private supplemental insurance than those with higher incomes." *Id.* (footnotes omitted).

[71] *Id.*

[72] *See* Provost & Hughes, *supra* note 5, at 141–42.

[73] Williams et al., *supra* note 36.

[74] Roberts et al., *supra* note 70, at 559.

[75] Katherine Baicker, Sarah L. Taubman, Heidi L. Allen, Mira Bernstein, Jonathan H. Gruber, et al., *The Oregon Experiment—Effects of Medicaid on Clinical Outcomes*, 368 NEW ENGLAND J. MED. 1713, 1718–19 (2013). Catastrophic expenses are those exceeding thirty percent of income. *Id.* at 1718.

medications than those who just missed the income requirements.[76] Finally, receiving Medicaid benefits is associated with lower rates of depression among the elderly.[77] Thus, the impact of Medicaid aligns with its goal: providing care for people who would otherwise be financially unable to access it.

While some may be tempted to dismiss these gains, the American healthcare system is inextricably intertwined with Medicaid.[78] State funding relies on Medicaid, private insurers face less risk because Medicaid insures elderly populations regardless of expensive pre-existing conditions, and millions of Americans rely on Medicaid as protection from the loss of insurance due to retirement or the loss of income.[79] Thus, *all* Americans, even non-recipients, benefit from and are covered by the promise of Medicaid.

In sum, Medicaid is defined by four key features: (1) state and federal cooperation; (2) the eligible populations; (3) the reserved congressional power to alter the program; and (4) the promise of Medicaid to provide healthcare for eligible populations. Medicaid is critical to the national healthcare market because it covers vast swaths of the population and is a critical stopgap for people who lose their insurance. However, while Medicaid plays an essential role in insuring Americans, it has a dark underbelly: estate recovery programs, which seize patients' estates after their death, often with little or no notice, and can reinforce existing racial inequality by constraining intergenerational transfers of assets.

B. An Overview of the Medicaid Estate Recovery Program

Medicaid Estate Recovery Programs (ERPs) impose the harsh burden of home seizure on people who require long-term care.[80] In 1993, congressional concern about the cost of providing Medicaid prompted the Omnibus Budget Reconciliation Act of 1993 (OBRA '93).[81] OBRA '93 contained several cost-

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[76] Roberts et al., *supra* note 70, at 554, 557. For example, diabetes is considered a manageable disease, yet many people are unable to get diagnosed or receive treatment because of the high cost associated with the disease. Brian Callaghan, *High Out-of-Pocket Costs Hindering Treatment of Diabetes*, MICH. INST. HEALTHCARE POL'Y & INNOVATION (Feb. 22, 2024), https://ihpi.umich.edu/news/high-out-pocket-costs-hindering-treatment-diabetes. This result demonstrates Medicaid produces improved health outcomes. Roberts et al., *supra* note 70, at 554, 560.

[77] Baicker et al., *supra* note 75, at 1719.

[78] *See* Williams et al., *supra* note 36.

[79] *Id.*

[80] Wood & Sabatino, *supra* note 1, at 84–85.

[81] Paul Grimaldi, *OBRA 1993 Slices Medicare Payments*, 24 NURSING MGMT. 28, 28 (1993).

saving measures, including a new requirement for state participation in Medicaid: estate recovery.[82]

Under estate recovery, states must recoup the cost of Medicaid from people who require long-term services and supports (LTSS).[83] LTSS encompasses many services, including bathing, eating, administering medication, and housekeeping.[84] Medicaid is the "primary payer" of LTSS, and LTSS spending makes up thirty-seven percent of federal and state Medicaid expenditures.[85] According to estimates from HHS, seventy percent of people who reach age sixty-five will develop "severe" LTSS needs.[86] Medicaid funds are, thus, critical for LTSS recipients.

Some recipients of LTSS live in nursing homes or other controlled facilities.[87] Such care is prohibitively expensive—exceeding $100,000 a year—and insurance policies covering LTSS are similarly expensive.[88] Three-quarters of Medicaid recipients have a net worth below $48,500,[89] pushing private payment for LTSS beyond their means. Thus, the millions of people who require this care are pushed to Medicaid.[90] Unfortunately, in receiving needed care, these recipients become, often unknowingly, exposed to the threat of estate recovery.

Additionally, because of the asset spending required to qualify for Medicaid, the only asset generally available for recovery is the patient's home.[91] To recover, states can place liens against homes while the patient is alive or recover

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82 Wood & Sabatino, *supra* note 1, at 84. Before 1993, states could recoup Medicare costs, but OBRA '93 made recovery mandatory. *Id.*

83 42 U.S.C. § 1396p(b)(1). LTSS is the mandatory recovery; states can choose to expand what other care and services they wish to recover. *Id.*

84 Priya Chidambaram & Alice Burns, *How Many People Use Medicaid Long-Term Services and Supports and How Much Does Medicaid Spend on Those People?*, KFF (Aug. 14, 2023), https://www.kff.org/medicaid/issue-brief/how-many-people-use-medicaid-long-term-services-and-supports-and-how-much-does-medicaid-spend-on-those-people/. LTSS includes in-home and community-based care. *Id.*

85 *Id.*

86 RICHARD W. JOHNSON, URBAN INST., WHAT IS THE LIFETIME RISK OF NEEDED AND RECEIVING LONG TERM SERVICES AND SUPPORTS? 2–3, 8 (April 2019), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/188046/LifetimeRisk.pdf.

87 *Id*. at 3.

88 *See* Cost of Care Survey, GENWORTH, https://www.genworth.com/aging-and-you/finances/cost-of-care (last visited July 21, 2024); Maryalene LaPonsie, *The High Cost of Long-Term Care Insurance (and What to Use Instead)*, U.S. NEWS & WORLD REP. (Sept. 16, 2019), https://money.usnews.com/money/personal-finance/family-finance/articles/the-high-cost-of-long-term-care-insurance-and-what-to-use-instead.

89 MACPAC, *supra* note 33, at 81.

90 *See* Chidambaram & Burns, *supra* note 84.

91 West Virginia v. U.S. Dep't of Health & Hum. Servs., 289 F.3d 281, 284–85 (4th Cir. 2002).

from the patient's estate after their death.[92] A state's failure to enact an estate recovery program would bring the state out of compliance with Medicaid program requirements, leading to the loss of all Medicaid funding.[93]

OBRA '93 placed some limits on what states can recover; for example, recovery cannot exceed the total amount spent by Medicaid on or after age fifty-five,[94] and states can allow for undue hardship waivers.[95] One notable feature is the transfer lookback. Under the lookback, if, in the thirty-six months preceding their application for Medicaid, a recipient has transferred their property, the recipient may be required to delay enrollment.[96] The only exemption to the lookback is a property transfer for market value or to specified dependents.[97]

States also vary widely in how much information they provide about ERPs when a patient enrolls. For example, Massachusetts provides notice via legalese on page twenty of a thirty-four-page application—"To the extent permitted by law, and unless exceptions apply, for any eligible person age 55 or older, or any eligible person for whom MassHealth helps pay for care in a nursing home, MassHealth will seek money from the eligible person's estate after death."[98] This leads families to be blindsided by the state's attempts to recover their loved one's home.[99] One study concluded that while all states provide notice, most states follow Massachusetts's lead and provide a one-line reference buried in the Medicaid application.[100] Additionally, many states fail to articulate what services will lead to estate recovery.[101] Thus, many Medicaid patients lack actual notice of ERPs.

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[92] 42 U.S.C. § 1396p(b)(1).

[93] Ctr. for Special Needs Tr. Admin., Inc. v. Olson, No. 1:09-CV-072, 2011 WL 1562516, at *4 (D.N.D. Apr. 25, 2011), *aff'd*, 676 F.3d 688 (8th Cir. 2012); *see also* Corbett, *supra* note 6.

[94] 42 U.S.C. § 1396p(b)(1).

[95] 42 U.S.C. § 1396p(b)(3)(A).

[96] 42 U.S.C. § 1396p(c). This thirty-six-month requirement lengthens to sixty months if the beneficiary places their property in a trust. *Id.*

[97] *See id.* Of course, this requirement makes the exemption nearly impossible because it forces the family to lose the equity they invested into the home by requiring the family to pay market value.

[98] Corbett, *supra* note 6.

[99] *See id.*; Sarah True, *Debt After Death: The Painful Blow of Medicaid Estate Recovery*, U.S. NEWS & WORLD REP. (Oct. 14, 2021), https://www.usnews.com/news/health-news/articles/2021-10-14/debt-after-death-the-painful-blow-of-medicaid-estate-recovery.

[100] *See* ERICA F. WOOD & ELLEN M. KLEM, ABA COMM'N ON LAW & AGING, PROTECTIONS IN MEDICAID ESTATE RECOVERY: FINDINGS, PROMISING PRACTICES, AND MODEL NOTICES 9 (2007), https://assets.aarp.org/rgcenter/il/2007_07_medicaid.pdf.

[101] *Id.* at 6.

