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Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending After *NFIB v. Seblius*

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IS THE CLEAN AIR ACT UNCONSTITUTIONAL?
COERCION, COOPERATIVE FEDERALISM AND CONDITIONAL SPENDING AFTER *NFIB v. SEBELIUS*

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Forthcoming in ECOLOGY LAW QUARTERLY

ABSTRACT

The Clean Air Act (CAA) is a persistent source of federal-state conflict. Like many federal environmental laws, the CAA relies upon the cooperation of state environmental agencies for its execution and enforcement. To induce such cooperation, the CAA authorizes, even requires, the imposition of sanctions on noncooperating states, including the loss of federal highway funds. *NFIB v. Sebelius*, however, casts doubt on the constitutionality of the CAA’s sanction regime. Specifically, *NFIB* enforced limits on the use of conditional spending to induce state cooperation with a federal program and held that Congress may not use conditional spending to “coerce” state cooperation. Combined with *South Dakota v. Dole*, *NFIB* provides objecting states with a powerful set of arguments that the CAA highway fund sanctions are unconstitutional, and suggests potential challenges to other CAA sanction provisions as well.

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INTRODUCTION

The Clean Air Act (CAA) is the nation’s most-far-reaching federal environmental law. It is a model of “cooperative federalism”¹ and a source of persistent federal-state conflict.² Like many federal environmental laws, the CAA relies upon the cooperation of state environmental agencies for its execution and enforcement. It operates on the expectation that state officials will develop implementation plans, issue permits, and enforce emission limitations. If states do not cooperate, the CAA obligates the federal government to regulate in their stead. Perhaps more significantly, the CAA also authorizes (and in some cases, requires) the imposition of “sanctions” on non-cooperating states, including the imposition of more stringent regulatory requirements and the loss of federal highway funds for states that do not adopt adequate plans for meeting federal air quality standards.

¹ See *New York v. United States*, 505 U.S. 144, 167 (1992) (describing “cooperative federalism” as arrangement where states may regulate according to federal standards as alternative to direct federal regulation).

² See, e.g., *Texas v. U.S. E.P.A.*, 2016 WL 3878180 (5th Cir. July 15, 2016) (challenging EPA disapproval of regional haze plans); *Michigan v. EPA*, 135 S.Ct. 2699 (2015) (challenge to regulation of mercury emissions from coal-fired power plants); *Utah v. U.S. Environmental Protection Agency*, 765 F.3d 1257 (10th Cir.2014) (challenge to EPA’s partial rejection of state implementation plan); *N. Dakota v. U.S. E.P.A.*, 730 F.3d 750 (8th Cir. 2013) (same); *Mississippi v. E.P.A.*, 744 F.3d 1334 (D.C.Cir.2013) (challenge to NAAQS revisions); *Oklahoma v. U.S. E.P.A.*, 723 F.3d 1201 (10th Cir. 2013) (challenging EPA rejection of Oklahoma emission control plan); *Texas v. U.S. E.P.A.*, 726 F.3d 180 (D.C.Cir.2013) (challenging EPA rules on greenhouse gas emission permits); *Texas v. U.S. E.P.A.*, 690 F.3d 670 (5th Cir.2012) (Challenge to EPA rejection of state implementation plan); *N. Carolina v. U.S. E.P.A.*, 531 F.3d 896 (D.C.Cir.2008), on reh’g in part, 550 F.3d 1176 (D.C.Cir.2008) (challenge to Clean Air Interstate Rule); *New Jersey v. U.S. E.P.A.*, 517 F.3d 574 (D.C.Cir.2008) (challenge to hazardous air pollutant regulations); *New York v. U.S. E.P.A.*, 443 F.3d 880 (D.C.Cir.2006) (challenge to EPA New Source Review regulations); *New York v. U.S. E.P.A.*, 413 F.3d 3 (D.C.Cir.2005) (challenge to EPA implementation of New Source Review program); *West Virginia v. EPA*, 362 F.3d 861 (D.C. Cir. 2004) (challenge to regulations governing nitrogen oxide emissions); *Michigan v. U.S. E.P.A.*, 268 F.3d 1075 (D.C.Cir.2001) (challenge to EPA rules on Clean Air Act permits on Indian lands); see also John Dwyer, *The Practice of Federalism under the Clean Air Act*, 54 MD. L. REV. 1183 (1995).

Since the CAA’s enactment, states have chafed against the CAA.³ In the 1970s, states successfully opposed efforts to force their compliance with the CAA. Subsequent efforts to obtain relief from the CAA’s inducements have been unavailing—but that could change. Under *National Federation of Independent Business v. Sebelius* (“*NFIB*” hereinafter)⁴ states have a new set of arguments against the CAA regime, including an argument that the most severe sanctions for non-compliance are unconstitutional. As federal air quality standards become more stringent and more difficult for states to meet, states are more likely to challenge the constitutionality of the sanctions for noncompliance.

In *NFIB* the Court reaffirmed that Congress may not force states to implement federal programs. Specifically, the Court concluded that Congress had sought to “coerce” states into accepting a dramatic expansion of the federal Medicaid program by threatening to withhold funding for the pre-existing Medicaid program.⁵ This use of conditional spending, seven justices concluded, crossed the line from permissible inducement to unconstitutional coercion.⁶ In the process, the Court reaffirmed that the Constitution creates a federal government of limited and

³ See, e.g., Thomas O. McGarity, *Regulating Commuters To Clear the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 PAC. L.J. 1521 (1996) (discussing local resistance to CAA implementation); Jackson B. Battle, *Transportation Controls Under the Clean Air Act—An Experience in (Un)cooperative Federalism*, 2 LAND & WATER REV. 1 (1980) (describing conflict over CAA implementation). See also *infra* note 2 and sources cited therein.

⁴ Nat’l Fed’n Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012).

⁵ *NFIB*, 132 S.Ct. at 2630 (opinion of Roberts, C.J.); *id* at 2666 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

⁶ The seven justices were Chief Justice Roberts, joined by Justices Breyer and Kagan on this point, and the four dissenting justices, Scalia, Kennedy, Thomas, and Alito.

enumerated powers,⁷ and that the federal government’s so-called spending power is subject to judicially enforceable limits.⁸

The Supreme Court had previously articulated limits on the use of conditional spending in *South Dakota v. Dole*.⁹ This decision purported to set outer limits on the extent of Congress’ spending power, but these limits had never been enforced.¹⁰ *Dole* itself had found that Congress acted within the scope of its spending power, and, until *NFIB*, the Court had never found a congressional spending condition unconstitutional.¹¹ As one might expect, lower courts were anything-but-eager to get ahead of the Court on this front.¹² With little guidance on how to apply

⁷ *NFIB*, 132, S.Ct. at 2577 (“The Federal Government is acknowledged by all to be one of enumerated powers. . . . The enumeration of powers is also a limitation of powers, because the enumeration presupposes something not enumerated. . . . the Federal Government can exercise only the powers granted to it.” (internal quotations omitted). On *NFIB*’s embrace and embodiment of this principle, see Jonathan H. Adler, *The Conflict of Visions in NFIB v. Sebelius*, 62 DRAKE L. REV. 937 (2014).

⁸ A majority of the Court also concluded that Congress could not enact a minimum coverage provision requiring all individuals present in the country to obtain health insurance, aka the “individual mandate,” under the Commerce Clause or Necessary and Proper Clause. This provision was upheld as a permissible exercise of the taxing power. See *NFIB*, 132 S.Ct. at 2630 (Commerce Clause), at 2593 (Necessary and Proper Clause), at 2600 (taxing power).

⁹ *South Dakota v. Dole*, 483 U.S. 203 (1987).

¹⁰ With one exception, lower courts to apply the *Dole* test routinely upheld conditional spending statutes against constitutional challenge. See, e.g. *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006) (rejecting conditional spending challenge to Religious Land-Use and Institutionalized Persons Act), *Cutter v. Wilkinson*, 423 F.3d 579 (6th Cir. 2005) (same), *Barbour v. Washington Metropolitan Area Transit Auth.*, 374 F.3d 1161 (D.C.Cir. 2004) (rejecting conditional spending challenge to Civil Rights Remedies Equalization Act), *Kansas v. United States*, 214 F.3d 1196 (10th Cir.2000) (rejecting conditional spending challenge to Personal Responsibility and Work Opportunity Reconciliation Act), *Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989) (rejecting conditional spending challenge to speed limit requirement). The one exception was *Virginia Department of Education v. Riley*, 1056 F.3d 559 (4th Cir. 1997) (en banc) (successful conditional spending challenge to Department of Education’s implementation of Individuals with Disabilities in Education Act).

¹¹ See Bradley W. Joondeph, *The Health Care Cases and the New Meaning of Commandeering*, 91 N.C. L. REV. 811, 832 (2013) (noting *NFIB* “was the first in United States history to invalidate a federal spending provision on the ground that it coerced the states”).

¹² In the five years after the Supreme Court’s decision in *United States v. Lopez*, invalidating the Gun-Free School Zones Act for exceeding the scope of the Commerce Clause, only one federal appellate court declared a federal law unconstitutional on equivalent grounds. After the Supreme Court found another law to have exceeded the scope of the Commerce Power in *United States v. Morrison*, however, lower courts began to apply greater scrutiny in commerce cases. See Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751 (2005).

Dole's test, there was little reason for lower courts—or Congress—to take the *Dole* limits seriously.¹³

In *NFIB* the Court fleshed out what it means for a conditional spending statute to be unconstitutionally coercive and affirmed that the doctrinal limits articulated in *Dole* should be enforced.¹⁴ This will likely spur additional litigation and should signal to lower courts that they should apply greater scrutiny to congressional reliance on conditional spending to achieve federal policy preferences.¹⁵ The CAA is an obvious target for such litigation.¹⁶ It is a continuing source of regulatory obligations and is appears to be one of the statutes most vulnerable to attack for exceeding *Dole* and *NFIB*, particularly insofar as the CAA conditions the receipt of federal highway funds on state willingness to implement various CAA requirements.¹⁷ Although several post-*NFIB* analyses concluded that *NFIB* does not threaten the constitutionality of the highway fund sanction,¹⁸ this Article reaches the opposite conclusion. The CAA's

¹³ One of the authors nonetheless argued that the Clean Air Act's highway fund sanctions were constitutionally suspect under the *Dole* test. See Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 447-52 (2005).

¹⁴ See Joondeph, *supra* note __, at 815 (noting the Court "reconceptualized what constitutes a federal *command* to the states").

¹⁵ See *id.* at 815-16 (noting that the *NFIB* holding "potentially jeopardizes a range of federal spending programs" and could even extend beyond conditional spending); see also Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1284 (2013) (noting conditional spending holding "is apt to have the most far-reaching consequences beyond health care.").

¹⁶ See Ann Carlson, *Another (Mostly) Uninformed Post About the Health Care Cases and Environmental Law*, Legal Planet (June 28, 2012), <http://legal-planet.org/2012/06/28/another-mostly-uninformed-post-about-the-health-care-cases-and-environmental-law>.

¹⁷ See, e.g., Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause after NFIB*, 101 GEO. L.J. 861, 916-20 (2013) (suggesting highway funds under the Clean Air Act could be vulnerable under *NFIB*).

¹⁸ See, e.g., Sarah Buckley, *Clean Air Post-Health Care: The Federalism Limits of the Spending Power and the Future of Environmental Regulation*, 101 VA. L. REV. 807 (2015); Erin Ryan, *The Spending Power and Environmental Law after Sebelius*, 85 U. COLO. L. REV. 1003 (2014); Georgina Jones Suzuki, Note, *Clearing the Air Following National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 2131 (2013); David Baake, *Federalism in the Air: Is the Clean Air Act's "My Way or No Highway" Provision Constitutional after NFIB v. Sebelius?*, 37 HARV. ENVTL L. REV. ONLINE 1 (2012); Jonathan Zasloff, *Conditional Spending and the Clean Air Act*, Legal Planet (June 28, 2012), <http://legal-planet.org/2012/06/28/conditional-spending-and-the-clean-air-act>.

highway fund sanctions are the most vulnerable, but anti-coercion challenges may be raised against other parts of the statute as well.¹⁹

Part I provides a brief survey of the Supreme Court’s anti-coercion jurisprudence, including the prohibition on commandeering and pre-*NFIB* limits on conditional spending. Part II briefly summarizes the framework of “cooperative federalism” as it has been applied in federal environmental statutes, including the Clean Air Act. Part III details the Supreme Court’s spending power holding in *NFIB* and explains how this decision augments and reinforces the *Dole* limits on conditional spending. Part IV discusses the potential implications of applying *NFIB* and the *Dole* principles to the CAA’s highway fund sanctions. Part V then briefly discusses whether *NFIB* creates the opportunity to label other parts of the CAA coercive.

I. COERCION, COOPERATIVE FEDERALISM, & CONDITIONAL SPENDING

The federal government has extensive power to enact environmental and other regulatory measures.²⁰ The federal government also has a range of measures to induce state cooperation with federal regulatory initiatives. Such power is not unlimited, however. While the federal government may seek state cooperation, it may not coerce state participation in federal programs or initiatives.

Under existing doctrine, the federal government is precluded from “commandeering” state governments to implement federal regulatory programs. The federal government may

¹⁹ See *infra* Part V.

²⁰ For a general discussion of the federal government’s authority to regulate in the environmental context and a survey of federalism imitations on such authority, see Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377 (2005).

regulate private firms directly, it may preempt states from regulating in ways that are contrary to federal policy, and it may even authorize state regulations that, in the absence of federal legislation, might run afoul of the Dormant Commerce Clause. The federal government may not, however, require states to regulate on its behalf.²¹ As the Supreme Court explained in *New York v. United States*:

The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States²²

As reaffirmed by chief Justice Roberts in *NFIB*, Congress may not “conscript state agencies into the national bureaucratic army.”²³

Whether to ensure sufficient disposal capacity for low-level radioactive waste²⁴ or remedy lead contamination in drinking water,²⁵ the federal government cannot require state governments to adopt desired policy measures. State governments remain “sovereign” under the doctrine of “dual sovereignty,” and therefore cannot be commandeered by the federal

²¹ See generally *Printz v. United States*, 521 U.S. 898 (1997) (holding unconstitutional a federal law requiring state officers to perform background checks on handgun purchasers); *New York v. United States*, 505 U.S. 144 (1992) (holding unconstitutional a federal law requiring states to accept ownership of waste or regulate according to instructions of Congress).

²² *New York*, 505 U.S. at 188.

²³ *NFIB*, 132 S.Ct. at 2606-07 (quoting *FERC v. Mississippi*, 456 U.S. 742, 775 (1982)(O’Connor, J., concurring in judgment in part and dissenting in part).

²⁴ See *New York*, 505 U.S. at 188 (holding that portions of the Low-Level Radioactive Waste Policy Act Amendments unconstitutionally commandeer state governments).

²⁵ *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996) (invalidating portions of the Lead Contamination Control Act).

government.²⁶ Articulated by the Supreme Court in clear and unequivocal terms, this anti-commandeering principle admits no exceptions.²⁷

The inability to commandeer state governments to enact a federally desired program or regulatory scheme does not leave the federal government powerless to induce state action or cooperation. To the contrary, the federal government retains ample authority to encourage state action through the provision of positive and negative incentives for state action. Both carrots and sticks are permissible. As the Court further explained in *New York*:

[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation . . . This arrangement . . . has been termed “a program of cooperative federalism.”²⁸

²⁶ See *NFIB*, 132 S.Ct. at 2578 (noting “State sovereignty is not just an end in itself” and that dual sovereignty helps ensure “that powers which ‘in the ordinary course of affairs, concern the lives liberties, and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy.” (quoting *The Federalist* No. 45 (J. Madison))).