Moreover, OBRA '93 permitted states to waive the recovery requirement when it would "work an undue hardship as determined on the basis of criteria established by the Secretary [of HHS]."[102] Congress established this exemption to give states flexibility in implementation, and it reflects the partnership between the state and federal governments, which is the "cornerstone of Medicaid."[103] While the statute does not define undue hardship, a House Budget Committee Report noted undue hardship likely applies if the estate is: (1) the sole income-producing asset, like a farm; (2) a homestead of modest value; or (3) subject to compelling circumstances.[104] With these criteria, the Secretary of HHS delegated the development of the undue hardship criteria to the Centers for Medicare and Medicaid Services (CMS).[105]

CMS guides states in implementing their ERPs via the State Medicaid Manual.[106] The manual notes that states "have flexibility in implementing an undue hardship provision."[107] However, states cannot define a home of modest value at such a value that it would "negate the intent of the estate recovery program";[108] meaning estate recovery cannot be thwarted by a broad definition of modest value. The Manual approves defining a homestead of modest value as fifty percent or less of the average price of homes in the county, ensuring at least half of the homes in a county are theoretically subject to ERPs.[109] Additionally, states could avoid estate recovery altogether if recovery would not be cost-effective.[110] Thus, states have limited discretion to define undue hardship or tailor ERPs to the financial needs of their population.

The hardship exemption was an important stopgap intended to allow for consideration of state differences to ensure that estate recovery would not be harmful.[111] However, in practice, it has been ineffective. For example, the Rhodes family was ineligible for a hardship exemption because the family did not meet the state's definition of hardship.[112] Massachusetts required a child live in the home with the beneficiary for at least a year prior to Medicaid eligibility,

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[102] 42 U.S.C. § 1396p(b)(3)(A).

[103] West Virginia v. Thompson, 475 F.3d 204, 207 (4th Cir. 2007) (internal quotation marks omitted) (quoting Harris v. McRae, 448 U.S. 297, 308 (1980)).

[104] H.R. REP. NO. 103–111, at 209 (1993).

[105] *Thompson*, 475 F.3d at 208.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 209.

[111] *See id.* at 207–08.

[112] Corbett, *supra* note 6.

receive an interest in the estate from the deceased beneficiary's estate, not be forced to sell the property by other heirs, *and* have an income below 133% of the federal poverty level.[113] In short, the Rhodes children would not only have needed to live with their mother before she became sick and eligible for Medicaid but also forgo jobs paying over $36,000 to meet the income threshold. Thus, by not intuiting their mother's illness, nor forgoing higher paying jobs, the children forfeited the chance to claim an exemption.

While the construction of the homestead exemption was likely developed to maximize state recovery, it is defined so narrowly that it is onerous, if not impossible, to claim. Furthermore, when states have attempted to define the exemption broadly, HHS has intervened and challenged such definitions.[114] Therefore, regardless of the good intentions of the homestead limitation, it does little to stem the tide of estate recovery.

C. The Impact of Estate Recovery Programs

Economics research has identified three effects linked to ERPs: (1) the elderly are less likely to own a home at death;[115] (2) the elderly have diminished home equity;[116] and (3) the lower and middle classes have smaller intergenerational wealth transfers.[117] These economic impacts show the financial damage wrought by ERPs. However, ERPs perniciously affect eligible populations: needy people may not enroll in Medicaid, opting to forgo access to needed care to avoid losing their homes.[118]

To compound these programmatic failures, states, through ERPs, are recovering very little; in 2019, less than one percent of long-term service outlays were recovered.[119] From 2015 to 2019, ERPs recovered between 0.53% and 0.62% of Medicaid spending for long-term services,[120] with the average gross

[113] Sarah G. Henry, *MassHealth to Broaden Estate Recovery Hardship Exception*, MARGOLIS, BLOOM, & D'AGOSTINO, https://margolisbloom.com/planning-for-life/masshealth-to-broaden-estate-recovery-hardship-exception/ (last visited July 21, 2024).

[114] *See, e.g.*, *Thompson*, 475 F.3d at 206 (upholding HHS's rejection of West Virginia's proposed exemption).

[115] Nadia Greenhalgh-Stanley, *Medicaid and the Housing and Asset Decisions of the Elderly: Evidence from Estate Recovery Programs*, 72 J. URBAN ECON. 210, 211 (2012).

[116] *Id.*

[117] *See id.*; MACPAC, *supra* note 33, at xvii.

[118] Greenhalgh-Stanley, *supra* note 115, at 221 ("ERPs may be a partial explanation for why the nursing home population has remained steady at roughly 1.3–1.4 million even as there are more elderly in the U.S.").

[119] Corbett, *supra* note 6.

[120] MACPAC, *supra* note 33, at 89.

recovery ranging from $2,768 to $71,556.[121] Yet, some states net much less because recovery is costly, and third-party agents used to effectuate recovery typically take a fraction of any amount recovered.[122] Finally, states must remit a portion of the amount recovered to the federal government, diminishing the amount netted, for both federal and state governments.[123] Thus, ERPs fail in their basic purpose, netting very little and failing to contain healthcare costs.[124]

Furthermore, the impact of ERPs is inequitably distributed, with People of Color bearing the brunt of the impact, exacerbating existing wealth inequality.[125] Families of Color already lag behind White families in their reported levels of family wealth.[126] A 2024 report from the Federal Reserve Bank of St. Louis reveals on average, for every dollar held by White families, Black families held twenty-three cents, and Hispanic families held nineteen cents.[127] Notably, according to census data, home equity accounts for about thirty percent of household wealth,[128] meaning that for most people, their home is their most significant source of wealth.[129] Therefore, ERPs target the primary vehicle for accumulating wealth: the home.

Amid existing economic inequality, ERPs exacerbate the wealth gap because Black people are disproportionately represented in the Medicaid population.[130] This disproportionate representation means Black families are more likely to be subject to ERPs. Hence, Black families are more likely to lose one of the leading stores of wealth, their home, while already lagging. The effect of this loss is felt

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[121] *Id*.

[122] *See* Tony Leys, *They Could Lose the House — to Medicaid*, NPR (Mar. 1, 2023, 12:02 PM), https://www.npr.org/sections/health-shots/2023/03/01/1159490515/they-could-lose-the-house-to-medicaid.

[123] *See, e.g.*, West Virginia v. U.S. Dep't of Health & Hum. Servs., 289 F.3d 281, 285 (4th Cir. 2002) (noting seventy-five percent of West Virginia's recovery was required to be remitted to the federal government).

[124] This outcome should not be a surprise. The stringent means testing required for beneficiaries to be eligible for Medicaid ensures recovery is very limited.

[125] *See* MANATT HEALTH, STATE HEALTH & VALUE STRATEGIES, MAKING MEDICAID ESTATE RECOVERY POLICIES MORE EQUITABLE: STATE TOOLKIT 3 (2022), https://www.shvs.org/wp-content/uploads/2022/04/Medicaid-Estate-Recovery-State-Toolkit.pdf (detailing in 2019, White families reported median wealth of $188,200, Black families of $24,100, and Hispanic families of $36,100).

[126] *Id.*

[127] Ana Hernández Kent & Lowell R. Ricketts, *The State of U.S. Wealth Inequality*, FED. RESERVE BANK OF ST. LOUIS (May 3, 2024), https://www.stlouisfed.org/institute-for-economic-equity/the-state-of-us-wealth-inequality.

[128] BRIANA SULLIVAN, DONALD HAYS & NEIL BENNETT, U.S. CENSUS BUREAU, THE WEALTH OF HOUSEHOLDS: 2021 at 3 (2023) https://www.census.gov/content/dam/Census/library/publications/2023/demo/p70br-183.pdf.

[129] *Id*.

[130] MANATT HEALTH, *supra* note 125, at 3.

across generations because homes are consistent assets that are one of the key predictors for inter-generational wealth accumulation.[131] Therefore, the pernicious impact of ERPs includes families losing years of investment into homes for care that Medicaid promised and seemingly required no such repayment, ultimately exacerbating existing economic inequality.[132]

The negative impact of ERPs is notable because it is contrary to the aims of OBRA '93 and Medicaid. OBRA '93 endeavored to reduce federal costs, a goal that is served when more people have access to assets that can be used to cover medical costs. Further, housing costs make building wealth more difficult, while the cross-generation transfer of homes allows wealth accumulation.[133] Thus, by preventing the accumulation of wealth, ERPs may cause future generations to be less able to afford healthcare and more likely to require federal support. Like OBRA '93, Congress intended Medicaid would ensure those needing care received it.[134] However, ERPs discourage access to healthcare because patients avoid Medicaid enrollment to avoid the pitfalls of estate recovery.[135]

In sum, ERPs are remarkably ineffective at delivering on OBRA '93's promise of reduced costs, while also wreaking havoc on families, reinforcing existing racial inequity, and blindsiding recipients.[136] Yet, states are unable to remove the recovery requirements because doing so risks the loss of Medicaid funding,[137] creating a financial quagmire for states. Thus, states face an impossible choice: they can either engage in the hugely unpopular and politically unsavory practice of seizing the homes of the dead or risk the loss of Medicaid funding and the decimation of their state healthcare system. Joseph Heller said it best: "That's some catch, that Catch-22."[138]

[131] Fabian T. Pfeffer & Alexandra Killewald, *Generations of Advantage. Multigenerational Correlations in Family Wealth*, 96 SOC. FORCES 1411, 1437 (2017).

[132] *See* discussion *supra* Section I.B.

[133] *See* Greenhalgh-Stanley, *supra* note 115, at 211–12.

[134] Moore & Smith, *supra* note 5, at 45.

[135] *See* Paula Span, *When Medicaid Comes After the Family Home*, N.Y. TIMES (Mar. 16, 2024), https://www.nytimes.com/2024/03/16/health/medicaid-estate-recovery-seniors.html.

[136] The story of the Rhodes family, as recounted in the introduction, is just one example of the chaos, confusion, and harm wrought by ERPs. *See* Corbett, *supra* note 6.

[137] *See* West Virginia v. U.S. Dep't of Health & Hum. Servs., 289 F.3d 281, 284 (4th Cir. 2002).

[138] JOSEPH HELLER, CATCH-22 52 (1999).

D. State Challenges to the Estate Recovery Program Requirement

States have not gone gently into the ERP program. Two states resisted the ERP requirement for more than a decade: Michigan and West Virginia.[139] This resistance, on various grounds, reflects the unpopularity of the ERP program and states' concern that ERPs are not a financially prudent program nor an appropriate use of Congress's power to alter Medicaid requirements.

1. Michigan's Delayed Enactment of an Estate Recovery Program

Following the passage of OBRA '93, Michigan refused to enact an ERP.[140] However, as years passed, CMS began pressuring Michigan to enact an ERP.[141] Nevertheless, across governors from both parties, the state continued to resist estate recovery.[142] CMS's pressure campaign culminated with a threat that Michigan would lose all federal funding for Medicaid if it did not enact an ERP.[143] This threat was based on the power of the HHS Secretary to control eligibility requirements and to deny funding when a state is out of compliance.[144]

If Michigan lost its Medicaid funding, the state would have forfeited billions of dollars every year, creating a massive budget shortfall.[145] Furthermore, Michigan's Constitution requires that the annual budget be balanced,[146] meaning the loss of funding would push the state to violate its constitution. The loss of federal funding would destabilize Michigan's healthcare system because the state would still be obligated to cover enrolled patients yet would lack the promised funds that underlie the program's feasibility.

Eventually, when faced with the loss of funding and the consequences of such a loss, Michigan finally capitulated, enacting an ERP in 2007, fourteen years after OBRA '93 was passed.[147] Thus, the federal government used the

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[139] True, *supra* note 99.
[140] *Id.*
[141] *See id.*
[142] *See id.*; *List of All Former Governors*, FORMER GOVERNORS OF MICH., https://www.michigan.gov/formergovernors/list-of-all-former-governors (last visited July 21, 2024).
[143] *See* True, *supra* note 99.
[144] 42 U.S.C. §§ 1396b(a)(1), 1396c.
[145] In fiscal year 2020–21, Michigan received over seventeen billion dollars from the federal government for Medicaid and the Healthy Michigan Plan. KEVIN KOORSTRA & KENT DELL, MICH. HOUSE FISCAL AGENCY, BUDGET BRIEFING: HHS – MEDICAL SERVICES AND BEHAVIORAL HEALTH 7 (2021), https://www.house.mi.gov/hfa/PDF/Briefings/HHS_Medicaid_BudgetBriefing_fy21-22.pdf.
[146] MICH. CONST. art. IX, § 28.
[147] *Michigan Enacts an Estate Recovery Law*, EST. PLANNING & ELDER L. SERVS., P.C. (June 8, 2008), https://www.formyplan.com/michigan-enacts-an-estate-recovery-law/.

threat of destabilizing Michigan's healthcare system and its budget to coerce compliance with the ERPs. Michigan did not sue or attempt to enjoin this requirement.

2. *West Virginia's Judicial Challenges of the Estate Recovery Program Requirement*

Similarly, West Virginia enacted an ERP after facing the same threat from HHS, then filed suit to challenge the ERP requirement. In 1995, West Virginia filed its first suit against HHS, arguing that the ERP requirement was inconsistent with federalism and unduly infringed on states' rights, which were reserved under the Tenth Amendment.[148]

First, West Virginia argued that the ERP was "bad public policy," which created more administrative and political problems than it yielded in recovered money.[149] At the time, West Virginia received over one billion dollars in Medicaid funding from the federal government, 320 million of which funded services that fell under mandatory recovery.[150] In turn, West Virginia only recovered $14,000 per estate, yielding a mere two-and-a-half million dollars annually.[151] However, seventy-five percent of that recovery was required to be remitted to the federal government, leaving approximately $625,000 for West Virginia.[152] Effectively, West Virginia, at significant political and administrative cost, yielded only "two-tenths of one percent" of the federal Medicaid funds.[153] From a policy perspective, West Virginia argued this return was too little to be of value to the state, especially considering the high costs.[154]

Additionally, West Virginia posited that losing federal funds was unconstitutionally coercive.[155] West Virginia could not reject the ERP program because, if HHS made good on its threat, it would lead to the total collapse of the state's healthcare system. As with Michigan, West Virginia relied on federal funding to keep its Medicaid program afloat, meaning the loss of funding would

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[148] HHS threatened West Virginia, saying failure to institute an ERP would lead to compliance proceedings that "could result in West Virginia losing all or part of its Federal financial participation in the State's Medicaid Program." West Virginia v. U.S. Dep't of Health & Hum. Servs., 289 F.3d 281, 285 (4th Cir. 2002).

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *See id.*

[153] *Id.*

[154] *Id.*

[155] *Id.* at 287.

sink the program.[156] Thus, the coercive budget threats forced West Virginia to comply with the ERP requirement, regardless of the state's concerns.[157] In essence, the risk of destabilization was so high that West Virginia lacked any meaningful choice. Therefore, the state argued, the ERP requirement, combined with HHS's threats to pull all funding, made the ERP requirement unconstitutionally coercive.[158]

However, the Fourth Circuit rejected West Virginia's coercion argument, noting that Congress, under the Spending Clause, can require states to comply with federal conditions to receive federal funds.[159] While the court acknowledged that funding conditions cannot violate the Tenth Amendment's reservation of powers by being overly coercive,[160] Congress does have the power to condition grants on compliance with federal requirements.[161]

Notably, when West Virginia's challenge was decided, no court had held that a conditional grant was impermissibly coercive.[162] In fact, the Fourth Circuit questioned if a condition could be so coercive and "under what circumstances coercion might be found."[163] In short, the court was wary of finding coercion when there was a dearth of case law to support such decision.[164]

The court found that the possibility that HHS would pull Medicaid funding was not a threat but a factual statement.[165] It was "the federal government simply inform[ing]" West Virginia of potential consequences.[166] The court reasoned that the Medicaid Act allowed HHS to select and tailor penalties, which gave the department broad discretion in ensuring compliance.[167] The potential loss of funds was thus a "limited sanction," which did not infringe on West Virginia's

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156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.* at 295–96.

160 *Id.* at 286 (finding that funding conditions violate the Constitution when they are "so coercive as to pass the point at which pressure turns into compulsion" (quoting South Dakota v. Dole, 483 U.S. 203, 211 (1987))).

161 *Id.*; U.S. CONST. amend. X.

162 *West Virginia*, 289 F.3d at 289.

163 *Id.* ("[W]e are aware of no decision from any court finding a conditional grant to be impermissibly coercive.").

164 Of course, in *Sebelius*, the Court would later hold that the exact scheme at issue, threatening to withhold all Medicaid funding to induce compliance with a program change, was unconstitutional coercion. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012).

165 *West Virginia*, 289 F.3d at 292.

166 *Id.*

167 *Id.* at 293.

powers under the Tenth Amendment.[168] Interestingly, the court found there was no risk HHS would withhold all Medicaid funding,[169] despite HHS's threat to do just that.[170]

Additionally, the court held West Virginia could only have challenged the ERP provision by refusing to implement an ERP and then receiving a sanction.[171] In enacting an ERP, the court reasoned that West Virginia lost the right to challenge the provision as unduly coercive.[172] Critical to the court's analysis was that HHS could have withheld some funds or used a different, non-monetary sanction.[173] However, West Virginia, in enacting the program, presented hypothetical consequences to the court that were insufficient for finding Congress violated the Constitution.[174] Thus, because there was a scenario in which West Virginia may have lost only part of their Medicaid funds, the court held the ERP requirement was not unduly coercive.[175]

Years after this initial challenge, West Virginia again challenged the ERP under narrower grounds: arguing the state should have the power to define what properties were exempt from estate recovery.[176] The ERP statute granted states the power to waive the ERP requirement if enforcement would bring an undue hardship on citizens.[177] Furthermore, states were empowered to "establish procedures" for determining when an undue hardship exists.[178]

Relying on this statutory power, West Virginia's legislature amended its definition of undue hardship to include all property with an appraised value below the mean value of West Virginia homes.[179] At the time, the mean value of homes in West Virginia was $50,735.[180] Under the exemption, homes worth less than the mean would be entirely excluded from estate recovery; while those

[168] *Id*. However, it is hard to imagine what would be a full sanction if loss of funding is a limited sanction.
[169] *Id.* at 295.
[170] *Id.* at 292. Notably, this decision pre-dated HHS's threats to Michigan. *See* discussion *supra* Section I.D.1.
[171] *West Virginia*, 289 F.3d at 292. ("[T]he challenger must establish that no set of circumstances exists under which the Act would be valid." (quoting United States v. Salerno, 481 U.S. 739, 745 (1987))).
[172] *Id.* at 294–95.
[173] *See id*. at 291–92.
[174] *See id*.
[175] *See id*.
[176] West Virginia v. Thompson, 475 F.3d 204, 213–14 (4th Cir. 2007).
[177] 42 U.S.C. § 1396p(b)(3).
[178] *Id*.
[179] *Thompson*, 475 F.3d at 209.
[180] *Id*.

worth more would have the mean deducted, recovering only the overage.[181] The net effect of this rule was below-mean value homes could never be seized, nor have a lien placed against them via West Virginia's ERP.[182]

However, HHS rejected this proposed rule, holding it was too broad and exempted "a high percentage of homes in many of the state['s] counties," which was contrary to the goals of estate recovery.[183] HHS argued that the state could define undue hardship, but the state's definition was bound by standards promulgated by the Secretary to ensure ERPs were not rendered obsolete.[184] Placing these limits on states was a critical change because it prevented states from tailoring their ERPs to the needs of the populous.