²⁷ See *Printz*, 521 U.S. at 935 (“[N]o case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”). There is language in *Printz* that suggests purely ministerial requirements might be exempt from the anti-commandeering rule, but the federal courts have not, as yet, found an attempted commandeering that was sufficiently immaterial to warrant an exception. See *Printz*, 521 U.S. at 936 (O’Connor, J., concurring) (noting the Court “appropriately refrains from deciding whether other purely ministerial reporting requirements” represent unconstitutional commandeering of state governments). This may be due, in part, to the fact that relatively few statutes commandeer state governments. Conditional spending programs, on the other hand, are quite common.

²⁸ *New York*, 505 U.S. at 167 (citations omitted); see also *NFIB*, 132 S.Ct. at 2579 (noting Congress’s power to tax and spend “gives the Federal Government considerable influence even in areas where it cannot directly regulate”). The Court had made this point before, as in *FERC v Mississippi*, where the Court explained “where Congress has the authority to regulate private activity,” Congress may “offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation.” 456 U.S. 742, 764-65 (1982); see also *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981).

In effect, the federal government can say to the states “Regulate X, or we’ll do it for you.”

The threat of conditional federal regulation may provide a sufficient incentive for states to act. Among other things, state policymakers may conclude that state-level regulation will be more sensitive to local conditions and preferences. Where the threat of conditional federal regulation by itself is not sufficient inducement, Congress may combine incentives, simultaneously offering to fund compliant state programs and threatening to preempt noncompliant programs, as was done in the CAA. Particularly when used in combination, these incentives “may well induce the States to adopt policies that the Federal Government itself could not impose.”²⁹

The prospect of federal regulation, in itself, may be insufficient to induce states to adopt their own regulations. State regulation may be more attuned to local needs and priorities, but it can be costly as well. As a consequence, some states may prefer not to cooperate in the imposition of regulatory burdens on local constituencies, even if only to avoid being held responsible for the costs of such regulations. States may also believe that leaving implementation and enforcement in federal hands may impede the imposition of regulatory requirements.

Where states are reluctant to implement federal regulatory requirements, the most straightforward way to encourage states to implement the desired regulatory programs is to pay them.³⁰ As interpreted by the Supreme Court, “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found

²⁹ *NFIB*, 132 S.Ct. at 2579.

³⁰ As Rick Hills notes, “[t]he federal government can purchase the services of state and local governments whenever it is cost-effective to do so; it has no more need to conscript such services than it has to conscript the services of secretaries, FBI agents, janitors, or Supreme Court justices.” See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Federalism” Doesn’t*, 96 MICH. L. REV. 813, 819 (1998).

in the Constitution.”³¹ Thus Congress may offer states financial support to enact policies that Congress could not enact itself. Such financial inducement is often enough to spur state policymakers into action. Such funding can serve to multiply state investments in a given field, as well as to provide political benefits to state policymakers.³² The imposition of conditions on the receipt of such funding can also ensure that state policies are implemented in a way that is consistent with federal objectives.³³

The power to offer conditional federal funding is quite expansive, but it is also subject to limits. In *United States v. Butler*, the Supreme Court embraced a capacious understanding of the “general welfare” Congress may pursue through the expenditure of federal money, but it also constrained Congress’s ability to use financial inducements “to regulate or control” matters

³¹ *United States v. Butler*, 297 U.S. 1, 66 (1936). *See also Helvering v. Davis*, 301 U.S. 619, 640-41 (1937) (affirming Congress’s power to determine when spending serves the “general welfare”).

Although this question is settled as a matter of constitutional doctrine, prior to *Butler* there was extensive debate as to whether the Constitution afforded Congress the power to spend monies for purposes other than those expressly identified in the Constitution. Alexander Hamilton, for one, argued that the federal power to raise and spend money was “plenary and indefinite.” *See* ALEXANDER HAMILTON, REPORT ON MANUFACTURES (1791), reprinted in 2 THE FOUNDERS’ CONSTITUTION 446-447 (Philip B. Kurland & Ralph Lerner eds., 1987). James Madison, on the other hand, feared that such a broad construction of the spending power would produce a “general power of legislation, instead of the defined and limited one” otherwise provided for in the Constitution. *See* 30 ANNALS OF CONG. 212 (1817). *See also* John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001) (defending a narrower construction of the spending power); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003) (same); *but see* David E. Engdahl, *The Spending Power*, 44 DUKE L. J. 1, 5 (1994) (“No one today candidly denies that Hamilton’s view of the spending power was correct.”).

³² *See* Ilya Somin, *Closing Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 484 (2002) (“While state governments have strong political incentives to resist ordinary federal legislation that inhibits their authority, they have incentives to accept and even lobby for conditional federal grants.”).

³³ *See* *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (noting permissibility of imposing conditions on the receipt of federal funds to achieve “broad policy objectives”); *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (Congress may “further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.”).

“beyond the powers delegated to the federal government,”³⁴ a category of matters far more limited in 1936 than it is today.³⁵

Since *Butler*, the Court has loosened its restraints on the scope of federal power, but also reaffirmed that the power to impose conditions on the receipt of federal funds is limited so as to ensure that such power is not used to circumvent other structural limits on federal power.³⁶ Most notably, in *South Dakota v. Dole*,³⁷ the Supreme Court identified a set of restraints upon Congress’s use of conditional federal spending.

The *Dole* test consists of four requirements. First, the appropriation of funds must be for the “general welfare” and not for a narrow special interest.³⁸ In making this determination, however, courts are “to defer substantially to the judgment of Congress.”³⁹ Second, there can be no independent constitutional bar to the condition imposed upon the federal spending.⁴⁰ In other words, Congress may not seek to use the spending power to induce states to engage in conduct that would otherwise be unconstitutional. These first two requirements are easy to meet and are rarely an issue in conditional spending cases.

³⁴ *Butler*, 297 U.S. at 68.

³⁵ See *United States v. Dole*, 483 U.S. 203, 216 (1987) (O’Connor, J., dissenting) (“The error in *Butler* was not the Court’s conclusion that the Act was essentially regulatory, but rather its crabbed view of the extent of Congress’s regulatory power under the Commerce Clause.”).

³⁶ On the threat an unrestrained spending power poses to other, federalism-based limits on federal power, see Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 502-04 (2003); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 195 (2001); Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause after Morrison*, 25 OKLA. CITY U.L. REV. 843, 857 (2000).

³⁷ *United States v. Dole*, 483 U.S. 203 (1987).

³⁸ *Id.* at 207.

³⁹ *Id.*

⁴⁰ *Id.*

The third requirements is that any conditions imposed upon the receipt of federal funds must be clear and unambiguous.⁴¹ Recipients of federal funds must have notice of any conditions with which they must comply, and the scope of their obligation.⁴² As the Court noted in *Pennhurst State School and Hospital v. Halderman*, “the legitimacy of Congress’s power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”⁴³

Fourth, and perhaps most significantly, the conditions imposed must be related to the federal interest that the exercise of the spending power is itself supposed to advance. As the Court explained in *Dole*, “the condition imposed by Congress is directly related to one of the main purposes for which . . . funds are expended.”⁴⁴ As the Court further explained in *New York*, the “conditions must . . . bear some relationship to the purpose of the federal spending, otherwise, of course the spending power could render academic the Constitution’s other grants and limits of federal authority.”⁴⁵

In addition to this four-part test, *Dole* also declared that Congress may not use its power to impose conditions on the receipt of federal funding to “coerce” the states. Specifically, the Court noted that “in some circumstances the financial inducement offered by Congress might be

⁴¹ *Id.*

⁴² See Engdahl, *supra* note __, at 78 (noting “sufficient clarity is required not only as to the fact that an obligation is being assumed, but also as to the scope or scale of that obligation”).

⁴³ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The interpretive rule urged in *Pennhurst* is arguably in tension with *Chevron* deference for agency interpretations of ambiguous statutory language. See David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism and the Administrative State*, 82 TEX. L. REV. 1197 (2004).

⁴⁴ *Dole*, 483 U.S. at 208.

⁴⁵ *New York*, 505 U.S. at 167 (citations omitted).

so coercive as to pass the point at which ‘pressure turns into compulsion.’”⁴⁶ This point has been reiterated in subsequent cases.⁴⁷

While not explaining what amount or degree of financial inducement would be necessary for an exercise of the spending power to become coercive, the *Dole* majority noted that here Congress only conditioned “a relatively small percentage of certain federal highway funds”⁴⁸—specifically five percent of the funds from specific highway grant programs. Such an imposition represents “relatively mild encouragement to the States,” thereby leaving states with the ultimate decision as to whether to conform to federal dictates, and is therefore not coercive.⁴⁹

Alternatively, the coercion inquiry could turn not on the amount of money at stake, but on whether the manner in which the conditions were imposed “interferes with a state’s sovereign accountability.”⁵⁰

As written, *Dole* does not make clear whether this prohibition is an independent requirement for the use of conditional spending—a fifth prong to *Dole*’s test—or a gloss on the doctrine. One possibility is that the degree of scrutiny with which courts should apply the four-part test is dependent, in part, on the amount of money at stake. Alternatively, as some scholars

⁴⁶ *Id.* at 211.

⁴⁷ *See, e.g.,* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 687 (1999) (noting that, in some instances, “the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion” (quotation omitted)). *See also* *New York*, 505 U.S. at 167 (noting limits of federal spending power).

⁴⁸ *Id.* at 211.

⁴⁹ *Id.*

⁵⁰ *See, e.g.,* Celestine R. McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163, 173 (2001) (“Coercion implicates a state’s ability to act as a representative of its people, not the state’s level of temptation in choosing among alternatives.”)

have suggested, conditional spending requirements that readily satisfy *Dole*'s four stated requirements may nonetheless be unconstitutionally coercive.⁵¹

Although the *Dole* Court clearly stated that Congress's power to impose conditions on the receipt of federal funds is limited, federal appellate courts have been extremely reluctant to strike down federal programs for exceeding the scope of the spending power.⁵² The "general welfare" prong is treated as a "complete throw away,"⁵³ and most of the other prongs have not fared much better.⁵⁴ The relatedness prong of the *Dole* test is perhaps that with the greatest potential for constraining the use of conditional spending. It is repeatedly referenced by the lower courts, but rarely examined in any detail.⁵⁵ The concept of "coercive" uses of federal spending has attracted some attention as well, but "the coercion theory is somewhat amorphous and cannot easily be reduced to a neat set of black-letter rules of application."⁵⁶

Most lower court challenges to conditional spending provisions under *Dole* have been unsuccessful. One notable exception is *Virginia Department of Education v. Riley*, in which the U.S. Court of Appeals for the Fourth Circuit, sitting *en banc*, concluded that the Department of Education could not condition state receipt of federal funds under the Individuals with

⁵¹ See, e.g., Mitchell N. Berman, *Coercion without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001).

⁵² See *Kansas v. United States*, 214 F.3d 1196, 1201–02 (10th Cir. 2000) ("The Court has never employed the [coercion] theory to invalidate a funding condition, and federal courts have been similarly reluctant to use it."); *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) ("The coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party.").

⁵³ See Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 464 (2003).

⁵⁴ *Id.* at 464 ("[T]he lower courts, quite predictably, have found little use for three of the five elements of the test."); *id.* at 466 (The other two elements have not fared much better, as most lower courts have read them "to be toothless, even nonjusticiable, en route to sustaining a wide range of conditional federal spending legislation").

⁵⁵ *Id.* at 466–67; *but see* *Barbour v. Wash. Metro. Area Trans. Auth.*, 374 F.3d 1161 (D.C. Cir. July 9, 2004) (discussing the relatedness prong).

⁵⁶ *West Virginia v. U.S. Dep't of Health and Human Services*, 289 F.3d 281, 288 (4th Cir. 2002).

Disabilities Education Act (IDEA) on compliance with terms not explicit in the statute itself.⁵⁷

According to the court’s majority, “Language which, at best, only implicitly conditions the receipt of federal funding on the fulfillment of certain conditions is insufficient to impose on the state the condition sought.”⁵⁸ Six of the thirteen judges in *Riley* went further, suggesting the withholding of \$60 million in IDEA funds on such a basis would also be unconstitutionally “coercive” even if it had been explicitly authorized by Congress.⁵⁹ Whereas in *Dole* states only risked losing a small portion of federal funding for failing to adopt a higher drinking age, in *Riley* the Department sought to withhold “the entirety of a substantial federal grant” because Virginia refused “to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign states.”⁶⁰

At least until this point, *Riley* has been the exception. Prior to *NFIB*, the *Dole* limitations had yet to be meaningfully enforced. *Dole* itself had found that Congress acted within the scope of its spending power, and, until *NFIB*, the Court had never found a congressional spending condition unconstitutional. With little guidance on how to apply *Dole*’s test, there was little reason for lower courts—or Congress—to take the *Dole* limits seriously.

II. COERCION, COOPERATION, & THE CLEAN AIR ACT

Most major federal environmental statutes adopt a “cooperative federalism” model of one sort or another. Each major environmental statute incorporates some combination of incentives

⁵⁷ 106 F.3d 559 (4th Cir. 1997) (en banc).

⁵⁸ *Riley*, 106 F.3d at 561 (per curiam).

⁵⁹ *Id.* at 561 (per curiam).

⁶⁰ *Id.* at 570 (opinion of Luttig, J.).

in order to encourage state cooperation.⁶¹ Under most of these statutes, the federal government outlines the contours of a given regulatory program, typically through statutory mandates elaborated upon by regulatory measures. States are then encouraged to implement the program in lieu of the federal government, in accordance with federal guidelines. Provided these standards are met, states are free to tailor the details of their individual programs to accommodate local conditions and concerns. In most cases the federal standards operate as a floor – albeit a highly prescriptive one – and states remain free to adopt more stringent measures.⁶² State programs that meet federal standards are typically eligible for federal financial assistance.⁶³ States that fail to adopt adequate programs are not only denied the relevant federal funding, they can also be subject to various sanctions and federal preemption of their programs.⁶⁴ That is, if states refuse to regulate in accordance with federal guidelines, the federal government may regulate in their place. While characterized as a “cooperative” structure, the federal-state relationship in environmental policy is often adversarial and a source of substantial friction.⁶⁵

⁶¹ For a breakdown of which major statutes use which incentives to encourage state cooperation, see Ryan, *supra* note __ at 1039.

⁶² Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1534 (1995) (“The essence of cooperative federalism is that states take primary responsibility for implementing federal standards, while retaining the freedom to apply their own, more stringent standards.”). A notable exception is the case of product standards. As a general matter, federal product standards, such as vehicle emission standards, tend to preempt more stringent state standards. *See, e.g.*, 42 U.S.C. § 7543(a) (2000) (preemption of state automobile emission standards); 42 U.S.C. § 7545(c)(4)(A) (2000) (preemption of state fuel standards).

⁶³ *See, e.g.*, 33 U.S.C. § 1256 (2000) (authorizing financial support for state water pollution control programs that adopt desired pollution control policies) *See also* Robert V. Percival, *Symposium - Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1173 (1995) (noting the use of federal funding to encourage land-use planning and solid waste management).

⁶⁴ *See, e.g.*, 42 U.S.C. § 7509 (2000) (detailing sanctions for failure to attain National Ambient Air Quality Standards under Clean Air Act); *see also* Percival, *supra* note __, at 1174 (noting under most environmental laws, the federal government will adopt and enforce a federal regulatory program in the absence of a sufficient state program).

⁶⁵ *See* R. V. Percival, *supra* note __, at 1144 (“federal environmental standards have been a chronic source of friction for federal-state relations”). According to one study, state officials “resent what they believe to be an overly prescriptive federal orientation toward state programs, especially in light of stable or decreasing grant awards.” *See* SCHEBERLE, *supra* note __, at 186. As noted earlier, this friction often leads to litigation. *See infra* note __ and cases cited therein. *See also* Nebraska v. EPA, 331 F.3d 995 (D.C. Cir. 2003) (challenging federal drinking water standards for arsenic); State of N.M. v. E.P.A., 114 F.3d 290 (D.C. Cir. 1997) (challenging the federal government’s

Among all federal environmental statutes, the Clean Air Act (“CAA”) is the source of the greatest state-federal conflict, and it has been since its enactment.⁶⁶ The CAA relies upon conditional preemption in addition to conditional spending in order to encourage state compliance. It also represents Congress’s most aggressive effort to induce state regulation through the use of conditional spending, and is therefore the most vulnerable to spending power challenge. Whereas many federal environmental statutes attach conditions on the use of federal funding of state environmental programs, the CAA relies upon the threat of withholding funding allocated for other purposes, specifically federal highway funds, to ensure state cooperation.

Under the CAA, the Environmental Protection Agency (EPA) sets National Ambient Air Quality Standards (NAAQS) for criteria air pollutants, such as ozone (“smog”) and particulate matter (“soot”).⁶⁷ These standards must be set at a level “the attainment and maintenance of which in the judgment of the Administrator . . . are requisite to protect the public health” allowing for “an adequate margin of safety.”⁶⁸ The EPA is authorized to propose NAAQS for additional pollutants and is required to review the existing NAAQS every five years.⁶⁹ With one

criteria for certification of compliance with disposal regulations disposal facility for radioactive waste from national defense activities); *State of Ohio v. U.S. E.P.A.*, 997 F.2d 1520 (D.C.Cir.1993) (challenging the federal government’s cost-benefit analysis, cancer risk range, federal/state cost-sharing requirements, and basis for departing from past policy, all promulgated under CERCLA); *Washington State Dept. of Transp. v. U.S.E.P.A.*, 917 F.2d 1309 (D.C.Cir.1990) (challenging decision by the EPA to include property owned by the agency on list of contaminated environmental areas subject to federal cleanup under the Superfund program); *People of State of Cal. v. U.S. E. P. A.*, 689 F.2d 217 (D.C.Cir.1982) (challenging EPA’s deferral of funding for two advance waste treatment projects pursuant to EPA policy memorandum, seeking declaratory judgment that memorandum was invalid, injunction against its use, and order requiring EPA to apply certain other procedures to its review of advanced waste treatment projects in lieu of those created by memorandum)

⁶⁶ See *infra* note ____.

⁶⁷ See 42 U.S.C. § 7408(a)(1).

⁶⁸ See 42 U.S.C. § 7409(b)(1). See also *Whitman v. American Trucking Ass’ns*, 531 U.S. 457 (2001) (upholding NAAQS provisions against non-delegation challenge and holding the primary NAAQS must be set without regard to cost). The CAA also provides for the establishment of “secondary” NAAQS that are intended to “protect public welfare.” *Id.* at § 7409(b)(2).

⁶⁹ See 42 U.S.C. § 7409(d).

exception,⁷⁰ this process has led to a fairly consistent tightening of existing NAAQS, as additional scientific evidence has emerged detailing the potential health effects of criteria air pollutants at lower levels.⁷¹

Most recently, in 2015, the EPA announced it was again revising the NAAQS for ozone, lowering it to 70 parts per billion.⁷² Almost immediately after this new standard was finalized, several states and industry groups filed suit.⁷³ Opponents of the tighter standards cite the high costs of compliance, as well as with the difficulty of attaining an ozone NAAQS that, in some parts of the country, may be approaching background ozone levels.⁷⁴

States with metropolitan areas that fail to attain NAAQS are required to draft State Implementation Plans (SIPs), which they submit to the EPA for its approval. Among other things, an adequate SIP must include “enforceable emission limitations . . . as well as schedules and timetables for compliance,”⁷⁵ monitoring systems,⁷⁶ a fee-based permitting system for

⁷⁰ See U.S. Env'tl. Prot. Agency, *Revisions to the National Ambient Air Quality Standards for Photochemical Oxidants*, 44 Fed. Reg. 8202 (Feb. 8, 1979) (codified at 40 C.F.R. § 50). This loosening of the standard was upheld in *Amer. Petr. Inst. v. Costle*, 665 F.2d 1176, 1184-86 (D.C. Cir. 1981). The standard was subsequently tightened in 1997. See U.S. Env'tl. Prot. Agency, *National Ambient Air Quality Standards for Ozone, Final Rule*, 62 Fed. Reg. 38,856 (July 18, 1997).

⁷¹ For a useful overview of the ozone NAAQS and its history, see Arnold Reitze, *The National Ambient Air Quality Standards for Ozone*, 6 AZ. J. ENVTL. L. & POL'Y 420 (2015).

⁷² See 80 Fed. Reg. 65292 (Oct. 26, 2015).

⁷³ See *Murray Energy v. U.S. Environmental Protection Agency*, No. 15-1385 (consolidated with Nos. 15-1392, 15-1490, 15-1491, and 15-1494) (D.C. Cir. filed Apr. 22, 2016).

⁷⁴ See Reitze, *supra* note __ at 445-48. As Reitze notes,

Where background concentrations are large relative to the impact of controllable man-made sources of NOx and VOC emissions within the U.S., effective control is difficult or impossible, especially in locations with few remaining opportunities for local emission reductions.

Id. at 448.

⁷⁵ 42 U.S.C. § 7410 (a)(2)(A).

⁷⁶ 42 U.S.C. § 7410 (a)(2)(B).

stationary sources,⁷⁷ an enforcement program,⁷⁸ and provide for sufficient public participation in the SIP process.⁷⁹ The 1990 Clean Air Act Amendments added additional requirements for state permitting programs for stationary sources.⁸⁰ This SIP process is the “heart” of the CAA.⁸¹

In the 1970s, the EPA sought to force states to implement the CAA in accordance with the agency’s dictates. In a series of cases, the EPA argued that, under the Act, states were simply required to implement various regulatory measures, such as vehicle emission testing programs, under federal law.⁸² The EPA maintained that courts should order uncooperative state officials to adopt EPA-mandated measures.⁸³ Although the Supreme Court had not yet decided *New York* or *Printz*, this claim was generally rejected in the courts of appeals.⁸⁴ These courts rested their holdings on the CAA’s text and structure, but several noted that the EPA’s position raised serious constitutional questions.⁸⁵ As the U.S. Court of Appeals for the D.C. Circuit noted, the EPA was “attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program

⁷⁷ 42 U.S.C. § 7410 (a)(2)(L).

⁷⁸ 42 U.S.C. §§ 7410 (a)(2)(C), (E) (2000).

⁷⁹ States must provide “reasonable notice” and public hearings on SIPs, and consult with affected local entities. 42 U.S.C. §§ 7410 (a)(2), (a)(2)(M) (2000).

⁸⁰ 42 U.S.C. § 7651o (2000).

⁸¹ *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976).

⁸² *See, e.g., Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977); *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977).

⁸³ *Brown*, 521 F.2d at 831.

⁸⁴ *Id.* at 827; *Maryland*, 530 F.2d 215; *District of Columbia v. Train*, 521 F.2d 971. A fourth federal appeals court found in favor of the EPA. *Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974). *See also* Arnold W. Reitze, Jr. *Air Quality Protection Using State Implementation Plans – Thirty-Seven Years of Increasing Complexity*, 15 VILL. ENVTL. L.J. 209, 345-48 (2004) (discussing litigation in 1970s and resulting uncertainty as to whether the EPA could force states to implement air pollution control measures).

⁸⁵ *EPA v. Brown*, 431 U.S. 99, 102 (1977) (“All of the courts rested on statutory interpretation, but noted also that serious constitutional questions might be raised if the statute were read as the United States argued it should be.”).

against the owners of motor vehicles.”⁸⁶ Upholding such an assertion of federal regulatory authority, the U.S. Court of Appeals for the Ninth Circuit noted, “would reduce the states to puppets of a ventriloquist Congress.”⁸⁷ The Supreme Court initially accepted petitions for certiorari to consider the commandeering question, but the federal government confessed error prior to argument and the decisions were vacated.⁸⁸ From that point on, it was uncontested that the EPA could not simply tell states to implement the federal governments preferred air pollution control measures.

Although the EPA may not simply order the states to cooperate with the implementation and enforcement of the CAA, the Act provides the EPA with substantial leverage over state officials. Failure to cooperate with CAA implementation places federal funding of state programs at risk.⁸⁹ Most significantly, if a state fails to submit a fully adequate SIP by the appropriate deadlines, it is subject to federal sanctions, including the loss of federal highway funds, increased offset requirements for new development, and the imposition of a Federal Implementation Plan (FIP) that the EPA will enforce.⁹⁰ Failure of a state to comply can also prompt the EPA to deny permit applications in nonattainment areas.⁹¹

⁸⁶ *Train*, 521 F.2d at 993.

⁸⁷ *Brown*, 521 F.2d at 839. The Ninth Circuit further made clear that its holding did not limit the federal government’s ability to induce state cooperation, such as through the spending power, or to preempt state pollution control laws with more stringent federally enforced requirements. *Id.* See also *Maryland*, 530 F.2d at 228 (“Inviting Maryland to administer the regulations, and compelling her to do so under threat of injunctive and criminal sanctions, are two entirely different propositions.”); *District of Columbia v. Train*, 521 F.2d at 989 (reaffirming federal power to preempt inconsistent state regulations).

⁸⁸ *Brown*, 431 U.S. at 103-04.

⁸⁹ See, e.g., 42 U.S.C. §7509(a)(4) (air quality planning grants); 42 U.S.C. § 7616 (water pollution control grants).

⁹⁰ 42 U.S.C. § 7509 (2000).

⁹¹ See 42 U.S.C. § 7413.

While some of these sanctions may be imposed at the EPA’s discretion, others are mandatory. Moreover, even should the EPA wish to refrain from sanctioning non-compliant states, individual citizens and activist groups may force the EPA’s hands through citizen suits seeking to enforce the express requirements of the CAA and regulations promulgated pursuant to it.⁹² In addition, under the CAA’s “conformity” provisions, local transportation projects cannot receive federal funding unless they conform to an EPA-approved SIP.⁹³ Thus, short of corrective legislation, states’ ability to seek compromise over CAA enforcement is constrained.⁹⁴

The primary sanctions provisions are contained in CAA Section 179.⁹⁵ Section 179(b) provides for two sanctions: 1) a prohibition on federal highway funding within the relevant nonattainment area, save for funding related to safety improvements and mass transit programs,⁹⁶ and 2) an increase in the offset requirements imposed on new or modified sources.⁹⁷ Under Section 179(a), the EPA Administrator “shall apply” one of these two sanctions on states that fail to submit a fully compliant state implementation plan if this deficiency is not corrected within 18 months.⁹⁸ If, after an additional six months, the state has not come into compliance with the applicable SIP requirements, the EPA Administrator is required to impose whichever sanction

⁹² 42 U.S.C. § 7604 (2000). In 2015, for example, environmentalist organizations threatened to sue the EPA for failing to enforce SIP requirements for the 2008 revisions to the ozone NAAQS. *See Reitze, supra* note __, at 440. *See also* Anuradha Sivaram, *Why Citizen Suits Against the States Would Ensure the Legitimacy of Cooperative Federalism Under the Clean Air Act*, 40 *ECOLOGY L.Q.* 443 (2013).

⁹³ 42 U.S.C. § 7506 (2000).

⁹⁴ *See* 42 U.S.C. § 7604.

⁹⁵ 42 U.S.C. § 7509 (2000).

⁹⁶ *Id.* at § 7509(b)(1).

⁹⁷ *Id.* at § 7509(b)(2).

⁹⁸ *Id.* at § 7509(a). The provision further provides that both sanctions shall apply if the Administrator “finds lack of good faith.” *Id.*

has not already been imposed.⁹⁹ Sanctions are to remain in place “until the Administrator determines that the State has come into compliance.”¹⁰⁰

As provided for under Section 179, these sanctions are mandatory.¹⁰¹ Under regulations EPA promulgated in 1994, the offset sanction is to be imposed first, and highway fund sanctions second, if the state fails to come into compliance within six months of the offset sanction being imposed.¹⁰² Under these regulations, as under Section 179, the relevant sanctions “shall apply” when the relevant conditions are met.¹⁰³

Section 110(m) provides the EPA Administrator the additional, discretionary authority to impose sanctions “at any time” in “any portion of the State the Administrator determines reasonable and appropriate,” after having made the requisite findings of non-compliance specified in Section 179.¹⁰⁴ In other words, the EPA may impose sanctions throughout a state,

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Some commentators have made the claim that the imposition of sanctions under Section 179 may be avoided once the federal government imposes and implements a FIP. *See, e.g.,* Ryan, *supra* note ___, at 1050; Baake, *supra* note ___, at 7-8. Ryan and Baake cite 40 C.F.R. § 93.120 in support of this proposition. Yet this regulation implements the transportation conformity provision in CAA Section 176, not the sanctions provisions in CAA Section 179. The EPA’s regulations interpreting and implementing Section 179 are found elsewhere, at 40 C.F.R. §§ 52.30 and 52.31, and do not suggest that the imposition of a FIP removes the threat of sanctions.

Baake also cites the EPA’s *Federal Register* notice explaining why the adoption of a FIP for cross-state air pollution does not trigger sanctions for further support of this point. *See* 71 Fed. Reg. 25328. Yet, as this notice explains, the reason the EPA’s FIP does not trigger sanctions is not because the existence of a FIP eliminates the sanction threat, but because of the specific CAA provisions under which the EPA took this action. As the EPA explained, “The findings do not start a sanctions clock pursuant to section 179 because the findings do not pertain to a part D plan for nonattainment areas required under section 110(a)(2)(I) and because the action is not a SIP Call pursuant to section 110(k)(5).” *Id.* at ___. In other words, there was no threat of sanctions here *not* because of the existence of a FIP, but because the EPA did not make the necessary findings under the relevant provisions of the CAA to trigger the sanctions clock.

¹⁰² 40 C.F.R. § 52.31(d).

¹⁰³ *Id.*

¹⁰⁴ *See* 42 U.S.C. § 7410(m).

even if the relevant SIP deficiency only applies to a smaller area.¹⁰⁵ The EPA may not, however, impose sanctions statewide within 24 months of an initial finding of noncompliance “where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.”¹⁰⁶ In other words, the EPA may not punish an entire state for the failings of one or more of its subdivisions – at least not right away.

Taken together, Sections 179 and 100(m) provide that if a state fails to comply with the relevant SIP requirements, the EPA is permitted to impose the highway funding and offset sanctions. If the state does not come into compliance within 18 months of the EPA’s initial noncompliance determination, however, the sanctions must be imposed, at least in those portions of the state subject to the EPA’s finding of noncompliance. Section 179 makes sanctions mandatory in noncompliant areas after states have had time to comply. Section 110(m), however, allows the EPA to impose sanctions sooner and more broadly.

The EPA threatens to impose sanctions far more frequently than sanctions have been imposed. “Imposition of sanctions is a relatively rare event, but their invocation to prompt state action is not,” according to the Congressional Research Service.¹⁰⁷ Since the CAA was last amended in 1990, sanctions have been threatened hundreds of times.¹⁰⁸ Between 1990 and 1999, for instance, the EPA made noncompliance findings that trigger the sanctions clock over 850

¹⁰⁵ See Reitze, *supra* note __ at 356 (“Once a finding under section 179(a) has been made, the Administrator may, pursuant to section 110(m), apply the sanctions to any portion of the State. Using section 110(m) allows sanctions to be applied to a larger area than sanctions imposed pursuant to Section 179(a).”)