Following an administrative review where HHS rejected the State's definition, West Virginia appealed to the Fourth Circuit.[185] On appeal, the State argued HHS was overstepping its authority in disapproving the state plan without establishing criteria through notice-and-comment rulemaking.[186] Notably, West Virginia articulated a strong policy preference for limiting estate recovery because it could lead "needy citizens to turn down necessary medical care out of fear that they will lose homes in which they take enormous pride."[187] Thus, the state argued its definition of undue hardship properly balanced the needs of the populous—providing access to Medicaid—with the ERP requirements.[188]

The court disagreed.[189] The Fourth Circuit held that HHS, as part of its statutory authority, could define undue hardship.[190] Hence, states were left to follow HHS's definition of hardship, making West Virginia's broad definition impermissible.[191] This dramatic change gave HHS more power to control ERPs, while states were left to merely apply HHS's interpretations—limiting states' power to tailor ERPs. Therefore, the Fourth Circuit dramatically curtailed the

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181 *See id*. at 206.

182 *See id*. at 209.

183 *Id.*

184 *See id.* at 208.

185 *Id.* at 206.

186 *Id.* at 209.

187 *Id.* at 214.

188 *See id.*

189 *Id.*

190 *Id*. at 213. Interestingly, the court noted that the CMS State Medicaid Manual "does not bind the states to any mandatory requirements beyond those in the Medicaid statute but merely provides guidance as to the agency's construction of the law." *Id.* at 211 n.2.

191 *Id*. at 214.

seemingly broad ability of states to define undue hardship and implement ERPs sensitive to their communities.

Thus, while states made numerous objections to the estate recovery, their concerns about coerciveness failed. One of the challenges states faced was that courts were hesitant to identify unconstitutional coercion in federal programs without the actual, rather than threatened, loss of Medicaid grants.[192] Similarly, the courts gave broad deference to HHS's definition of undue hardship, limiting states' ability to tailor ERPs to the needs of their state.[193] However, the Supreme Court rejected these principles in *Sebelius*, creating significant questions about the constitutionality of ERPs today.

II. LIMITS ON CONGRESSIONAL ACTION: THE DOCTRINE OF UNCONSTITUTIONAL COERCION UNDER *SEBELIUS*

Under the Constitution's Spending Clause, the federal government cannot coerce states to adopt a program.[194] States must voluntarily, and knowingly, accept the terms of a federal program in exchange for funding.[195] Congress can violate this limit when it enacts a federal program, then changes participation requirements with new provisions.[196] States are left to either accept the change or risk the loss of funds, meaning Congress usurps state legislative power by forcing compliance.

The Supreme Court has struck down federal programs that contravene these limits, holding a program that commandeers a state government by denying states the opportunity to forego participation violates federalism and constitutional protections of state powers.[197] The premise of this restriction is that Congress cannot use financial inducements to compel states to act because such a program strikes at a core fear of the founders: the federal government acting tyrannically, subverting the will of the states.[198]

Restrictions on congressional action have demanded new attention in the wake of *National Federation of Independent Businesses v. Sebelius*.[199] The

192 *See, e.g.*, West Virginia v. U.S. Dep't of Health & Hum. Servs., 289 F.3d 281, 292–93 (4th Cir. 2002).
193 *See, e.g.*, *Thompson*, 475 F.3d at 214.
194 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576 (2012).
195 *Id.* at 577.
196 South Dakota v. Dole, 483 U.S. 203, 212 (1987).
197 Printz v. United States, 521 U.S. 898, 935 (1997).
198 *See* THE FEDERALIST NO. 51 (James Madison).
199 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

plaintiff in *Sebelius*, the National Federation of Independent Businesses (NFIB), argued the Affordable Care Act was coercive because it threatened the loss of all federal Medicaid support if states failed to expand Medicaid to all people with income up to 133% of the federal poverty line.[200] Ruling for the NFIB, the Supreme Court established a new, three-pronged test for unconstitutional coercion.[201]

While this test may make *Sebelius* appear simple, it was a significant shift in jurisprudence that could implicate many federal programs and upset the common use of monetary inducements by Congress to shape state action.[202] The Court left little guidance for Congress or states, failing to articulate when and if the same rationale could apply to other congressional spending.[203] This lack of clarity begets confusion among commentators and courts, all attempting to understand the proper limits of the decision. ERPs present a ripe opportunity to analyze these limits and to evaluate if the current ERP program is constitutional under the test. This section will first provide insight into the *Sebelius* coercion test, then delineate the current confusion around the bounds of the doctrine, and close by applying the doctrine to ERPs.

A. *Background on* Sebelius*' Three-Pronged Test for Coerciveness*

In *Sebelius*, the Supreme Court established a three-part test for determining if the federal government is unconstitutionally commandeering state power. First, the congressional action must be amending an existing funding stream.[204] Funding requirements are best understood as a contract between the federal and state governments:[205] states agree to a contract with the federal government, complying with requirements and receiving federal money.[206] Coercion is not an issue when states initially opt-in because they can decline. However, when new requirements disrupt an existing funding stream, the original contract is

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200 *Id.* at 542.

201 *See id.* at 588. Notably, there is considerable debate about the exact contours of the *Sebelius* test. This three-part formulation is based on discussion and direction from Professor Matthew Lawrence of Emory Law. Not all scholars would agree with this formulation.

202 *See* Erin Ryan, *The Spending Power and Environmental Law After* Sebelius, 85 U. COLO. L. REV. 1003, 1006 (2014).

203 *See id*.

204 *Sebelius*, 567 U.S. at 583.

205 *Id*. at 577.

206 *See id*.

altered, creating the possibility of coercion.[207] In *Sebelius*, states challenged the required expansion of Medicaid under the Affordable Care Act.[208] The Court noted the federal government can restrict the grant of funding but cannot enact retroactive conditions on an existing program.[209]

Second, the federal government must fail to provide adequate notice to states of dramatic program changes.[210] If states have notice, they can establish alternatives to odious conditions or decline to participate, which avoids coercion.[211] However, if a state lacks notice, it will remain bound by the program and the new requirements without any meaningful way of objecting or extracting itself.[212] Importantly, the Court differentiated between *minor* program changes that merely adjust the program, a shift in degree,[213] and *dramatic* transformations that change the scope of a program, a shift in kind.[214] According to the Court, a shift in degree can be anticipated by states because such changes are minor.[215] The Medicaid statute provides that the Secretary of HHS can "alter or amend" the program, which provides adequate notice of minor changes.[216] However, dramatic changes must be supported by adequate notice to states.[217] Such a change includes expanding coverage to wide swaths of people,[218] a shift in funding,[219] and distinct conditions for using federal money.[220] Thus, the second step requires that Congress provide inadequate notice to states of program changes to demonstrate coercion.

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207 *Id*. at 584. Additionally, boundaries on federal requirements are needed so political accountability can be appropriately distributed to the politicians and institutions enacting policy. For example, federal regulations enacted by states may lead state officials to "bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 578.

208 *Id*. at 540.

209 *Id*. at 585.

210 *See id*. at 584 (explaining Congress cannot surprise states with dramatic changes to Medicaid).

211 *Id.* at 581–84.

212 *Id*. at 579–80.

213 *Id.* at 583 (pointing to the extension of eligibility via altered eligibility criteria as a shift in degree).

214 *See id.*

215 *See id.* at 584.

216 *Id.*

217 *Id.*

218 *Id*. at 583 (shifting from covering only four specified categories of people to all people below 133% of the federal poverty level).

219 *Id*.

220 *Id*. at 584 (shifting from paying a maximum of 83% of costs for traditional participants to a minimum of 90% for newly eligible participants).