¹⁰⁶ Section 110(m) specifically requires the EPA to promulgate regulations to ensure “such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.” The required regulation, setting forth criteria governing when sanctions may be imposed on a statewide basis, are at 40 C.F.R. § 52.30.

¹⁰⁷ James E. McCarthy, Cong. Research Serv., RL30131, Highway Fund Sanctions and Conformity Under the Clean Air Act 3 (1999).

¹⁰⁸ *Id.*

times.¹⁰⁹ In only fourteen of the instances, however, were sanctions actually imposed.¹¹⁰ The threat of sanctions is usually enough to induce even reluctant states to comply.¹¹¹ Where sanctions are imposed, they usually do not remain in place for long.¹¹² For most states, the threat of losing highway funds is a very powerful inducement to cooperate.

Three cases have challenged the EPA’s decision to impose sanctions under the CAA. In 1995, two states, Missouri and Virginia,¹¹³ each alleged that the EPA’s decision, if not the statutory provisions authorizing sanctions themselves, were unconstitutional infringements upon state sovereignty. According to the states, the CAA impermissibly authorized the EPA to impose severe sanctions upon those states failing to comply with the EPA’s interpretation of the Act.¹¹⁴ Both claimed that the highway fund sanction was an unconstitutional use of the federal spending power. Neither state was successful.

In *Virginia v. Browner*, the U.S. Court of Appeals for the Fourth Circuit found that the Clean Air Act’s provisions passed constitutional muster “because although its sanctions provisions potentially burden the states, those sanctions amount to inducement rather than ‘outright coercion.’”¹¹⁵ The district court in *Missouri v. United States* reached a similar

¹⁰⁹ *Id.* at 3.

¹¹⁰ *Id.* at 4.

¹¹¹ In some cases, sanctions are threatened because a state SIP submission is technically deficient, but due to a drafting error or something of that nature, and not due to a state’s effort to resist the relevant requirements. Therefore, the total number of cases in which sanctions are threatened likely overstates the degree of state resistance to the CAA’s SIP requirements.

¹¹² In April 2003, for example, the EPA imposed offset sanctions in the San Francisco Bay area. *See* 66 Fed. Reg. 48,340. These sanctions were only in place for three months, however, as they were stayed upon the submission of a corrected SIP. *See* 68 Fed. Reg. 42,172 (stay/deferral).

¹¹³ *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996); *Missouri v. United States*, 918 F. Supp. 1320 (1996) *vacated* 109 F.3d 440 (1997).

¹¹⁴ Virginia also argued that the EPA was wrong to conclude that its stationary source permit program failed to comply with Title V of the Clean Air Act. *Virginia*, 80 F.3d at 872.

¹¹⁵ *Id.* at 881.

conclusion, relying upon dicta in *New York* that “conditions [on receipt of federal funds] must . . . bear *some* relationship to the purpose of federal spending.”¹¹⁶ For the *Missouri* court, “the appropriate focus is not on the alleged impact of a statute on a particular state program but whether Congress has ‘directly compel[led]’ the state ‘to enact a federal regulatory program.’”¹¹⁷ Although the *Missouri* court only addressed the question of whether such sanctions were unconstitutional on their face, it implied that an as-applied challenge would not fare any better.¹¹⁸

More recently, in *Mississippi Commission on Environmental Quality v. EPA*, the D.C. Circuit rejected arguments by Texas and Mississippi that the “Clean Air Act’s sanctions for noncompliant states impose such a steep price that State officials effectively have no choice but to comply—in contravention of the Supreme Court’s decision in [*NFIB*].”¹¹⁹ The court found the CAA highway funds sanctions “not nearly as coercive as those in the ACA.”¹²⁰ This third case is only challenge to the imposition of highway fund sanctions since *NFIB*. Interestingly enough, the petitioners in this case relied exclusively on *NFIB*, and did not claim the imposition of highway fund sanctions was unconstitutional under *Dole*.¹²¹

As of September 2015, only a handful of nonattainment areas were subject to or under threat of sanctions. In nearly all cases, jurisdictions that had been on the sanctions clock had imposition of the sanctions stayed or suspended once the jurisdiction in question fixed whatever

¹¹⁶ *Missouri*, 918 F. Supp. at 1333 (citing *New York*, 505 U.S. at 167) (emphasis in *Missouri* opinion).

¹¹⁷ *Id.* at 1328 (citing *New York*, 505 U.S. at 161).

¹¹⁸ *Id.* at 1329. *Missouri* had sought to challenge the provisions on both grounds, but the District Court determined that an as-applied claim was not yet ripe.

¹¹⁹ *Mississippi v. EPA*, 790 F. 3d 138, 175 (D.C.Cir. 2015).

¹²⁰ *Id.* at 177.

¹²¹ *See id.* at 176 n.21.

deficiencies the EPA had found or otherwise demonstrated attainment with the relevant NAAQS.¹²² This could change.

With the adoption of more stringent NAAQS standards in 2008 and 2105, the costs of CAA compliance are increasing for both private regulated firms, as well as for state and local governments. As these costs increase – and standards become more difficult to meet – state resistance and noncompliance with the applicable SIP requirements is likely to increase. The amount of money at risk is potentially significant. On average, federal highway funds account for between three and four percent of each state’s budget,¹²³ or approximately one-third of state transportation spending.¹²⁴ Transportation spending also accounts for one of the larger components of state budgets, after Medicaid and education spending.¹²⁵ A threatened loss of federal highway funding would be quite significant. As a consequence, additional litigation challenging the constitutionality of CAA sanctions is likely.

III. *NFIB v. SEBELIUS*: CONDITIONAL SPENDING DOCTRINE REBORN

¹²² See Federal Highway Administration, Status of Sanctions Clocks under the Clean Air Act (Sept 1, 2015), http://www.fhwa.dot.gov/environment/air_quality/highway_sanctions/sanctionslock.cfm.

¹²³ Authors’ calculations based upon data from the National Association of State Budget Officers (NASBO). See <http://www.nasbo.org/publications-data/state-expenditure-report/archives>. The state average was 3.97 percent in FY2013 and 3.85 percent in FY2014. In states with large land areas and relatively small populations, however, federal highway funds may account for as much as ten percent of a state’s budget. In FY2013, this was true of Montana and South Dakota.

¹²⁴ *Id.* In FY 2013 and FY2014, for example, federal funds accounted for 32.2 percent and 31.1 percent of total state transportation spending, respectively.

¹²⁵ *Id.*

The primary challenge to the constitutionality of the PPACA was directed at the minimum coverage requirement, aka the “individual mandate.” Private and state petitioners maintained that this provision exceeded the scope of the federal government’s power to “regulate Commerce . . . among the several States” as supplemented by the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”¹²⁶ They also maintained that the individual mandate could not be justified as an exercise of the federal government’s taxing power. The petitioners prevailed on the first claims, but the individual mandate was ultimately upheld on the latter.¹²⁷

Another claim brought by state petitioners concerned the PPACA’s provisions expanding the federal Medicaid program. Specifically, the state petitioners (representing a majority of the states) argued that Congress exceeded the scope of the spending power by conditioning receipt of all Medicaid funds on state willingness to accept a dramatic increase in the scope of the program. This claim was largely dismissed by commentators when the lawsuit against the PPACA was first filed.¹²⁸ Yet this claim was ultimately more successful than those made against the individual mandate. It could also prove to be the most consequential, particularly for environmental law.

¹²⁶ U.S. Const., art. I, § 8.

¹²⁷ *NFIB*, 132 S.Ct. at 2591, 2600.

¹²⁸ See, e.g., Mark A. Hall, *Clearing Out the Underbrush in Constitutional Challenges to Health Insurance Reform*, 364 N. ENGL. J. MED. 793 (2011) (noting coercion arguments “found very little support among constitutional scholars” and have “little realistic chance” to succeed); Sara Rosenbaum, *The States’ Medicaid ‘Coercion’ Claim: More Rhetoric Than Fact*, Health Affairs Blog, Dec. 14, 2011, <http://healthaffairs.org/blog/2011/12/14/the-states-medicaid-coercion-claim-more-rhetoric-than-fact/> (“the states’ arguments are predicated on erroneous factual assertions that fly directly in the face of Medicaid’s entire history and structure”); see also David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits against PPACA?*, 2014 U. ILL. L. REV. 805, 815 n. 62 (2014) (collecting additional examples).

A. *The Medicaid Expansion*

Medicaid is a stereotypical program of cooperative federalism, not least because it has fostered widespread participation despite being a source of continued federal-state friction.¹²⁹ The federal government provides states with substantial funding in return for state implementation of the program in accord with federal requirements. The program, as created in 1965 and subsequently amended, provides for medical assistance for women, children, needy families, the blind, the elderly, and the disabled.¹³⁰ The various federal conditions placed on the program concern who is eligible for medical care through the program, what services are covered, and under what conditions. States have become highly dependent on federal Medicaid funding for the maintenance of their programs, and federal funds now account for over ten percent of most states' annual spending.

The PPACA expanded the Medicaid program well beyond the initial targeted populations with the express purpose of expanding health insurance coverage among uninsured populations.¹³¹ Most notably, the PPACA obligated states to expand eligibility to cover all adults with incomes below 133 percent of the federal poverty line.¹³² In return, the federal government agreed to cover the lion's share of the added costs for the first several years of the program.¹³³ If a state were to refuse this expansion, however, the PPACA provided that a state would lose all of its Medicaid funding, both funding allocated to pay for the expansion as well as all funding for

¹²⁹ See generally Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PENN. J. CONST. L. 432 (2011).

¹³⁰ 42 U.S.C. § 1396d(a) (2013); *NFIB*, 132 S.Ct. at 2572.

¹³¹ See Huberfeld, *supra* note __, at 450.

¹³² See 42 U.S.C. §1936a.

¹³³ The degree of federal funding has been described as a “supermatch.” See Huberfeld, *supra* note __, at 451.

the pre-existing Medicaid program. By leveraging state reliance on existing state funding to induce state cooperation with the expansion, state petitioners argued, the federal government was engaging in unconstitutional “coercion” of the states, contrary to *Dole*.

B. The Medicaid Ruling

Seven justices were ultimately convinced that the Medicaid expansion, as written, was unconstitutionally coercive. In two separate opinions – one by the Chief Justice and the other jointly by Justices Scalia, Kennedy, Thomas and Alito – the Court declared these provisions of the PPACA exceeded the bounds of Congress’s spending power. The Court did not settle on a single rationale. Nonetheless, *NFIB* marked the first time the Court invalidated conditions placed on federal spending in over seventy years, and (arguably) the first time the Court has ever found the use of conditional spending to be unconstitutionally “coercive.”¹³⁴ Acknowledging Congress’ broad authority to set conditions on the receipt of federal funds, a majority of the Court reaffirmed that this authority is subject to judicially enforceable limits.

The Chief Justice, joined by Justices Breyer and Kagan, concluded that Congress unconstitutionally coerced the states by presenting them with an offer that could not be refused. Longstanding state reliance on Medicaid funds made states vulnerable to this coercion. Insofar as Congress told states that their continued receipt of this funding was dependent upon adopting what was, in practical terms, a new and different program, Congress was impermissibility

¹³⁴ See *NFIB*, 132 S.Ct. at 2634 (Ginsburg, dissenting) (“Prior to today’s decision, however, the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.”); *Virginia v. Browner*, 80 F.3d 869, 881 (4th Cir. 1996) (“No court, however, has ever struck down a federal statute on grounds that it exceeded the Spending Power.”).

leveraging state reliance on the preexisting Medicaid program.¹³⁵ It is one thing to place conditions on how money is to be spent, the Chief Justice explained. This happens all the time. It is something else entirely, however, when the conditions placed on the receipt of federal money “take the form of threats to terminate other significant independent grants.”¹³⁶ In such cases, “the conditions are properly viewed as a means of pressuring the States to accept policy changes.”¹³⁷ And such pressure, if sufficiently sever, is potentially coercive. The cure for this infirmity, according to the Chief Justice, was to sever the two programs. Funding for the Medicaid expansion would be dependent only on a state’s willingness to accept the conditions of the expansion. Traditional Medicaid funding, on the other hand, would only be conditioned on state compliance with the traditional requirements of that program

The joint dissent adopted a broader rationale, and sought a broader remedy. According to the joint dissent, the constitutional problem was not the federal government’s attempt to leverage longstanding state participation in Medicaid so much as it was the federal government’s willingness to put so much money at stake. Because federal and state tax dollars ultimately come from the same place – American taxpayers – threatening to withhold large enough sums of money from noncooperative states is, itself, potentially coercive.¹³⁸

Because the Chief Justice’s opinion adopted a narrower holding, it is the focus of this Article’s analysis. Traditionally, the narrowest opinion is viewed as the controlling opinion, and is the one most likely to be followed by lower courts.¹³⁹ Insofar as challenges the CAA, or other

¹³⁵ See Bagenstos, *supra* note ___, at 866-67.

¹³⁶ *NFIB* 132 S.Ct. at 2604 (opinion of Roberts, C.J.)

¹³⁷ *Id.*

¹³⁸ See *NFIB* 132 S.Ct. at 2662 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

¹³⁹ See Bagenstos, *supra* note ___, at 866-68.

federal statutes, are vulnerable to constitutional challenge after *NFIB*, it will be because they fail to satisfy the analysis offered by the Chief Justice.

C. *NFIB* and *Dole*

Even after *NFIB*, the extent of the constitutional limits on the use of conditional spending are unclear. Although many rightly see Chief Justice Roberts’ controlling opinion “giving teeth” to the Court’s earlier spending power jurisprudence—crystalized in the four-part test announced in *Dole*—some confusion lingers over the relationship between *NFIB* and *Dole*, as well as how courts should now understand and apply *Dole* and *NFIB* in future cases. Some scholars have even suggested that Chief Justice Roberts’ “opaque . . . application of the four *Dole* factors” effectively announces “a new judicial approach to Medicaid and other Spending Clause cases.”¹⁴⁰ Another has criticized *NFIB* for creating “a wholly new constitutional limit”¹⁴¹ while neglecting *Dole* and failing to provide “a more satisfying integration with preceding spending power precedent.”¹⁴²

Chief Justice Roberts’ treatment of the *Dole* factors was regrettably “unclear and disorganized.”¹⁴³ But, as professors Nicole Huberfeld, Elizabeth Weeks Leonard, and Kevin Outterson (hereinafter Huberfeld, et al) have observed, “[t]he *NFIB* opinions relied heavily, but

¹⁴⁰ Nicole Huberfeld, et al., *Plunging Into Endless Difficulties*, 93 BOSTON U. L. REV. 1, 58 (2013); Joondeph, *supra* note __, at 816.

¹⁴¹ Ryan, *supra* note __, at 1026.

¹⁴² Ryan, *supra* note __, at 1022, n. 92.

¹⁴³ Huberfeld, et al., *supra* note __, at 51.

indirectly, on the elements of the *Dole* test” Indeed, they acknowledge, the “elements of the *Dole* test feature prominently in the plurality opinion, though not identified as such.”¹⁴⁴

Despite a rather disorganized treatment of *Dole*, Chief Justice Roberts raised the same animating concerns and relied upon the same spending power cases as *Dole*. As noted, *Dole*’s four-part test requires: (1) that the spending at issue is “in pursuit of ‘the general welfare’”; (2) that conditions on the States’ receipt of federal funds be stated “unambiguously . . . , enabl[ing] the States to exercise their choice knowingly”; (3) that the conditions on federal grants be related to the federal interest in the funded project; and (4) that no other constitutional provisions bar the conditional grant.¹⁴⁵ The *Dole* majority provided a perfunctory explanation of the first three of these four factors because South Dakota did not argue that the conditional spending in question was “inconsistent with any of the first three restrictions.”¹⁴⁶ In fact, “the basic point of disagreement between the parties” turned entirely on “whether the Twenty-first Amendment constitute[d] an ‘independent bar’ to the conditional grant of federal funds.”¹⁴⁷ Thus, the *Dole* Court had little reason to elaborate on the first three limitations on the spending power—they were uncontested. Regarding the “relatedness” factor, for example, the *Dole* majority merely observed that “rather than challenging the germaneness of the condition to federal purposes,” South Dakota ““never contended that the congressional action was . . . unrelated to a national concern in the absence of the Twenty-first Amendment.””¹⁴⁸ Accordingly, the Court was content to note that “[b]ecause petitioner has not sought such a [relatedness] restriction, and because we

¹⁴⁴ Huberfeld, et al., *supra* note ____, at 51.

¹⁴⁵ *South Dakota v. Dole*, 483 U.S. 206, 207-208 (1987).

¹⁴⁶ *Dole*, 483 U.S. at 208.

¹⁴⁷ *Dole*, 483 U.S. at 209.

¹⁴⁸ *Dole*, 483 U.S. at 208.

find any such limitation on conditional federal grants satisfied in this case in any event, we do not address whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power.”¹⁴⁹

Similarly, insofar as the parties and the lower courts in *NFIB* did not prominently discuss the *Dole* factors, the *NFIB* Court’s treatment of those factors was less-than-methodical. Nevertheless, in striking down the PPACA’s conditions, the Roberts opinion invokes the same constitutional limitations and principles set forth in *Dole*. Perhaps more importantly, his opinion reaffirms the fundamental principle and federalism concerns expressed summarily by the *Dole* majority, but explained more fully by Justice O’Connor’s “relatively narrow” disagreement with the Court’s application of the principle in her dissent.

From the beginning, the Chief Justice’s opinion approached the case concerned about federalism¹⁵⁰ and mindful that Congress may not commandeer the states through the spending power. The Chief Justice understood the States to argue that the PPACA’s threat to withhold all of a State’s Medicaid grants unless the State accepted the expansion and its conditions would “violate[] the basic principle that the ‘Federal Government may not compel the States to enact or administer a federal regulatory program.’”¹⁵¹ These same concerns informed both the majority and dissenting opinions in *Dole*.

The spending at issue in *NFIB* was for the “general welfare,” as this has long been understood, and Congress did not require states to engage in unconstitutional conduct as a

¹⁴⁹ *Dole*, 483 U.S. at 208 n. 3.

¹⁵⁰ *Natl. Fedn. of Indep. Business v. Sebelius*, 132 S.Ct. 2566, 2602, 183 L.Ed.2d 450 (2012) (“Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. . . . For this reason, ‘the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” (quoting *New York* at 162)).

¹⁵¹ *NFIB*, 132 S.Ct. at 2601.

condition of receiving the funds. Thus, the PPACA spending conditions did not implicate the constitutional limits set by the first and fourth factors in *Dole*, and the *NFIB* Court had no reason to discuss them. The PPACA’s threat to withhold existing Medicaid funds from states that did not participate in the expansion, however, did raise constitutional concerns addressed by *Dole*’s second and third limitations.

Without expressly citing *Dole*’s second factor, Chief Justice Roberts began his discussion of the Court’s “recognized limits on Congress’s power under the Spending Clause” by quoting *Pennhurst State School and Hospital v. Halderman*: “We have repeatedly characterized . . . Spending Clause legislation as ‘much in the nature of a *contract*.’”¹⁵² Because of this “characterization,” the Chief Justice explained, “[t]he legitimacy of Congress’s exercise of the spending power ‘thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”¹⁵³ Without a voluntary and knowing acceptance of the terms of Congress’s offer, the conditional spending would be unconstitutional.

Scholars have debated the merits of the Court’s “contract” characterization,¹⁵⁴ but, relying on *Pennhurst*, the *Dole* Court explained that “if Congress desires to condition the States’ receipt of funds, it ‘must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’” In *NFIB*, Chief Justice Roberts explained why this must be so: “Respecting this limitation is critical to ensuring that

¹⁵² *NFIB*, 132 S.Ct. at 2602 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)).

¹⁵³ *NFIB*, 132 S.Ct. at 2602 (quoting *Pennhurst*, 451 U.S. at 17).

¹⁵⁴ See, e.g., Berman, *supra* note __; Einer Elhauge, *Contrived Threats versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 502 (2016); James F. Blumstein, *NFIB v. Sebelius and Enforceable Limits on Federal Leveraging: The Contract Paradigm, the Clean Notice Rule, and the Coercion Principle*, 6 J. HEALTH & LIFE SCI. L. 123 (2013); James F. Blumstein, *Enforcing Limits on the Affordable Care Act’s Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011-12 CATO SUP. CT. REV. 67 (2012).

Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system.”¹⁵⁵ And it is out of this critical concern for federalism that the Court will “strike down federal legislation that commandeers a State’s legislative or administrative apparatus for federal purposes,” and will “scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a ‘power akin to undue influence.’”¹⁵⁶ But Congress’s “financial inducements” and “undue influence” only present constitutional concerns when they are used so as to “require the States to regulate,” for it is that requirement that violates the constitutional limits and “undermine[s] . . . our federal system.”¹⁵⁷

Here, the Chief Justice invokes both *Pennhurst* and *Dole*, building upon the former’s “contract characterization” and the latter’s related requirement of “unambiguous notice.” He expounds on this concern, discussing coercion, political accountability, and “undue influence” as described in *Steward Machine*, before returning to confirm that “Congress may attach appropriate conditions to federal taxing and spending programs to preserve control over the use of federal funds.”¹⁵⁸ But it is because of these concerns that the Court must first determine whether (1) the conditions at issue are merely Congress’s attempt to “preserve control over the use of federal funds,” or a means of enlisting states in the federal regulatory apparatus; and (2) the conditions at issue have “crossed the line distinguishing encouragement from coercion.”¹⁵⁹ The Chief Justice’s opinion will later revisit the *Dole* “notice” factor, but it is at this point—in an effort to make these crucial determinations—that the Chief Justice’s analysis turned to how

¹⁵⁵ *NFIB*, 132 S.Ct. at 2602.

¹⁵⁶ *NFIB*, 132 S.Ct. at 2602.

¹⁵⁷ *NFIB*, 132 S.Ct. at 2602.

¹⁵⁸ *NFIB*, 132 S.Ct. at 2603.

¹⁵⁹ *NFIB*, 132 S.Ct. at 2603. (quoting *New York*, at 175).

Congress structured the PPACA funding: “Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States’ existing Medicaid funds.”¹⁶⁰ As Roberts explained: “The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health coverage effected by the Act.”¹⁶¹ And the Chief Justice agreed, finding that the federal government was doing far more than conditioning the receipt of new funds on state willingness to comply with conditions on how those funds would be used. Rather, Congress was conditioning prior funding to induce states to adopt new policies. And “such conditions [that] take the form of threats to terminate other significant independent grants . . . are properly viewed as a means of pressuring the States to accept policy changes.”¹⁶²

Having found the purpose of the spending conditions at issue, the Chief Justice’s reasoning pivots to another *Dole* factor without expressly invoking the *Dole* framework. Whether the PPACA’s condition threatens an “independent grant” is another way of asking whether the condition is reasonably related or “germane” to the federal interest in the program. Much of the subsequent discussion in the Chief Justice’s opinion concerning whether the Medicaid expansion is “properly viewed merely as a modification of the existing program,” whether the expansion “accomplishes a shift in kind, not merely degree,” how the expansion is “structured,” and whether earlier Medicaid amendments “fall into the same category as the one at stake here,” informs his determination that Congress has leveraged the states’ reliance on one

¹⁶⁰ *NFIB*, 132 S.Ct. 2603.

¹⁶¹ *NFIB*, 132 S.Ct. 2603.

¹⁶² *NFIB*, 132 S.Ct. 2604.

program to induce them to participate in another, new program—and this makes the spending conditions “unrelated” to the funding.

Huberfeld, et al, have criticized the plurality opinion for “the artificial distinction it forges between ‘old’ and ‘new’ Medicaid,” arguing that the Chief Justice “also may have modified the ‘germaneness’ prong of the *Dole* test. Until now, the Court had not enforced relatedness in this context. But after *NFIB*, we will undoubtedly see many cases attempting to apply this new concept, especially to determine exactly how ‘related’ the condition must be to the existing program.”¹⁶³ We, too, question the distinction that the Chief Justice drew between “old” and “new” Medicaid, but it is not clear that the plurality opinion has modified *Dole*’s “germaneness” prong. Nor can we agree that *NFIB* has applied a “new concept” of germaneness or, as others have suggested, established a new constitutional rule or test for spending power cases.

To be sure, the Chief Justice engaged in a more rigorous application of the test factors articulated in *Dole*, perhaps for no other reason than so much more money was at stake. The *Dole* majority did not much discuss the “relatedness” factor other than to note that South Dakota never contended that the condition was unrelated to the federal interest, and then to state summarily that the drinking age requirement was “directly related to one of the main purposes for which highway funds are expended—safe interstate travel.”¹⁶⁴ So although, as Huberfeld, et al, suggest, the “Court had not enforced relatedness in this context,” that only means that the Court had not yet found a condition so unrelated to the program that the Court had to strike it

¹⁶³ Huberfeld, et al., *supra* note ____, at 55.

¹⁶⁴ *Dole*, 483 U.S. at 208.

down. It is not that the relatedness principle had never been applied, it is merely that the Court had yet to find that the principle had been violated.

Indeed, Justice O'Connor disagreed with the *Dole* majority's rather superficial review of the "relatedness" principle—but not the principle itself. She was not offering a "new concept" of relatedness, but a more rigorous application of the existing concept articulated in *United States v. Butler* and *Oklahoma v. CSC*.¹⁶⁵ Justice O'Connor found the *Dole* majority's "application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended [to be] cursory and unconvincing."¹⁶⁶ In her view, the minimum drinking age requirement was "not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose."¹⁶⁷ Instead, she argued:

[A] condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction. The only possible connection, highway safety, has nothing to do with how the funds Congress has appropriated are expended. Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such it is not justified by the spending power.

Justice O'Connor's insistence that the germaneness factor be more scrupulously applied stemmed from the same concern animating Chief Justice Roberts's line of inquiry: federalism

¹⁶⁵ 330 U.S. 127 (1947).

¹⁶⁶ *Dole*, 483 U.S. at 213 (O'Connor, dissenting).

¹⁶⁷ *Dole*, 483 U.S. at 213-14 (O'Connor, dissenting).

and the preservation of state sovereignty in the face of Congress’s spending power. Congress may not, she wrote, “insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State’s social and economic life because of an attenuated or tangential relationship to highway use or safety.”¹⁶⁸ Why? Because, in Justice O’Connor’s view, “if the rule were otherwise, the Congress could effectively regulate almost any area of a State’s social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced.”¹⁶⁹

For much the same reason the plurality opinion in *NFIB* engages in similar scrutiny of the purported relationship between the purpose of the funding and the purpose of the condition attached to the receipt of that funding. Indeed, the driving concerns underlying Justice O’Connor’s dissent in *Dole* and Chief Justice Roberts’s opinion in *NFIB* are largely the same: whether the spending conditions merely restrict the use of the expended funds, or whether they require states to make new policy choices. As Huberfeld, et al, suggest, the plurality and the joint dissent in *NFIB* stand ready “to carefully scrutinize the relatedness of conditions on federal programs, regardless of the way in which Congress structures those programs or describes their germaneness. Thus, it appears that Justice O’Connor’s *Dole* dissent, which similarly would have given prominence to germaneness under the *Dole* test, will now surely operate in future coercion analyses.”¹⁷⁰ They predict that future challenges to spending conditions will focus on whether “conditions unrelated to the program for which funding is offered [are] deemed non-germane, and therefore coercive, depending on the amount and percentage of funding at stake.”¹⁷¹ The

¹⁶⁸ *Dole*, 483 U.S. at 215 (O’Connor, dissenting).

¹⁶⁹ *Dole*, 483 U.S. at 215 (O’Connor, dissenting).

¹⁷⁰ Huberfeld, et al., *supra* note ____, at 57.

¹⁷¹ Huberfeld, et al., *supra* note ____, at 58.

Chief Justice referred to such non-germane conditions as “a means of pressuring the States to accept policy changes.” Justice O’Connor called them “regulations.”

The *NFIB* plurality did not open a new line of attack against spending power statutes. Rather, *NFIB* applied *Dole*’s germaneness prong and echoed, without attribution, Justice O’Connor’s explanation for how that prong was intended to apply—namely, that when a condition goes beyond specifying how the federal money must be spent, the condition becomes regulatory insofar as it requires a state to change its policy. For Justice O’Connor—applying the Court’s spending power precedent and the *Dole* majority’s factors—the dichotomy in such cases is not between “coercive” and “uncoercive” spending conditions, but rather between “how to spend the money” and “a regulation determining who may drink liquor.” In *NFIB*, Chief Justice Roberts applied the same precedent and principles at work in *Dole* and applied more rigorously by Justice O’Connor, and he concluded that the structure of the PPACA conditions worked not to ensure how the federal money is spent, but to force the states to change their Medicaid policies. The former is permissible, the latter is unconstitutional—just as they were in *Dole*.

Professor Erin Ryan has distilled Chief Justice Roberts’s opinion similarly. Styling the plurality opinion as the “*Sebelius* doctrine,” she has argued that *NFIB* will require future cases to “distinguish (1) conditional funds that directly sponsor the program in question from (2) federal funds sponsoring one program that are conditioned on state participation in another program. While the former remain presumptively permissible, the latter are potentially coercive under the new limit.”¹⁷² She, too, laments the “cavalier manner” in which *NFIB* treated precedent, and argues that the Chief Justice’s opinion “lack[ed] the more satisfying integration with principal case law that one might expect from a new constitutional statement that does not purport to

¹⁷² Ryan, *supra* note ____, at 1030.

overrule prior cases.”¹⁷³ We agree with Professor Ryan that after *NFIB* courts may be more inclined to make this distinction, but, as we have argued, the constitutional limit requiring that spending conditions be “fairly related to the expenditure of federal funds” has been a long-standing element in the Court’s jurisprudence—not a “new limit” or a “new constitutional statement.” It was perhaps a forgotten, toothless prong, but Chief Justice Roberts has given it some bite.

IV. THE CLEAN AIR ACT RECONSIDERED

After *NFIB*, the Clean Air Act’s § 179 enforcement provisions that threaten to withhold federal highway funds from states that do not comply with Clean Air Act regulations appear vulnerable on several grounds. Although Congress has the authority to condition pollution control expenditures on compliance with federal pollution control priorities, there is a real question under *Dole* and *NFIB* as to whether it may condition the receipt of federal highway funds on the implementation of desired air pollution control measures. Thus, the Clean Air Act, perhaps more than any other statute, stretches the bounds set forth in *Dole* and expounded upon in *NFIB*.