Finally, the amount of federal money at stake must be so large that states have no option but to comply.[221] Notably, Congress has the authority "to condition the receipt of funds on the states' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the 'general Welfare.'"[222] For example, in *South Dakota v. Dole*, the Supreme Court upheld a federal law that withheld five percent of a state's federal highway monies unless the state raised the drinking age to twenty-one.[223] The Court reasoned the age requirement was "directly related" to the congressional goal of safe interstate travel, while the loss of funds would only amount to a loss of one-half of one percent of the plaintiff-state's budget.[224] Thus, the threat of lost funds was so "mild" that the decision to raise the drinking age remained firmly with the state, making the requirement permissible.[225]

However, conditions that "take the form of threats to terminate other significant independent grants" are impermissible.[226] In *Sebelius*, the Social Security Act provided that the Secretary of HHS could withhold all future Medicaid funding, threatening "over 10 percent of a State's overall budget" and leaving "the States with no real option but to acquiesce in the Medicaid expansion."[227] Further, three justices explicitly rejected the dissent's theory that "Congress has not threatened to withhold funds earmarked for any other program."[228] Instead, by creating a new program and reserving the Secretary's right to withhold all funding, Congress "penalize[s] States that choose not to participate" and impermissibly coerces states to expand Medicaid.[229]

The *Sebelius* test lacked a majority on large swaths of the opinion, failed to elucidate clear boundaries for application, and presented conflicting interpretations of the scope of coerciveness. This muddles the water of future congressional action, creating questions about how Congress can use grants to induce compliance with federal programs without undue coercion. Many states

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[221] *Id*. at 582.
[222] *Id*. at 580; *see also* South Dakota v. Dole, 483 U.S. 203, 206 (1987).
[223] *Dole*, 483 U.S. at 211–12.
[224] *Id*. at 208.
[225] *Id*. at 211.
[226] *Sebelius*, 567 U.S. at 580.
[227] *Id*. at 582 (footnotes omitted).
[228] *Id*. The three justices joined Part IV of the opinion.
[229] *Id*. at 585.

rely on federal funding across numerous programs, so unconstitutional coercion could exist in many grant programs.[230]

B. *The Current Debate over the Appropriate Limits of* Sebelius

Courts and commentators, in the wake of *Sebelius*, have struggled to identify the appropriate limits of the Court's holding.[231] Much of the confusion stems from the various parts of the opinion, many of which failed to receive a majority of the Court's support.[232] Commentators have noted "the outcome was four and one-half to four and one-half, an evenly divided Court."[233] Such fracturing over the correct understanding of unconstitutional coercion disturbed the "constitutional gestalt."[234] This confusion left courts and commentators to skirmish over the proper constitutional interpretation of congressional conditions on federal funding.[235]

Two questions remain following the decision: (1) when is a federal grant large enough that it may be coercive; and (2) when do congressional modifications to existing federal programs become dramatic transformations, untethered to the original purpose?[236] For the size of the federal grant, legal scholars agree the amount must be higher than 0.5% of a single state's budget because the Court in *Dole* found that amount not to be unduly coercive.[237] While the lower bound is clear, the *Sebelius* Court found withholding Medicaid funding, estimated at ten percent of state budgets, was coercive.[238] Thus, there are explicit bounds: imperiling 0.5% and less of a state budget is not coercive,

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[230] *See* Ryan, *supra* note 202, at 1027–28 (asserting that federal grant programs for education, civil rights, highway infrastructure, social services, and environmental law are sufficiently large to trigger *Sebelius* analysis and could be coercive).

[231] *See, e.g.*, Carter G. Phillips & Stephanie P. Hales, *Postmortem on* NFIB v. Sebelius, *in* THE FUTURE OF HEALTHCARE REFORM IN THE UNITED STATES 13, 27 (Anup Malani & Michael H. Schill eds., 2015) ("Coercion is not a concept that is self-defining. . . . For purposes of healthcare policy moving forward, however, and how to reform Medicaid and virtually every other entitlement program, [the holding in *Sebelius*] could be a bit of a nightmare . . . .").

[232] *Sebelius*, 567 U.S. at 529.

[233] Solum, *supra* note 28, at 57.

[234] *Id*. at 2.

[235] *See generally id.* at 2–4*;* Jonathan H. Adler, *The Conflict of Visions in* NFIB v. Sebelius, 62 DRAKE L. REV. 937, 976–79 (2014).

[236] Ryan, *supra* note 202, at 1026.

[237] *Id*. at 1027.

[238] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 582 (2012).

while 10% and above is coercive.[239] However, the Court declined to outline where a federal grant shifts from persuasive to coercive within that range.[240]

When considering the gap, numerous federal grants fall within the mathematical bounds,[241] though many of those programs can be rationalized by other constitutional aims.[242] For example, environmental regulations enacted through federal-state partnerships are grounded in the Commerce Clause and federal spending power.[243] Thus, even if they are too large to be rationalized under the Spending Clause, they are acceptable under the Commerce Clause, escaping *Sebelius*'s analysis in part. This has led to the conclusion that the Court's approach is akin to that of obscenities[244]—the Court knows it when it sees it.[245]

Similarly, the *Sebelius* Court did not clarify when a change was a minor alteration, which requires no notice, and a dramatic change, which does require notice. Rather than creating a straightforward test, the Court presented a series of changes and explained if they were minor or dramatic.[246] Critically, the Affordable Care Act's expansion requirement was a new program, a dramatic transformation, not a minor alteration.[247] The Court reasoned the expansion of Medicaid was distinct from the program's original purpose, which was to provide healthcare to a specified and limited group.[248] Additionally, the expansion was funded via a separate funding provision, which included more funding for the expansion population than standard Medicaid, and it provided a different level of coverage for the expansion population.[249] To the Court, these changes suggested a transformation of the original program that was far more than a modification.[250] Such a change was impermissibly coercive because if states fail to comply, they risk the loss of all Medicaid funding.[251] Notably, Congress's declaration that the expansion was an extension of the original

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239 *Id.* at 580–82.
240 *Id.* at 585.
241 Ryan, *supra* note 202, at 1027–28 (including education, civil rights, highway infrastructure, social services, and environmental grants in this group).
242 *Id.* at 1033.
243 *Id*.
244 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
245 Ryan, *supra* note 202, at 1031.
246 Nat'l Fed of Indep. Bus. v. Sebelius, 567 U.S. 519, 581–85 (2012).
247 *See id*. at 584.
248 *Id.* at 583.
249 *Id.* at 584.
250 *See id.*
251 *Id.* at 581.

Medicaid was insufficient.[252] Instead, the Court reasoned that Congress's titling an expansion as an extension did not override the effect: a new program that serves a new population.[253]

In contrast to the major change of Medicaid expansion, the Court held minor alterations were constitutionally permissible.[254] For example, an amendment to Medicaid that required states provide benefits to pregnant women and increased the number of eligible children was not a significant change.[255] The Court reasoned that from Medicaid's inception, women and their dependent children were covered, meaning the inclusion of pregnant women was consistent with the original purpose of Medicaid.[256] Additionally, the Court identified the Omnibus Budget Reconciliation Act of 1990, which required states to expand Medicaid to phase in coverage of poor children under age nineteen, as a minor change.[257] While the Court's reasoning was not articulated, it follows that the inclusion of children is similar to that of pregnant women—both are consistent with Medicaid's original purpose.[258]

Similarly, changes that conditioned past and current funding on state adoption were minor when the impact of the change was an "adjustment."[259] For example, the Social Security Amendments of 1972 increased benefits and created a minimum benefit for a limited population: long-term, low-income employees.[260] The Court noted this change was minor, even though payment of new Medicaid grants depended on adopting the change.[261] While the Court did not explain why it was minor, it can be inferred that the small population limited the scope of the change, suggesting it was an alteration.

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[252] *See id*. at 584.
[253] *Id*. at 583.
[254] *Id.* at 584–85.
[255] *Id*. at 585.
[256] *Id*.
[257] *Id.* at 583; Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4601, 104 Stat. 1388-166 (1990).
[258] *See Sebelius*, 567 U.S. at 541.
[259] *See id.* at 583.
[260] Patricia P. Martin & David A. Weaver, *Social Security: A Program and Policy History*, 66 SOC. SEC. BULL. 1, 8 (2005).
[261] *Sebelius*, 567 U.S. at 583.

The Court's failure to explain why some of these changes were minor demonstrates the confusion about what is a dramatic program change.[262] The limited impact of the 1972 amendment and the alignment of the 1990 change with the original purpose of Medicaid suggest two factors that indicate a minor change: (1) limited scope and (2) alignment with Medicaid's original purpose. Of course, the Court failed to elucidate the proper bounds of a minor alteration. By extension, there can be unconstitutional coercion when Congress makes dramatic changes to a program that do not align with its original purpose or impacts the fundamental basis of the program.[263]

Therefore, there are numerous questions about when it is appropriate to apply *Sebelius* to congressional grants and the true limits of the doctrine. These questions are critical because their answers will shape future cooperative state-federal programs and Congress's ability to promulgate grant requirements, extending beyond estate recovery to almost all areas of federal policy development.

C. Applying Sebelius *to Estate Recovery Programs*

Estate Recovery Programs (ERPs) provide a compelling case study for the appropriate limit of *Sebelius*. First, though the federal grant limit for other federal programs is unclear, Medicaid is subject to *Sebelius*'s analysis because the decision was centered on if Medicaid expansion was coercive.[264] However, previous analysis of ERPs centered on the idea that HHS has the *option* of withholding all or part of Medicaid funding, thereby insulating the ERP requirements from being unduly coercive.[265] This presents two compelling questions about the appropriate limit of *Sebelius*: does that rationale stand, and if it does, what fraction becomes too coercive?

In *Sebelius*, the expanded Medicaid program brought additional state administrative requirements and served a distinct purpose from the original program.[266] These two features pushed the expansion from a change to Medicaid

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[262] *See* Adler, *supra* note 235, at 940. *Compare* NCAA v. Governor of N.J., 730 F.3d 208, 226 (3rd Cir. 2013) (suggesting "the method chosen to regulate (forcing into economic activity individuals previously not in the market for health insurance)" was the critical issue in *Sebelius*), *with* New York v. U.S. Dep't of Just., 951 F.3d 84, 116 (2nd Cir. 2020) (suggesting the amount of funding at stake was the critical consideration).

[263] *See Sebelius*, 567 U.S. at 583.

[264] *Id.* at 581.

[265] *See* West Virginia v. U.S. Dep't of Health & Hum. Servs., 289 F.3d 281, 291–92 (4th Cir. 2002).