First, the Clean Air Act “conditions” receipt of money for one program (highway construction) on compliance with requirements in a separate program (air pollution control). This stretches the relatedness prong in *Dole* and suggests impermissible coercion under *NFIB*. Second, the requirements imposed on states under the Clean Air Act are constantly changing, as the EPA tightens or otherwise revises federal air quality standards and additional pollutants

¹⁷³ Ryan, *supra* note ____, at 1031.

become subject to Clean Air Act regulation. Finally, the sheer amount of money at stake, in terms of its percentage of state transportation spending, state budgets, and even in absolute terms, suggests that the Clean Air Act may be unduly coercive under *NFIB*.

A. *Relatedness*

In *NFIB*, Chief Justice Roberts was concerned with whether the PPACA’s condition threatened an “independent grant.” This concern informed his determination that Congress was leveraging the states’ reliance on one program to induce them to participate in another. The Chief Justice found that the PPACA’s “new” Medicaid was sufficiently distinct from the “old” Medicaid such that the new spending conditions were effectively unrelated to the old Medicaid program. But the connection between “old” and “new” Medicaid is much closer than any connection between the SIP requirements of the Clean Air Act and federal highway money. In fact, even under *Dole* the CAA’s sanctions were constitutionally suspect, though lower courts thus far have upheld them.¹⁷⁴

Federal highway legislation suggests many reasons why federal funding of highway construction supports the “general welfare,” but environmental protection is not one of them. In *Dole*, however, both the highway legislation and the drinking age increase at issue were explicitly enacted to improve highway safety.¹⁷⁵ The connection between the CAA’s purpose and transportation is, at best, attenuated. Nothing in the CAA requires any connection to highways,

¹⁷⁴ See *infra* notes ___ and accompanying text.

¹⁷⁵ See *Dole*, 483 U.S., at 208–09. Whether improving highway safety by, respectively, improving road construction or reducing drunk driving, was the actual motivating purpose behind either of these enactments in another matter.

mobile sources, or even the specific pollutants most associated with vehicular traffic. Instead, states can lose their highway funding for failing to meet *any* of the CAA’s myriad SIP requirements.¹⁷⁶ For example, failure to adopt a sufficiently rigorous stationary source permit scheme, sufficiently stringent emission regulations on dry cleaners, bakeries and other “area” sources, or even failure to provide adequate citizen suit access to state courts can provide the basis for rejecting an SIP and imposing sanctions.¹⁷⁷

Congress has sought to connect highway construction to environmental protection, but it has still stopped short of claiming highway construction serves the *purpose* of environmental protection. The Federal-Aid Highway Act of 1970 instructed the Secretary of Transportation to ensure that federal highway programs were “consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act.”¹⁷⁸ Similarly, in 1991 Congress sought to create an environmentally sound interstate highway system with the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA).¹⁷⁹ In 1998, Congress reauthorized ISTEA with the Transportation Equity Act for the 21st Century (TEA-21),¹⁸⁰ again reiterating its intent to “minimize transportation-related fuel consumption and air pollution.”¹⁸¹ The Federal Highway Administration, for its part, is candid about the real purpose of the sanction, declaring on its website that the highway fund sanction “could be air quality related in an area that is

¹⁷⁶ 42 U.S.C. 7410(k) (2000) (SIP is inadequate if EPA Administrator finds, *inter alia*, SIP fails to comply “with any requirement of this chapter”).

¹⁷⁷ *Id.*

¹⁷⁸ Pub. L. No. 91-605, 84 Stat. 1713 (1970).

¹⁷⁹ Pub. L. No. 102-240, 105 Stat. 1914 (1991).

¹⁸⁰ Pub. L. No. 105-178, 112 Stat. 107 (1998).

¹⁸¹ 49 U.S.C. § 5301(a) (2000).

nonattainment for transportation related pollutants, but is intended primarily as an economic incentive to SIP submission.”¹⁸²

Assessing the Clean Air Act’s vulnerability after *NFIB*, Professor Ryan has argued that the CAA’s “conditions are sufficiently related to satisfy the germaneness requirements of *Dole*, because the use of state highways will contribute to that state’s ambient air-quality problems through automobile exhaust.”¹⁸³ We disagree.

Although Congress has repeatedly noted the potential environmental impacts of highway construction, none of these statutes establishes that a *purpose* of federal highway programs is environmental protection. Yet it is the *purpose* of federal funding that controls whether a given condition is sufficiently related for purposes of *Dole*.¹⁸⁴ These statutory highway provisions provide an indication of the sort of highways Congress sought to fund; they do not establish environmental protection as a purpose of highway funding. In contrast, the federal statute calling upon states to raise the drinking age in *Dole* echoed the *explicit* purposes of the federal highway programs: safe highways.¹⁸⁵

Merely because automobile exhaust contributes to ambient air-quality problems is not in any way germane to the purpose of the highway funds. Such a tenuous connection would seem to violate the federalism concerns underlying *Dole* and articulated more fully by Justice O’Connor. If the germaneness factor may be satisfied merely because roads may “contribute to” a state’s air-quality concerns, then, as Justice O’Connor warned, “Congress could effectively

¹⁸² Federal Highway Administration, Clean Air Sanctions, http://www.fhwa.gov/environment/air_quality/highway_sanctions/index.cfm.

¹⁸³ Ryan, *supra* note ____, at 1052.

¹⁸⁴ *Dole*, 483 U.S. at 207.

¹⁸⁵ *See Dole*, 483 U.S., at 208–09.

regulate almost any area of a State’s social, political, or economic life on the theory that” air quality is somehow effected. This, she understood, was not the law even after *Dole*. Were that not enough, it is also worth noting that other provisions of the Clean Air Act, specifically the Section 176 conformity provisions, already serve to ensure that federal highway funds do not contribute to nonattainment of relevant air quality standards, so concerns about the relationship between highway funds and CAA compliance are taken care of separate from the sanction threat.

We agree more with how Professor Bagenstos has framed the Clean Air Act sanctions: “Congress has told states that wish to continue participating in the entrenched and lucrative federal highway program that they can do so only if they *also* agree to participate in a separate and independent program for reducing air pollution.”¹⁸⁶ The Clean Air Act already places air quality planning funds at risk in noncompliant states. The addition of the highway fund sanctions serves the purpose of creating additional leverage – it is, in Professor Elhauge’s terminology, a “contrived threat”¹⁸⁷ – not to advance the Clean Air Act’s goals directly.

The Clean Air Act is not itself the source of the funds, making more tenuous the claim that the sanctions are an exercise of Congress’s spending power. In threatening to withhold highway funding, the CAA sanctions do not threaten to withhold Clean Air Act funds, but instead threaten highway funding authorized in the Highway Act codified in Title 23 under a completely separate federal program. The Title 23 program and the Clean Air Act are so separate and independent, in fact, that Title 23 does not even mention the Clean Air Act’s so-called “conditions” for receiving highway funds. Notably, whereas Title 23 makes no mention of any Clean Air Act “conditions,” Congress has used the Highway Act to impose a variety of

¹⁸⁶ See Bagenstos, *supra* note __ at 917.

¹⁸⁷ See Elhauge, *supra* note __.

other conditions that require states to enforce, for instance, vehicle weights and sizes, advertising near roadways, the minimum drinking age at issue in *Dole*, and employment discrimination rules and prevailing wage rates on highway projects.¹⁸⁸ States must comply with these conditions—all stated in Title 23—or risk a 10% reduction in their allocated highway funds.¹⁸⁹

There is no real doubt that the Clean Air Act sanctions and the federal highway funds are separate and distinct federal programs that are “related” only in the most tangential terms. The CAA sanctions are intended, as Professor Bagenstos has suggested (and the FHWA has admitted), to convince potentially unwilling states to participate in the SIP process. Understood this way, the § 179 sanctions are vulnerable to a “relatedness” challenge under *Dole*, and even more so after the *NFIB* plurality struck down the Affordable Care Act’s threat to withhold “old” Medicaid funding because it “serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage”¹⁹⁰

B. Notice

There is some reason to question whether the sanctions under the CAA satisfy the “notice” requirement of *Pennhurst* as applied by *Dole* and *NFIB*. Both decisions adopt

¹⁸⁸ See, e.g., 23 U.S.C. 113 (requiring states to pay laborers on highway projects a prevailing wage); 23 U.S.C. 127 (requiring states to police vehicle weight limits); 23 U.S.C. 131 (requiring states to enforce restrictions on outdoor advertising near roadways); 23 U.S.C. 140 (requiring non-discrimination in employment practices in connection with highway projects); 23 U.S.C. 141 (requiring enforcement of vehicle sizes); and 23 U.S.C. 158 (withholding funds for states that do not enforce a minimum drinking age of 21).

¹⁸⁹ These conditions are all related to the original and explicitly stated purpose of the federal highway grants. Congress may add and amend related conditions like these as they become necessary. So it is not the case that Congress is precluded from imposing new conditions on existing federal funding, but those conditions must satisfy the *Dole* requirements and be related to the original grant.

¹⁹⁰ *NFIB*, 132 S.Ct. at 2603.

Pennhurst's formulation of spending power legislation as being “much in the nature of a contract.” In *NFIB*, the Chief Justice understood that the “legitimacy of Congress’s exercise of the spending power ‘thus rests on whether the State voluntarily and knowingly accepts the terms of the “contract.””¹⁹¹ The *NFIB* plurality therefore explored whether the Affordable Care Act’s Medicaid expansion had provided states with the requisite “notice” when they signed on to Medicaid. As the Chief Justice reminded, “‘if Congress intends to impose a condition on a grant of federal moneys, it must do so unambiguously.’”¹⁹² Despite Medicaid provisions “expressly reserving ‘[t]he right to alter, amend, or repeal any provision’” of the Social Security Act, the *NFIB* plurality suggests that the expansion failed the notice prong insofar as it “accomplishes a shift in kind, not merely degree” that the states could not have anticipated when they signed on to the Medicaid program.¹⁹³ The expansion was such that “[a] State could hardly anticipate that Congress’s reservation of the right to ‘alter’ or ‘amend’ the Medicaid program included the power to transform it so dramatically,”¹⁹⁴ and that “[p]revious Medicaid amendments simply do not fall into the same category as the one at stake here.”¹⁹⁵ Turning again to *Pennhurst*, the Chief Justice explained that the spending power “does not include surprising participating States with postacceptance or ‘retroactive’ conditions.”¹⁹⁶

Applying such scrutiny to the Clean Air Act sanctions suggests that those sanctions may fail the “notice” test as well. Whereas the Medicaid program included express statutory

¹⁹¹ *NFIB*, 132 S.Ct. at 2602 (quoting *Pennhurst*, *supra*, 451 U.S. at 17).

¹⁹² *NFIB*, 132 S.Ct. at 2605 (quoting *Pennhurst*, 451 U.S. at 17).

¹⁹³ *NFIB*, 132 S.Ct. at 2605.

¹⁹⁴ *NFIB*, 132 S.Ct. at 2606.

¹⁹⁵ *NFIB*, 132 S.Ct. at 2606.

¹⁹⁶ *NFIB*, 132 S.Ct. at 2606 (quoting *Pennhurst*, 451 U.S. at 25).

provisions notifying states that Congress may amend the program’s terms, the Highway Act includes no such similar warning that accepting highway funds could later require states to participate in Clean Air Act programs. The federal highway program predates the Clean Air Act by decades. Thus, any “conditions” imposed on the pre-existing, entrenched highway fund program by the subsequently enacted Clean Air Act would seem to violate the *NFIB* and *Pennhurst* bar on “surprising States with postacceptance or ‘retroactive’ conditions.” When states originally signed on to the highway program, they could not have anticipated that highway funds would be conditioned on the “non-attainment” provisions of the Clean Air Act.

This is not to say that Congress may not create new, subsequent conditions related to the original purpose of the program. As a general matter, Congress remains free to alter the conditions imposed on the receipt of related federal funds. Yet subsequent changes made by *Congress* may be substantively different than such changes made by a regulatory agency.¹⁹⁷ Particularly if it is assumed that the states are protected by the “political safeguards of federalism” in the legislative process—at least as concerns the imposition of conditions on the receipt of federal funds—it would follow that unambiguous statutory amendments to existing conditions would be more acceptable than the imposition of new conditions through the regulatory process.¹⁹⁸ But although the CAA itself outlines broad requirements for state implementation plans, many ambiguous details are left to a regulatory process that has imposed

¹⁹⁷ See, e.g., *Commonwealth of Va. v. Riley*, 106 F.3d 559 (1997)(en banc).

¹⁹⁸ Professor Somin notes, however, that the political safeguards argument is actually at its weakest in the context of spending power, for whereas state governments will often have strong incentive to resist the assertion of federal power in areas traditionally left to within state control, state governments “have incentives to accept and even lobby for conditional federal grants.” For this reason, Somin argues “there is a greater need for judicial intervention” in the Spending Clause context. Somin, *supra* note ____, at 484.

on states constantly changing requirements as the EPA tightens or otherwise revises federal air quality standards and additional pollutants become subject to Clean Air Act regulation.

The text of the CAA, for example, may place a given state on notice that a given air quality determination will require the adoption of an “enhanced” vehicle inspection and maintenance program, but the precise contours and costs of such a program are left to the EPA.¹⁹⁹ Whether a given metropolitan area must adopt pollution control measures at all is, in part, a function of subsequent agency decisions. Under the CAA, the EPA is authorized—indeed, required—to reconsider the national ambient air quality standards periodically.²⁰⁰ In recent years, the EPA has tightened air quality standards, thereby requiring states to adopt more stringent air pollution control measures than they may have anticipated.²⁰¹ At the same time, the EPA has adjusted SIP requirements midstream to account for changes in atmospheric modeling or revised estimates of upwind state contributions to downwind state pollution problems.

The notice problem is compounded by the fact that, under Section 110(m), the EPA has some discretion as to when and where sanctions apply. As discussed above, Section 179 details mandatory sanctions that are to be imposed after 18 and 24 months of state non-cooperation. EPA regulations provide that offset sanctions are imposed first, and highway sanctions second. Section 110(m), however, enables the EPA to impose sanctions more quickly and, subject to some limits, beyond the boundaries of the nonattainment area for which the relevant SIP is inadequate. This means that when and whether sanctions are to be imposed is *less* foreseeable than if it were fully governed by the statute, which means that states have less notice and less

¹⁹⁹ See 42 U.S.C. §§ 7511a(a)(2)(B), (b)(4), (c)(3) (2000); 40 CFR pt. 51, subpart S.

²⁰⁰ 42 U.S.C §§ 7409(a), (d) (2000).

²⁰¹ See Particulate Matter NAAQS, 62 Fed. Reg. 38,652 (July 18, 1997); Ozone NAAQS, 62 Fed. Reg. 38,861 (July 18, 1997); see also *Am. Trucking Ass’n, Inc. v. E.P.A.*, 283 F.3d 355 (D.C. Cir. 2002), *modifying* 175 F.3d 1027 (D.C. Cir. 1999).

certainty as to when and whether highway funds upon which they have come to rely may be placed at risk.

C. Coercion

The most important doctrinal development in *NFIB* may be the focus on the amount of money at stake. Highway funds are raised from a dedicated revenue source in gasoline taxes and placed in the Highway Trust Fund.²⁰² Transportation spending is a major component of most states' budgets, and federal grants are typically a major share of state transportation expenditures.²⁰³ These moneys are explicitly earmarked for transportation projects.²⁰⁴ Conditioning the receipt of such funds on compliance with myriad federal environmental requirements seems to strain the *Dole* test, particularly when viewed against the background of the Court's broader federalism jurisprudence.

Dole involved a modest loss of highway funds, only five percent. Yet under the CAA, virtually all highway funds are at risk, except for those designated for special purposes.²⁰⁵ In this

²⁰² For a brief overview of the history and financing of the Highway Trust Fund, see Salvatore Massa, *Surface Freight Transportation: Accounting for Subsidies in a "Free Market"*, 4 N.Y.U.J. LEGIS. & PUB. POL'Y 285, 318-19 (2000-2001).