[266] *See Sebelius*, 567 U.S. at 584.

to an entirely new program.[267] Turning to ERPs, the program's features present fertile ground for considering what is a new program. While ERPs undoubtedly require additional state administrative support, are they so distinct that they are a new program? If ERPs represent such a deviation, what insight do they provide into the proper limit of the crossover condition requirement?

The pre-*Sebelius* challenges of Medicaid Estate Recovery failed because the district court and court of appeals found the threat of losing all Medicare funding was not unduly coercive.[268] However, the *Sebelius* Court found the same threat was so coercive that it was functionally a "gun to the head" of states, forcing compliance.[269] In light of these divergent outcomes, the power of Supreme Court declarations, and swirling questions about the limits of *Sebelius*, the remainder of this section applies *Sebelius* to the Medicaid estate recovery requirement.

Under *Sebelius*, there are three requirements for coerciveness: (1) an amendment to pre-existing federal funds; (2) a change to the core nature of a federal program; and (3) the amount of threatened funding is so significant that it is financially impossible for states to be out of compliance.[270] This section considers each prong in turn. Subsection 1 posits that ERPs are an amendment to pre-existing federal grants: Medicaid funding. Subsection 2 considers the nature of the ERP change, arguing that ERPs represent a fundamental change because they subvert the original purpose of Medicaid and target homeownership, which has high cultural and institutional significance. Subsection 3 argues that the amount of money at risk is identical to that in *Sebelius*, thereby meeting the third prong of the test. Finally, the section concludes by presenting arguments against ERPs as unconstitutionally coercive.

1. Estate Recovery Programs Are an Amendment to Pre-Existing Federal Funds

Estate recovery easily meets the first prong because the estate recovery amendment was enacted almost thirty years after Medicaid.[271] According to the *Sebelius* Court, the critical consideration is whether legislation changes existing program requirements after states have opted in, thereby preventing states'

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[267] *See id.*
[268] *West Virginia*, 289 F.3d at 287–88.
[269] *Sebelius*, 567 U.S. at 581.
[270] *Id.* at 582, 583, 584.
[271] Medicaid was enacted in 1965, twenty-eight years before the '93 OBRA. *See* Moore & Smith, *supra* note 5, at 45; Wood & Sabatino, *supra* note 1, at 84.

objection.[272] When Congress enacted the estate recovery requirement in 1993, all fifty states and D.C. had enacted Medicaid.[273] The final state to adopt a Medicaid program, Arizona, had done so a decade before the estate recovery program was enacted.[274] Thus, every state was receiving Medicaid funding when estate recovery was inserted.

Furthermore, the estate recovery requirement amended existing rules because failure to comply with federal standards placed a state's plan out of compliance with federal requirements, which allowed the federal government to suspend all Medicaid funding.[275] In fact, HHS threatened states that failed to enact ERPs, telling West Virginia that compliance proceedings could lead to "losing all or part of its Federal financial participation in the State's Medicaid Program."[276] This threat lays bare the effect of ERPs on existing money: continued federal funding was contingent upon implementing an estate recovery program. Thus, estate recovery programs directly targeted existing financial support from the federal government, meeting the first element of the *Sebelius* framework.

2. *Estate Recovery Programs Are a Core Change to Medicaid*

Applying the second prong, estate recovery was a fundamental change to the Medicaid program for two reasons. First, ERPs subverted Congress's original intent to provide low-cost healthcare to the neediest people without the expectation that the recipient would reimburse the government.[277] Second, ERPs target homeownership, which is closely associated with the "American Dream" and supported by a plethora of government programs and tax breaks.[278] The "core change" prong considers whether the shift in a program was fundamental.[279] As enacted in 1965, Medicaid was intended to provide healthcare coverage to the needy.[280] The legislative history and implementation of Medicaid belied no intention that recipients would repay the federal

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[272] *Sebelius*, 567 U.S. at 579–80.

[273] *See* CTR. FOR HEALTH CARE STRATEGIES, MEDICAID: A BRIEF HISTORY OF PUBLICLY FINANCED HEALTH CARE IN THE UNITED STATES (2019), https://www.chcs.org/media/Medicaid-Timeline-Fact-Sheet_01.14.20v2.pdf.

[274] *Id.*

[275] West Virginia v. U.S. Dep't of Health & Hum. Servs., 289 F.3d 281, 284 (4th Cir. 2002).

[276] *Id.* at 285.

[277] *See* Moore & Smith, *supra* note 5, at 45.

[278] *See infra* notes 289, 295.

[279] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 583 (2012).

[280] Moore & Smith, *supra* note 5, at 45.

government.[281] Instead, healthcare was provided to needy people without caveat.[282] In a significant departure, OBRA '93 fundamentally changed the program's functioning, requiring recipients to reimburse the federal government.[283]

Estate recovery is a fundamental change because it alters the intended purpose of Medicaid. By requiring recipients to pay back the government, Medicaid shifts from a program covering the needy without caveat to a program that requires some recipients to reimburse the government. This shift changes the program from a disbursement to a liability. By way of analogy, consider public schools. The child that attends public schools is not expected to, at death, repay the government for their education. Instead, the government provides schooling to all children who choose to accept it, the cost of which is covered through state and federal taxes.[284] To require repayment would fundamentally alter the nature of public schools. Rather than offering a public option at no cost to ensure all can access schooling, public schooling would become a looming liability. Undoubtedly, some families would choose to keep their children out of public schools. The recipient of public schooling would be expected to pay for public education twice: once via their taxes and again after they die for the exact costs of their education. Such a change would unquestionably change the very nature of public schools by restricting access and doubly charging recipients.[285]

Similarly, by requiring the estates of Medicaid recipients to repay the government, the fundamental nature of Medicaid is changed from a benefit program to a liability.[286] Recipients, who by their very eligibility lack assets, are compelled to repay the government for their care, subverting Medicaid's purpose—to provide care to those who could not afford it.[287] Furthermore, eligible persons have declined Medicaid coverage, forgoing needed medical care to avoid estate recovery.[288]

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[281] *See generally id.* (discussing the legislative history of Medicaid).
[282] *See id.*
[283] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13612, 107 Stat. 312.
[284] My apologies to scholars of education funding for the simplistic explanation.
[285] This analogy is not perfect because all public-school students would be required to repay the government, but the mandatory ERP collections do not apply to all Medicaid recipients. However, the limits on mandatory recovery populations may reflect the limited income or assets of some classes of recipients.
[286] *See* Corbett, *supra* note 6.
[287] *See* Moore & Smith, *supra* note 5, at 45.
[288] *See* Corbett, *supra* note 6.

Even if ERPs were not a fundamental change for those reasons, estate recovery targets one of American society's most protected and recognized goals: homeownership.[289] Arguably, the home is one of the most sanctified spaces in American life, the "moral nexus between liberty, privacy, and freedom of association."[290] The Constitution, the courts, and congressional legislation have all enshrined provisions protecting the home, dictating a high reverence for personal property. The Constitution provides specific protection for property rights in the Fifth and Fourteenth Amendments;[291] these protections are intended to promote liberty and economic prosperity, ensuring that majority groups cannot exploit minorities.[292] In litigation, the courts have established considerable protection for the home: developing a broad takings scheme, which prevents various forms of government usurpation of property.[293] Similarly, Congress has enshrined incentives for homeownership in the federal tax code, providing tax breaks and subsidizing costs.[294] Thus, there is extensive institutional protection of homeownership. Beyond the concerted institutional protection, homeownership is closely equated with the American Dream, underlying its cultural significance.[295]

Homeownership's institutional and cultural significance suggests estate recovery is a fundamental change because states could not anticipate congressional action would run counter to established protections and the cultural significance of homeownership. The *Sebelius* Court held Medicaid expansion was beyond a "mere alteration" because it was unlikely to be anticipated by states, was funded by a new stream, and created a different payment schedule.[296] Similarly, the ERP requirement was unlikely to be anticipated because it is divorced from Medicaid's purpose, created a new

[289] *See generally* Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 332 (2009) (discussing homeownership as a means of achieving the American Dream).

[290] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991 (1982).

[291] U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); U.S. CONST. amend. XIV ("nor shall any State deprive any person of . . . property, without due process of law").

[292] Edward H. Ziegler & Jan G. Laitos, *Property Rights, Housing, and the American Constitution: The Social Benefits of Property Rights Protection, Government Interventions, and the European Court on Human Rights'* Hutten-Czapska *Decision*, 21 IND. INT'L COMP. L. REV. 25, 26 (2011).

[293] *See generally* Kelo v. City of New London, 545 U.S. 469 (2005) (applying the Takings Clause framework).

[294] Kamila Sommer & Paul Sullivan, *Implications of US Tax Policy for House Prices, Rents, and Homeownership*, 108 AM. ECON. REV. 241, 241 (2018).

[295] Laurie S. Goodman & Christopher Mayer, *Homeownership and the American Dream*, 32 J. ECON. PERSPS. 31, 31 (2018).

[296] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 584 (2012).

funding stream via seized property, and runs contrary to established protection of homeownership.

To avoid coercion, new program requirements cannot be "an unforeseeable departure from the status quo at the time the States agreed to accept the funding."[297] Yet, in a dramatic shift, estate recovery changed Medicaid from a program in which the needy get healthcare without caveat to a program in which certain recipients are required to pay back the government after their death. It was a shift that "[a] State could hardly anticipate" because "it so dramatically" transformed Medicaid.[298] Therefore, the estate recovery provisions are a fundamental change to the core purpose of Medicaid, a change in kind rather than a mere shift in degree, fulfilling the second prong of *Sebelius*'s analysis.