²⁰³ See *infra* notes ___ and accompanying text. See also Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147, 160 (2001) (claiming federal funds may account for as much as 95 percent of a state's transportation budget).

²⁰⁴ Massa, *supra* note ___, at 318. Some argue that the "trust fund" system within the federal budget is simply an accounting gimmick, and that there is not, in fact, a separate "fund" of highway monies. See, e.g., Thomas G. Donlan, *Selling America Short*, BARRON'S, Aug. 10, 1998 (suggesting federal "trust funds" are "budgetary gimmicks"). Whether this is true when the issue is deficit reduction, a strong argument can be made that the federal government has a moral, if not legal, obligation to expend money from the trust fund for road purposes and nothing else, as this is the express basis upon which the relevant monies are raised.

²⁰⁵ 42 U.S.C. § 7508 (b)(1) (2000). The EPA may not cut off highway funds for projects necessary to "resolve a demonstrated safety problem," mass transit, car pooling programs, construction of high-occupancy vehicle (HOV) lanes, "programs to limit or restrict vehicle use in downtown areas," and other programs that will "improve air

respect, the CAA creates a situation more like *Skinner* or *Riley* than *Dole*. Thus, even if the CAA’s sanctions are not facially suspect, the imposition of sanctions could nonetheless cross the line from inducement to coercion if enough unrelated funds were at stake.²⁰⁶ Federal highway funding does not rise to the level of federal Medicaid funding, but it is far more significant than most programs to have survived a spending power-based challenge. For some states, particularly those with smaller populations and extensive interstates, federal highway funding actually approaches the funding levels seen in Medicaid.

As Professor Bagenstos reads *NFIB*, the Supreme Court has adopted an “anti-leveraging principle” for assessing the constitutionality of federal spending power statutes. That principle, as noted above, “provides that when Congress takes an entrenched federal program that provides large sums to states and tells states they can continue to participate in that program only if they *also* agree to participate in a separate and independent program, the condition is unconstitutionally coercive.”²⁰⁷ Of particular concern and most vulnerable to litigation are statutes that impose “cross-over conditions.”²⁰⁸ As both Professor Bagenstos and Professor Ryan²⁰⁹ have suggested, the Clean Air Act sanctions are cross-over conditions that “threaten to ‘withdraw future funds provided under some specific preexisting grant program’ if a state does

quality and would not encourage single occupancy vehicle capacity.” 42 U.S.C. § 7508 (b)(1)(B) (2000). In some jurisdictions, exempt fund will be a substantial portion of the available highway funding. *See* Baake, *infra* note ____.

²⁰⁶ According to Stewart, “such a condition, accompanying funds which the state cannot afford to forgo, intensifies federal interference with local mechanisms of political accountability by compelling states to enforce against their constituencies restrictions the constituencies oppose.” Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE LJ. 1196, 1255 (1977).

²⁰⁷ Bagenstos, *supra* note ____, at 865.

²⁰⁸ Bagenstos, *supra* note ____, at 906.

²⁰⁹ Ryan, *supra* note ____, at 1049 (“Because the CAA conditions the receipt of federal highway funds on a state’s performance of CAA duties that are only indirectly related to those highway funds, it comes closer than any other environmental law to the vulnerable crossover condition at the heart of the *Sebelius* doctrine.”).

not ‘enact some new federally mandated regulation.’”²¹⁰ The federal highway program is a large, entrenched, preexisting program on which states heavily rely, and, as Professor Bagenstos acknowledges:

Insofar as they address stationary sources of pollution, the CAA’s requirements would appear . . . to be separate and independent from the highway-grant program. Those requirements do not govern how states should construct and maintain highways. Nor do they govern the processes by which states should choose *which* highways to construct and maintain. And they do not even govern the *use* of the highways constructed or maintained with federal funds.²¹¹

For Professor Bagenstos, this marks the beginning of the coercion analysis. Courts would then need to determine “whether the threatened cutoff of funds leaves states ‘with a “prerogative” to reject Congress’s desired policy, “not merely in theory but in fact.””²¹² This second analytical step looks to the amount of federal funds threatened or at stake and, as Bagenstos acknowledges, “it is conceptually difficult to identify a point at which the amount of federal funds at stake is so great that a state has no realistic option to refuse.”²¹³ In *NFIB*, Chief Justice Roberts also declined to “identify a point” or draw that line, stating instead that “[i]t is enough for today that wherever that line may be, this statute is surely beyond it.”²¹⁴ Applying the anti-leveraging principle of *NFIB* to the Clean Air Act sanctions, Professor Bagenstos distinguished the substantial but comparatively smaller highway grants from the larger Medicaid

²¹⁰ Bagenstos, *supra* note ___, at 916-17.

²¹¹ Bagenstos, *supra* note ___, at 918-19.

²¹² Bagenstos, *supra* note ___, at 919; *see also* Joondeph, *supra* note ___, at 834.

²¹³ Bagenstos, *supra* note ___, at 919.

²¹⁴ *NFIB*, 132 S.Ct. at 2606.

funds and surmised that perhaps “[t]he threat to withhold federal highway funds may well trigger the Chief Justice’s principle that sometimes sovereign states ‘have to act like it.’”²¹⁵

Nevertheless, he recognized that legal challenges to the Clean Air Act may raise serious questions under *NFIB* as it remains “unclear at exactly what point a state should be understood to lack a real choice to refuse a federal grant,” making it “impossible to predict precisely how courts will apply *NFIB* to the CAA.”²¹⁶

To date, only the D.C. Circuit has considered this question and applied *NFIB* and the “coerciveness inquiry” to the Clean Air Act. The decision in *Mississippi v. EPA* is significant for several reasons: first, because the court upheld the CAA sanctions after conducting a post-*NFIB* “coerciveness inquiry”; and second, because the court questioned the need for such an inquiry after misreading the Clean Air Act and misapplying the *Dole* factors.

The petitioners in *Mississippi* argued that “the Clean Air Act’s sanctions for noncompliant states impose such a steep price that State officials effectively have no choice but to comply—in contravention of the Supreme Court’s decision in [*NFIB*].”²¹⁷ Framed as purely a question of federal coercion following *NFIB*, the D.C. Circuit’s ruling focused almost exclusively on the disparate amounts of money at issue in *NFIB* and the highway funds threatened by the CAA.

The *Mississippi* court assumed for the sake of its “coercion analysis” that “like the one at issue in *Dole*,” the CAA sanctions are “not a restriction on how the highway funds are to be used, but rather an incentive to encourage States to take action in a related policy area.”²¹⁸ Thus,

²¹⁵ Bagenstos, *supra* note ___, at 920.

²¹⁶ Bagenstos, *supra* note ___, at 920.

²¹⁷ *Miss. Com'n on Env'tl. Quality v. E.P.A.*, 790 F.3d 138, 175 (D.C.Cir.2015).

²¹⁸ *Mississippi*, 790 F.3d at 177.

the court did not engage in a robust consideration of whether the Clean Air Act was leveraging participation in an entrenched program to persuade unwilling states to comply with separate regulatory requirements. Without such consideration, the court gave two reasons for finding the Clean Air Act’s sanctions “not nearly as coercive as those in the ACA.”²¹⁹ First, the court found that “unlike the situation in *NFIB* and like that in *Dole*, a noncompliant State does not risk losing *all* federal funding for an existing program,” only funding for highway projects in the nonattainment areas.²²⁰ Second, the court opined, even if the EPA withheld all \$3 billion of Texas’s highway funds for 2013, “it would still have amounted to less than 4 per cent of the State’s 2013 budget.”²²¹ Such a relatively small amount, according to the court, “does not even approach the ‘over 10 percent of a State’s overall budget’ at issue in *NFIB*.”²²² The *Mississippi* court concluded that it was “clear that Texas does not risk losing anywhere near the percentage of its federal funding—either for the program at issue or of its overall budget—that the Court found fatal in *NFIB*.”²²³

Such a perfunctory “coercion” analysis suggests that the court did not appreciate or take seriously *NFIB*’s anti-leveraging principle. Instead, the court simply compared the federal dollars threatened by the two statutes and conclude that the highway funds were not significant enough to constitute “coercion.”

²¹⁹ *Mississippi*, 790 F.3d at 177.

²²⁰ *Mississippi*, 790 F.3d at 177.

²²¹ *Mississippi*, 790 F.3d at 178.

²²² *Mississippi*, 790 F.3d at 178.

²²³ *Mississippi*, 790 F.3d at 178.

More troubling, however, are the *Mississippi* court’s treatment of *Dole* and misreading of the Clean Air Act. The *per curiam* opinion did not formally apply the *Dole* factors²²⁴ and questioned, albeit in dicta, whether *Dole* and the coerciveness inquiry was even necessary. The court understood the CAA conditions to “redirect the federal highway funds of non-complying states to programs of the Congress’ choosing, including those that ‘would improve air quality and would not encourage single occupancy vehicle capacity,’” whereas, in *Dole*, the spending condition did not restrict how the federal highway funds were to be used.²²⁵ The court appears to suggest that, unlike in *Dole*, the CAA has merely restricted—through “redirection”—how highway funds should be used.²²⁶

For support, the court cites 42 U.S.C. § 7509(b)(1)(B)(viii) of the Clean Air Act. These sanctions, however, are not as the court describes. The CAA’s broad highway funds sanctions allow the EPA to “impose a prohibition . . . of any projects or the awarding by the Secretary [of the Transportation] of any grants, under title 23 other than projects or grants for safety”²²⁷ The *Mississippi* court cites a list of possible *exceptions* to the general prohibition on Title 23 highway funds. These exceptions do not “redirect” highway funding as the court suggests, rather they allow the Transportation Secretary to continue funding these specific excepted highway programs notwithstanding the EPA’s sanctions under the Clean Air Act. Thus, the circuit court’s

²²⁴ The court acknowledged as much, observing in a footnote that the petitioners “do not argue that the sanctions provision fails to comply with any other constitutional requirements governing conditions on federal grants to the States. See *South Dakota v. Dole*, 403 U.S. 203, 207-08.” *Mississippi*, 790 F.3d at 176 n. 21.

²²⁵ *Mississippi*, 790 F.3d at 179 (citing 42 U.S.C. § 7509(b)(1)(B)(viii)).

²²⁶ This was not the position that the court took, however, when it began its spending power analysis earlier in the decision. Before questioning the need for a “coerciveness inquiry,” the court had already reached the opposite conclusion, stating: “In the case now before us, the Congress has conditioned some federal highway funding on Texas’s adoption of an adequate implementation plan. This condition, like the one at issue in *Dole*, is—at least arguably—not a restriction on how the highway funds are to be used, but rather an incentive to encourage States to take action in a related policy area.” *Mississippi*, 790 F.3d at 177 (emphasis added).

²²⁷ 42 U.S.C. § 7509(A).

first attempt to distinguish the CAA highway sanctions from *Dole* relies on a misreading of the sanctions.

The *Mississippi* court’s second attempt to distinguish *Dole* and excuse any need for a coerciveness inquiry focused on the fact that the “new” spending conditions imposed in *Dole* and *NFIB* surprised the “participating States with post-acceptance or retroactive conditions.”²²⁸ The circuit court distinguished *Dole* and *NFIB* by finding “[n]either the Clean Air Act’s requirement to submit an implementation plan, nor its highway funds sanction, is a condition that has been newly imposed on the States.”²²⁹ Because the highway funds sanction came as no surprise to Texas, the court reasoned, it was not clear that “the coerciveness inquiry employed in *Dole* and *NFIB* was even triggered by the Clean Air Act provisions at issue here.”²³⁰ This reasoning misconstrues *Dole* and *NFIB*.

A threshold question in *Dole* and *NFIB* is whether Congress has exceeded its spending power by imposing conditions that “threat[en] to terminate other significant independent grants.” Thus, as we have discussed, one of the open issues in *NFIB* was whether the PPACA’s “new” Medicaid program was actually new, and sufficiently distinct from “old” Medicaid so as to trigger a coerciveness inquiry. But whether the States in *Dole*, *NFIB*, or *Mississippi* were “surprised” or caught off guard by a grant condition does not by itself determine whether Congress has exceeded its constitutional conditional spending authority. In cases in which the conditions “threat[en] to terminate other significant independent grants,” the *Dole* test is to be

²²⁸ *Mississippi*, 790 F.3d at 179 (quoting *NFIB*, at 2606).

²²⁹ *Mississippi*, 790 F.3d at 179.

²³⁰ *Mississippi*, 790 F.3d at 179.

applied, and a coerciveness inquiry is then conducted when the spending conditions violate even one of the four elements of that test.

In *Mississippi*, the D.C. Circuit had already concluded that that the CAA conditions were “an incentive to encourage States to take action in a related policy area”—a conclusion that should have triggered a *Dole* analysis. That is, having determined that the threat to withhold federal highway funds was designed to encourage states to comply with an environmental program, the court then should have questioned, as in *Dole*, whether the spending conditions were (1) in pursuit of the general welfare; (2) stated by Congress unambiguously so that the States could “exercise their choice knowingly, cognizant of the consequences of their participation”; (3) related to the federal interest in particular national projects; or (4) otherwise prohibited by constitutional provisions. Instead, the *Mississippi* court’s dicta suggests that because Texas had been a longtime recipient of the federal highway funds, and because those funds had long been subject to the CAA sanctions, those sanctions were not “new” or “surprising” to Texas and were therefore unlikely to require a coerciveness inquiry.

After *NFIB*, many predicted that legal challenges to a variety of federal environmental statutes would ensue. The *Mississippi* decision is not likely to be the final word on the constitutionality of the Clean Air Act sanctions or even much of a blueprint for how lower courts will apply *NFIB* or employ the “anti-leveraging principle.” Indeed, federal courts should avoid *Mississippi*’s cursory analysis and misreading of the Clean Air Act, and consider more carefully whether the CAA sanctions “threaten to terminate other significant independent grants.”²³¹

In our view, given that the Court has so far declined to “fix a line” at which pressure becomes coercion, the amount of money at issue should not be the dispositive factor, but will

²³¹ *NFIB*, 132 S. Ct. at 2604.

likely affect the rigor with which courts apply the *Dole* test. That is, if the amount of money threatened by a given statute is small, courts may not look too carefully at the “notice” or “relatedness” prongs, but will simply expect the states to act like independent sovereigns. As the amount in jeopardy increases, however, the Court has shown a willingness to explore whether the conditions are being applied retroactively, surprising the states, or really are related to the purpose of the funding. This would explain why the Court found a meaningful distinction between old and new Medicaid in *NFIB*, but might have been less concerned about the relationship between drinking ages and highway funding in *Dole*. As the amount of money and related reliance interests increase, so too does the need to police the boundary between permissible encouragement and impermissible coercion.