3. Estate Recovery Programs Implicate Hefty Federal Grants and Are a "Gun to the Head" of States

Finally, the amount of money at risk when states fail to comply with estate recovery is akin to a "gun to the head" because it unconstitutionally coerces states.[299] Federal requirements cannot be "so coercive as to pass the point at which 'pressure turns into compulsion.'"[300] However, Medicaid and Medicare funding are often the biggest federal contributions to state budgets, and noncompliance with the ERP requirement could lead to the loss of all federal health funding.[301] This is the same loss contemplated in *Sebelius*.[302] The Court held, "Congress is not free . . . to penalize States that choose not to participate . . . by taking away their existing Medicaid funding."[303] Therefore, applying the Court's rationale and holding, the threatened loss of Medicaid funding is sufficient to meet the monetary threshold for coercion.

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[297] New York v. U.S. Dep't of Health & Hum. Servs., 414 F. Supp. 3d 475, 569 (S.D.N.Y. 2019).

[298] *Sebelius*, 567 U.S. at 523.

[299] *Id.* at 581 (comparing the "relatively mild encouragement" of the threat of losing five percent of highway funds with the "gun to the head" of losing all existing Medicaid funding, which is constitutionally impermissible).

[300] South Dakota v. Dole, 483 U.S. 203, 211 (1987).

[301] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13612, 107 Stat. 627.

[302] *Sebelius*, 567 U.S. at 582 (noting 42 U.S.C. § 1396c leaves "the States with no real option but to acquiesce"); 42 U.S.C. § 1396c (providing that the Secretary of HHS can halt future payments to states if they fail to comply with federal requirements).

[303] *Sebelius*, 567 U.S at 585.

4. *Potential Defense Against a Theory that Estate Recovery Programs Are Unconstitutionally Coercive*

In defense of the ERP requirement, the federal government could argue the *Sebelius* Court implicitly endorsed ERPs constitutionality. In *Sebelius*, the Court discussed other Medicaid program changes as evidence that changes can be constitutional and not coercive.[304] However, the Court did not specifically discuss estate recovery.[305] This indicates that the Court has some familiarity with the previous changes, an implicit endorsement of those changes as constitutional. Relying on this endorsement, the government could argue the Court vouched for estate recovery as a constitutional program change because it made no mention of previous changes being unconstitutionally coercive. In fact, the Court explicitly referenced one past change as "presumably the most dramatic alteration" to the program,[306] suggesting ERPs (left unmentioned) are not as dramatic. Thus, the government would argue the Court, by implication, found ERPs are constitutionally permissible.

However, the argument that the Court found estate recovery was not coercive should fail because the Court did not demonstrate any awareness of ERPs. The Court pointed to specific program changes, legislation, and rulemaking.[307] Yet, even with that exhaustive accounting, the Court did not refer to ERPs, and the changes the Court discussed focused on eligible populations, not new requirements in program administration. Thus, it is not rational to establish the constitutionality of ERPs based on discussion of other programs. Furthermore, to do so would open a Pandora's Box of future constitutional litigation: how oblique of a reference to a program would be sufficient to say the Court established constitutionality?

ERPs are a significant program change, which states could not anticipate. By requiring states to implement ERPs or risk losing all their federal Medicaid funds, Congress impermissibly surprised states and engaged in unconstitutional coercion as established under *Sebelius*.

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[304] *Id*. at 583.
[305] *Id*.
[306] *Id*. at 584 (referencing examples in the dissent).
[307] *Id*. at 583.

III. IMPLICATIONS OF THE UNCONSTITUTIONALITY OF ESTATE RECOVERY PROGRAMS

Finding ERPs unconstitutional presents two significant implications: (1) the scope of *Sebelius* is better defined, potentially implicating other cooperative state-federal programs; and (2) millions of Americans have been affected by an impermissible program. This Part explores each of these implications in turn.

A. *The Scope of* Sebelius *Is Better Defined, with Potential Implications for Other Cooperative State-Federal Programs*

If ERPs are unconstitutional under *Sebelius*, courts and commentators gain insight into the appropriate limits of unconstitutional coercion. *Sebelius* unsettled the dominant paradigms of constitutional analysis, in part because the decision was fractured.[308] However, ERPs provide insight into future applications of the *Sebelius* test to other programs, suggesting the test can be applied to programs beyond Medicaid expansion. This has significant implications because it may change congressional behavior, limiting programs to avoid violating *Sebelius*.[309]

Applying *Sebelius* to ERPs demonstrates the Court's rationale extends beyond the limited question of Medicaid expansion. While there has been confusion about when *Sebelius* could apply,[310] this Comment demonstrates it appropriately applies to ERPs. With this insight, program changes other than expansion can be unconstitutionally coercive. To determine when *Sebelius* should apply to other changes, the ERP change must be appropriately defined.

Like Medicaid expansion, ERPs are best understood as a fundamental program change because ERPs required states to establish significant support for the program and could not be anticipated. Both changes were enforced through threatened loss of all Medicaid funding, about ten percent of state budgets.[311] However, rather than requiring additional outlays for healthcare, ERPs were intended to save money.[312] Thus, coercion could be present when there is a fundamental program change that risks at least ten percent of a state's budget, regardless of if it is intended to increase or decrease federal spending.

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308 Solum, *supra* note 28, at 57.

309 *See* Ryan, *supra* note 202, at 1061.

310 *Id*.

311 *Sebelius*, 567 U.S. at 585; West Virginia v. U.S. Dep't of Health & Hum. Servs., 289 F.3d 281, 285–86 (4th Cir. 2002).

312 *See* Wood & Sabatino, *supra* note 1, at 84.

Therefore, Congress can act coercively when shrinking and expanding programs.

When conceptualizing future program changes, Congress should be mindful of this restriction, acting carefully to ensure both expansion and constriction of programs do not run afoul of *Sebelius*. States may find they have more latitude and flexibility within cooperative programs, as Congress seeks to avoid coercion. However, there is a risk that Congress will simply avoid state-federal partnerships[313] out of concern that changes could be unconstitutionally coercive. This result could harm states, losing out on wanted funding or programs. Overall, by demonstrating *Sebelius* applies to ERPs, the limits of constitutional coercion are clarified, and Congress can act within those bounds.

B. Millions of Americans Have Been Affected by Unconstitutionally Coerced ERPs

The second major implication of the unconstitutionality of ERPs is the impact of the program on millions of Americans. While many Americans, like the Rhodes family,[314] risk losing their homes to estate recovery, many more chose to forgo Medicaid because of their fears of estate recovery.[315] In essence, every American has been impacted by the program, whether through the loss of the family home or because the cost of caring for a patient was passed onto them by taxes or higher insurance premiums.

This expansive impact presents important questions about what is owed to those who lost their family home because of this program. While repayment may seem ideal, it would become a legal and financial quagmire of valuing estates, determining the limits of state sovereign immunity, and defining governmental liability.[316] Furthermore, any remuneration may not be feasible politically due to the high costs associated with such a program.

Regardless, concluding ERPs were induced via unconstitutional means will significantly affect Americans' future choices. If states walk away from ERPs, which would likely be a popular choice politically, more people may enroll in Medicaid. Unburdened by the threat of recovery, people could seek earlier treatment for illnesses, improving health outcomes. Additionally, more families

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[313] Ryan, *supra* note 202, at 1061.

[314] Corbett, *supra* note 6.

[315] *Id.*

[316] These questions, including those around sovereign immunity and the intersection of ERPs and the takings doctrine, would be excellent topics for future research.

can pass their homes to future generations because the state will not seize it. This could have significant implications for intergenerational wealth and ameliorate the racial wealth gap.

Thus, while millions of Americans have been negatively affected by ERPs, the end of ERPs could usher in an era of improved access to healthcare, increased wealth, and a more equitable Medicaid program.

IV. SOLVING THE ESTATE RECOVERY PROGRAM PROBLEM: A PATH FORWARD VIA RENEWED STATE CHALLENGES OR EXECUTIVE ACTION

While Congress unconstitutionally coerced states to develop ERPs, every state now has an operative estate recovery mechanism. To rectify the unconstitutional nature of the current ERP requirement, there are two options: (1) states end their ERP, challenging the federal government to enforce it; or (2) HHS declares the requirement unconstitutional. Either solution will rectify the current unconstitutional regime. This Part discusses each solution. First, section A considers unilateral state cessation of ERPs, presenting potential pathways for state-federal bargaining and the outcome of litigation if HHS challenges a state's decision. Next, in section B, a radical solution is proposed: HHS declares the ERP requirement is unconstitutional. This approach presents fundamental questions about the role of agencies in constitutional power sharing but relies on executive power to refuse to enforce unconstitutional laws. Ultimately, although both solutions could reach the same outcome, the impact and possible success of each remedy will vary widely.

A. Renewed State Challenges to OBRA '93's Estate Recovery Requirement

Based on the rationale of this Comment, states should simply end their ERPs, then wait for HHS to attempt to enforce the requirement. Relying on the premise that the ERP requirement was unconstitutionally coercive, states can resist HHS's demands to re-establish their program. This puts HHS in the difficult position of either pulling all Medicaid funding,[317] or not enforcing the requirement. In either scenario, the state will be able to avoid reinstating their ERP.

If HHS decides to stop all Medicaid grants to the state, the state can use the arguments presented in this Comment and by West Virginia in its earlier

[317] This is something HHS will be unlikely to do because of the importance of Medicaid to states' budgets.

challenges. West Virginia presented a blueprint for constitutional challenges to ERPs.[318] While those challenges failed in the past, *Sebelius* provides new life to those claims. As the analysis above demonstrates, ERPs are unconstitutionally coercive under *Sebelius*.[319]

One key difference between West Virginia's challenges and this hypothetical is HHS never ceased Medicaid funding, something the Fourth Circuit concluded was inconsistent with coercion.[320] According to the court, the possibility that a fraction of funding would be impacted lessened the coercion of the requirement, making the ERP requirement constitutional.[321] However, in this scenario, HHS will be forced to take drastic action, basing the funding cut on a lack of compliance with program requirements.[322] Thus, one of the initial arguments against coercion is squashed.

While this may seem like it places states in a risky position, states will have a very strong bargaining position. When HHS ceases funding, the state can sue under the theory of unconstitutional coercion presented in this Comment. As in *Sebelius*, the state could argue the threat of losing all federal funding is identical to the "gun to the head" identified by the Court in *Sebelius*.[323] The sameness of the program (Medicaid) and the damage (loss of all funding) will make this argument especially persuasive.[324] Therefore, HHS, by enforcing the program requirement, will instantly push ERPs into the unconstitutional realm contemplated in *Sebelius*. Thus, the challenging state will have a strong argument, based on established precedent, that the federal government is impermissibly coercing states into having ERPs. To avoid harm to the state program, the state could seek an injunction while the litigation is pending to ensure the funding stream remains in place.

Alternatively, HHS could choose not to enforce the requirement, allowing states to be out of compliance without penalty. In this scenario, the constitutionality of the requirement will remain a question because HHS has not

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[318] *See* West Virginia v. Thompson, 475 F.3d 204, 209 (4th Cir. 2007).

[319] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012).

[320] *Thompson*, 475 F.3d at 208 n.1.

[321] *Id.*

[322] Alternatively, HHS could choose to do nothing, which would mean that the state could end its ERP without penalty or litigation. While it is possible that HHS chooses a lesser penalty, for the sake of brevity, this Comment does not address such possibility.

[323] *Sebelius*, 567 U.S. at 581.

[324] Notably, this challenge could fail by the same reasoning the Fourth Circuit employed: the state has already enacted an ERP, making judicial remedy inappropriate.

acted in a coercive manner, simply allowing the state to cease its program. But the state will have ended its ERP without penalty or litigation. Of course, HHS may threaten the loss of Medicaid funds, as it did with Michigan,[325] but the state could remain steadfast—daring HHS to act. Thus, HHS is left with two unsavory options, while the state that wishes to dismantle its ERP can do so. Not to mention, any HHS action will bring renewed attention to the program, forcing the executive branch to defend an unsavory practice.

This litigation strategy, while carrying some risk, likely bears fruit by placing HHS in a position where it has no good option: either invite litigation, which HHS is likely to lose or allow a state to be out of compliance. If a state is successful in its challenge, states will likely be left with the choice of continuing or ending their ERP.[326] Additionally, such a showdown will likely bring renewed attention to ERPs, which could create public pressure to eliminate the programs.[327]

Notably, the passage of time may play a role in the success of this litigation strategy. While this Comment has assumed courts will treat a challenge like West Virginia's previous challenges, over thirty years has passed since OBRA '93 was enacted. Thus, while a strong case may have been possible in 2001, the current case may be weakened by the passage of time. Every state has accepted Medicaid funds in the past thirty years, which may limit any direct analogy to *Sebelius*.[328] Further, the Court may see this acceptance of money as acquiescence with the ERP program.

However, states may be able to rebut this passage of time argument. States could argue that the nature of the ERP was fundamentally impermissible. After all, the natural result of coercion is compliance. Thus, states could successfully argue that their continued acceptance of Medicaid monies represents the natural state of the union—states are forced to accept federal money to keep federal programs afloat, despite pressing concerns about conditions tied to the funds.

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[325] *See* True, *supra* note 99.

[326] Additionally, under Section 1115 of the Medicaid Act, the Secretary can provide temporary waivers to states to disregard program requirements to serve more people. 42 U.S.C. § 1315. It is possible that a state could apply for a 1115 waiver and avoid the ERP requirement because of the enrollment hesitancy associated with the program.

[327] There already are several news outlets that have covered the harm of ERPs, these outlets could further pressure states. *See* Leys, *supra* note 122; Corbett, *supra* note 6.

[328] The challenge in *Sebelius* was soon after the enaction of the ACA, a possibly fundamental difference.

B. *Executive Action to Remove the Estate Recovery Requirement from OBRA ’93*

Without litigation, HHS could effectively end the ERP requirement by advising states, via an opinion from the Secretary, that it is unconstitutional and will not be enforced. While this may create a showdown between Congress and HHS, it would effectively eliminate the ERP requirement. Removal of the requirement via agency action will reach the same conclusion as a state challenge: allowing states to continue to engage in estate recovery at its discretion.

However, Congress will argue OBRA ’93 created an explicit program requirement that the Executive cannot ignore. In response, HHS will be able to argue the role of the executive branch is to ensure that laws are constitutional, giving the agency latitude to not enforce unconstitutional laws. This will likely prompt extensive litigation and could have the unintended consequence of creating unstable disagreement about power sharing.[329]

However, the role of the President, and by extension the executive agencies, is reflected in the Constitution’s Take Care Clause[330] and the Presidential Oath of Office.[331] Both provisions require the President act within the bounds of American laws, chief among them the Constitution.

Furthermore, there is extensive precedent that demonstrates the President can decline to enact unconstitutional provisions.[332] For example, in *Meyers v. United States*, the Supreme Court held the President has extensive power to discharge the duty to see “the laws are faithfully executed.”[333] Relying on this precedent, the President and HHS could argue the ERP requirement is contrary to the Constitution, and, thus, it is within the President’s power to decline to enforce the requirement. By choosing not to enforce the ERP requirement, states will have the latitude to decide if they wish to continue the program or end it. In

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[329] Notably, the Office of Legal Counsel has opined that the executive must implement and defend a statute if there is a reasonable argument that the statute is constitutional. *See The Attorney’s Duty to Defend the Constitutionality of Statutes*, 5 Op. O.L.C. 25 (1981). This executive norm suggests this strategy may be inappropriate.

[330] The Take Care Clause requires the President “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3.

[331] The Oath of Office requires the President to “preserve, protect and defend the Constitution of the United States.” U.S. CONST. art. II, § 1.

[332] *See* INS v. Chadha, 462 U.S. 919, 946–48 (1983); Myers v. United States, 272 U.S. 52, 135 (1926).

[333] *Myers*, 272 U.S. at 133.

either scenario, the constitutional question will be resolved with no coercion forcing continued compliance.

Alternatively, rather than challenging HHS, Congress could act to end ERPs.[334] The applicable statute currently reads: "[n]o adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made," and the statute then outlines the permissible estate recovery plans.[335] This section could be amended to merely read, "no lien may be imposed nor property seized on account of medical assistance paid under a state Medicaid plan." This echoes existing statutory language in the section, while clearly stating estate recovery is not permissible. This would effectively prohibit states from enacting an ERP.

Thus, there are multiple ways to correct the current unconstitutionality of ERPs: via state action refusing to continue the requirement or executive declaration that the requirement is unconstitutional. Using either method, the impermissible coerciveness of the current regime can be limited, allowing states to freely decide if they want to continue an ERP and giving the American public clarity about who is enacting estate recovery. The reach of estate recovery, across every state and millions of Americans, is so broad that urgent action could help families avoid the surprise experienced by the Rhodes family.[336]

CONCLUSION

The Supreme Court's holding in *Sebelius* fomented confusion about the appropriate uses of congressional power that avoids unconstitutional coercion. In applying the *Sebelius* test to Medicaid estate recovery programs, it is clear that the congressional requirement that states enact ERPs meets the *Sebelius* coercion standard. This provides an important marker, demonstrating the *Sebelius* rationale can apply to cases beyond the Affordable Care Act's expansion of Medicaid. Furthermore, it suggests unconstitutional coercion has shaped state adoption of ERPs.

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[334] In 2024, Rep. Jan Schakowsky introduced the "Stop Unfair Medicaid Recoveries Act of 2024" along with thirteen cosponsors; if passed, the bill would repeal the estate recovery requirement. Span, *supra* note 135; Press Release, Jan Schakowsky, Member of the House of Representatives, Schakowsky Introduces Legislation to Protect Families of Medicaid Recipients (Mar. 6, 2024), https://schakowsky.house.gov/media/press-releases/schakowsky-introduces-legislation-protect-families-medicaid-recipients.

[335] 42 U.S.C. § 1396p(b)(1).

[336] *See* Corbett, *supra* note 6.

ERPs are harmful to Americans economically, causing families to lose their biggest asset, retrenching inequality. Furthermore, they are remarkably inefficient, returning very little money to state coffers. To remedy this, states should call HHS's bluff: decline to continue their ERP programs, forcing HHS to confirm the unconstitutional coercion of the program or allow states to move away from the program. Alternatively, HHS can issue an opinion stating ERPs are unconstitutional, possibly prompting congressional action or confirming the coercion via litigation.

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