V. COERCION BEYOND CONDITIONAL SPENDING

NFIB reinforced, and arguably expanded, the limitations on Congress’s use of conditional spending to induce state participation in federal programs. As discussed above, even a rather narrow reading of the *NFIB* holding raises serious questions about the constitutionality of at least one extant federal environmental program, the imposition of highway fund sanctions under Section 179 of the Clean Air Act. If one were to adopt a broader reading of *NFIB*, the consequences would be broader as well.²³²

²³² For examples of broader readings of *NFIB*’s conditional spending holding, see Einer Elhauge, *Contrived Threats versus Uncontrived Warnings: A general Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 CHICAGO L.REV. 503 (2016). For an argument that *NFIB* should have adopted a broader anti-coercion principle, see Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283 (2013). Narrower readings, such as those applied above, have been characterized as “lawyerly . . . gutting” of *NFIB*. See Roderick Hills, *Fair-Weather*

NFIB itself concerned the use of conditional spending to induce state cooperation. An obvious question, however, is whether the holding should be so limited. If the underlying principle embodied in *NFIB*'s Medicaid holding is that the federal government should not be able to coerce states under the guise of offering mere inducements, it is not entirely clear why this principle should be limited to fiscal inducements. Other levers of influence, such as conditional preemption, should create no less risk of coercive influence, particularly if, as is the case with at least one CAA provision, a state's failure to cooperate results in the imposition of more stringent regulatory requirements. On the other hand, the Court seemed to consider, and reject, such arguments in *New York v. United States*, in the process of upholding conditional regulations that threatened to impose highly disruptive conditions on private industry in non-cooperating states.²³³

Since *NFIB*, litigants have already raised challenges to other aspects of the Clean Air Act, alleging that the choices presented to state governments have been no less coercive than the threat of holding desired and relied-upon federal funds. In one recent case, for instance, Texas argued (unsuccessfully) that the threat of a federal implementation plan was coercive.²³⁴ As this is being written, over two-dozen states argue that the Obama Administration's ambitious Clean Power Plan (CPP) is unconstitutionally coercive in that it leaves states no ability to opt out of participation in the control of greenhouse gases from the utility sector. In what follows, we consider the CAA's offset sanction and the coercion challenges to the CPP.

Friends of Federalism (and Nationalism) in King v. Burwell? The dilemma of supporting principles that hurt one's cause, PRAWFSBLAWG, Mar. 7, 2015, <http://prawfsblawg.blogs.com/prawfsblawg/2015/03/fair-weather-friends-of-federalism-and-nationalism-in-king-v-burwell.html>.

²³³ See *New York*, 505 U.S. at 174 (“The affected States are not compelled by Congress to regulate, because any burden caused by a State’s refusal to regulate will fall on [private citizens], rather than on the State as a sovereign.”).

²³⁴ *Texas v. E.P.A.*, 726 F.3d 180, 197 (D.C.Cir. 2013).

A. Offsets

The failure to submit or maintain an adequate SIP to achieve the NAAQS not only threatens the loss of highway funds. It can also trigger more stringent regulatory requirements for stationary sources in the relevant jurisdiction. Under the CAA, firms in non-attainment areas are required to make investments that reduce emissions of the relevant air pollutants to “offset” any emission increases resulting from the construction or modification of covered stationary sources. Where states fail to cooperate with the EPA by developing and implementing a SIP of their own, the offset requirements increase. Specifically, Section 179 provides that in applying the emission offset requirements to stationary sources subject to the relevant permitting requirements, “the ratio of emission reductions to increased emissions shall be at least 2 to 1,”²³⁵ instead of the default 1.15 to 1 ratio otherwise provided for in the CAA. Under existing EPA regulations, this offset requirement will typically be imposed before a state risks losing its highway funds.²³⁶

Offset provisions are generally used to ensure that additional economic development does not come at the expense of emissions control. By requiring firms to offset capital investments that may increase emissions with equivalent (or greater) emission reductions, such provisions allow firms to upgrade and expand their facilities, so long as they do so in a way that does not increase pollution. Offset provisions often require emission reductions greater than the anticipated emission increases so as to account for potential leakage and reinforce other emission controls that seek to reduce – rather than simply maintain – existing emission levels.

²³⁵ 42 U.S.C. § 7509.

²³⁶ *See* 40 CFR 52.31.

There is nothing particularly unusual or punitive about requiring firms to offset expected emission increases with equal or greater emission reductions, particularly where (as with nonattainment areas) the policy aim is to reduce existing pollution levels. Without such provisions, permitting firms to construct new facilities poses a risk of increasing pollution levels, particularly over time.²³⁷ It may also make sense to increase the severity of offset requirements in areas with worse air pollution, as is done in some CAA provisions, as greater offset requirements would align with greater emission reduction requirements. There does not appear to be any such rationale for increasing offset requirements in states that fail to cooperate with federal regulatory initiatives particularly where, as with the CAA, the federal government is prepared to step in and impose the necessary regulatory controls in noncooperating states. Thus the CAA’s offset sanction appears to be nothing more than a punishment – a “sanction” – imposed on recalcitrant states as a means of pressuring states to cooperate. For this reason, the offset provisions would appear to at least raise the possibility of unconstitutional coercion.

NFIB did not address the problem of threatening more severe regulatory burdens in states that refuse to cooperate with the implementation and execution of a federal regulatory program. Such a problem was arguably raised in another PPACA case, however. At oral argument in *King v. Burwell*, Justice Kennedy suggested it would be unconstitutional to impose greater regulatory burdens in states that refuse to implement a federal program. Specifically, Justice Kennedy suggested that the Court “wouldn’t allow” a law that, instead of withholding a portion of highway funding, threatened non-cooperating states with lower speed limits.²³⁸ This scenario is

²³⁷ All else equal, new and modified facilities may be expected to have longer useful lives than older facilities, so the simple replacement of an older facility with a new one may result in an increase in aggregate emissions over time.

²³⁸ *King v. Burwell* transcript. (“In South [Dakota] v. Dole where the matter of funding for the highway, suppose Congress said, and if you don’t build the highways, you have to go 35 miles an hour all over the State. We wouldn’t allow that.”). This hypothetical appears to have been inspired by an amicus brief focusing on federalism arguments in support of the federal government’s position in *King*. Brief of Jewish All. for Law & Soc. Action (JALSA) et al.

quite analogous to the CAA offset sanction (if a bit more severe).²³⁹ It did not become part of the holding in *King*, however, as the Court eschewed any reliance upon federalism related arguments in reaching its conclusion that the PPACA did not withhold tax credits for the purchase of health insurance in states that refused to establish their own health insurance exchanges.²⁴⁰

The Court may have avoided the federalism coercion argument in *King* because of its potential to disrupt other federal regulatory programs.²⁴¹ Indeed, the argument that imposing a differential regulatory burden in non-cooperating states runs headlong into *New York v. United States*. In the very case that established the current anti-commandeering doctrine, the Court said there was no problem with Congress using its regulatory authority to encourage state cooperation. Specifically, in *New York*, the Court held that Congress could offer states the following deal: Either implement federal policy (so as to ensure local disposal capacity for low-level radioactive waste), or producers of such waste (which include hospitals and medical research centers) will face more costly disposal options and eventually be deprived of any ability to dispose of their wastes. Given the volumes of such wastes produced in many industries, health care in particular, this was a particularly draconian condition, but one that the Court said was not

as Amici Curiae in Support of Respondents, *King v. Burwell*, 135 S.Ct. 2480 (2015) (No. 14-114), 2015 WL 350366.

²³⁹ The federal government has proposed lowering speed limits to achieve environmental regulatory goals. See 151 Cong. Rec. H8537-02, 151 Cong. Rec. H8537-02, H8541, 2005 WL 2397286 (“an official with the Fish & Wildlife Service proposed dramatically reducing highway speeds to accommodate protection of the Delhi Sands Flower-Loving Fly”); Dick Feagler, *CLONING THE KEY TO CALM IN FLITTING FLOWER FLY FUROR*, Clev. Plain Dealer (March 3, 1997), 1997 WLNR 6322757; Andy McCue, *The Press-Enterprise*, Riverside, Calif., (July 27, 2001), 2001 WLNR 7665403.

²⁴⁰ *King v. Burwell*, 135 S.Ct. 2480 (2015).

²⁴¹ See Jonathan H. Adler, *Could King v. Burwell Overturn Parts of New York v. United States?*, VOLOKH CONSPIRACY, Mar. 5, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/05/could-king-v-burwell-overturn-parts-of-new-york-v-united-states/>

constitutionally problematic because the consequences of state inaction would fall upon private actors, and not the state itself. As Justice O’Connor explained in her opinion for the Court:

The affected States are not compelled by Congress to regulate, because any burden caused by a State’s refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign. A State whose citizens do not wish it to attain the Act’s milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile.²⁴²

This language would seem to allow for the constitutionality of the CAA’s offset provisions. Although these provisions may seem punitive – and, as a consequence, somewhat coercive, they impose the additional burden on private citizens, and not upon the states themselves.

If Congress’s use of incentives poses a risk of coercion, there is no clear reason why courts should provide greater scrutiny in the context of conditional spending than in the context of conditional preemption. Either poses the potential of presenting states with an offer they cannot refuse – the proverbial “gun to the head.” If, in the conditional spending context, leveraging state reliance upon federal funds is suspect, then there are reasons to suspect equivalent leveraging in the context of conditional preemption. If withholding money from

²⁴² *New York v. United States.*, 505 U.S. 144, 174 (1992).

unrelated programs looks coercive, the express imposition of greater regulatory burdens in non-cooperating states may be as well.

B. The Clean Power Plan

NFIB-based coercion arguments feature prominently in attacks on the lawfulness of the EPA’s “Clean Power Plan” (CPP).²⁴³ The CPP is a set of regulations implemented under Section 111 of the CAA that authorizes the issuance of standards of performance for new and existing sources.²⁴⁴ The central piece of the CPP imposes emission reduction obligations on existing power plants — those that are in operation and spewing GHGs into the atmosphere. Under Section 111(d), the EPA identifies the “Best System of Emission Reduction” that has been “adequately demonstrated” for a given source category — this becomes the standard of performance that existing sources must meet. States are then expected to develop State Implementation Plans (SIPs) that will ensure sources within each state will meet the emission targets. The goal of the plan is to reduce power plant emissions by 32 percent (below 2005 levels) by 2030. This is significant because power plants are responsible for the lion’s share of

²⁴³ Laurence H. Tribe, *Tribe: Why EPA’s Climate Plan Is Unconstitutional*, Harv. L. Today (Mar. 20, 2015), <http://today.law.harvard.edu/why-epa-climate-plan-is-unconstitutional/>; House Committee on Energy and Commerce: Subcommittee on Energy and Power. “EPA’s Proposed Rule For Existing Power Plants: Legal and Cost Issues: Testimony of Laurence H. Tribe.” (March 17, 2015) <http://docs.house.gov/meetings/IF/IF03/20150317/103073/HHRG-114-IF03-Wstate-TribeL-20150317-U1.pdf>. (“EPA’s proposal puts a gun to every state’s head.” *Id.* at 26.); Laurence H. Tribe, *The Clean Power Plan Is Unconstitutional*, Wall St. J. (Dec. 22, 2014, 7:06 PM), <http://www.wsj.com/articles/laurence-tribe-the-epas-clean-power-plan-is-unconstitutional-1419293203>.; Laurence H. Tribe and Peabody Energy Corporation, Comment Letter on 79 Fed. Reg. 34830 (June 18, 2014), (Dec. 1, 2014) [http://www.masseygail.com/pdf/Tribe-Peabody_111\(d\)_Comments_\(filed\).pdf](http://www.masseygail.com/pdf/Tribe-Peabody_111(d)_Comments_(filed).pdf). (“The Proposed Rule invades state regulatory control in an unprecedented manner under the Clean Air Act and raises grave constitutional questions. It seeks to commandeer state agencies in violation of core structural principles of federalism and the Tenth Amendment.” *Id.* at 32).

²⁴⁴ 42 U.S.C. § 7411.

GHG emissions (approximately one-third). Under the CPP, states are supposed to begin making reductions in 2022 with an ultimate compliance date of 2030. This may seem like a long ways off, but given the nature of utility investments, it is generally recognized that utilities would have to begin making investments in compliance within the next year or so in order to meet the targets (which is one argument that industry and the challenging states stressed in their stay applications with the Court).

The CPP gives states substantial flexibility in how they decide to meet the required emission reductions. Among other things, the EPA hopes that states will rely to some degree on energy efficiency and conservation investments and emission trading to reduce the costs of compliance. Despite EPA's promised flexibility, some states have indicated that they do not plan to cooperate (much as many states refused to cooperate with the ACA and refused to create exchanges). Should states refuse to develop their own SIPs, however, the EPA has the authority to impose a Federal Implementation Plan (FIP) to achieve the same level of emission reductions. A FIP, however, is unlikely to be as flexible as a SIP could be.

The levels of emission reductions targeted by the CPP are based upon a set of "building blocks" identified by the EPA. Specifically, the EPA assumes that the required emission reductions may be achieved by 1) heat rate improvements at individual plants; 2) increased use of natural gas instead of coal for electricity generation, and 3) increased use of renewable energy. The EPA also hopes that states will use their SIPs to encourage energy conservation and increased efficiency as well, although the EPA could not impose such measures directly under a FIP. The ultimate level of emission reductions required under the CPP is greater than can be achieved by merely imposing emission controls on existing fossil-fuel-fired power plants, and will require regulated sources to achieve emission reductions by displacing existing fossil fuel

electricity production with natural gas, renewable energy, energy conservation, or some combination thereof.

Twenty-seven states filed suit challenging the CPP in federal court.²⁴⁵ Among other things, these states (and their industry allies) argue that the CPP is coercive because it effectively forces states to participate in the federal government’s regulatory regime and offers states no ability to withhold their cooperation. This is because, should a state refuse to enact a SIP to implement the CPP, the substitute FIP would still require state cooperation in order for it to be effective without compromising the reliability of the electricity supply.²⁴⁶ If, for instance, sources in a given state seek to comply with a FIP by reducing reliance upon coal and increasing natural gas capacity, this could require the approval and cooperation of state regulators.

As with the offset provisions, the arguments against the CPP also seem to be precluded by the Court’s holding in *New York* – even more so. In the offset context, non-cooperating states are explicitly subject to more stringent regulatory burdens – the precise scenario suggested by Justice Kennedy in the *King* argument. With the CPP, however, it is not clear that the regulatory burden faced by electricity producers (and, by extension, state citizens) is any more severe in non-cooperating states than in those that adopt SIPs of their own. In either case, the CPP imposes an extensive range of costly emission reduction requirements with the aim of restructuring electricity markets.

²⁴⁵ An additional eighteen states support the CPP. See Robin Bravender, *44 States Take Sides in Expanding Legal Brawl*, GREENWIRE, Nov. 4, 2015.

²⁴⁶ According to the petitioners, “Because no regulated unit can achieve the Rule’s uniform performance rates, States will be required even under federal plans to facilitate the reordering of each State’s mix of electricity generation in order to “ensure that electric system reliability will be maintained” as coal generation is forced to retire and alternative generation must be constructed to take its place. (quoting 80 Fed. Reg. 64981). Joint Brief for the Petitioner, State of West Virginia, et al. v. E.P.A., et al., 15-1363 (No. 1599889). at 20, http://www.eenews.net/assets/2016/02/22/document_ew_02.pdf.

The stakes involved in the CPP may be higher than in other conditional preemption contexts, but it is not clear why the principle is any different. Further, unlike with the offset provisions, the EPA is not imposing greater regulatory burdens on non-cooperating states. The ultimate degree of emission reductions required is the same under either a SIP or a FIP. If the EPA’s CPP regulations are authorized by the CAA,²⁴⁷ then the choice presented to states is equivalent to that offered in most conditional preemption contexts: Adopt regulations that achieve the federally mandated goals or be subject to duly authorized federal regulations that will achieve this goal.

CONCLUSION

NFIB v. Sebelius may have saved the individual mandate and the rest of the PPACA, but it may have imperiled portions of the CAA. The seven-justice majority in support of curtailing Congress’s ability to use the threat of withholding substantial federal monies in order to induce state cooperation with federal programs appears to undermine the CAA’s sanctions regime. If any other provision of federal law is coercive under the *NFIB* Court’s rationale, it is likely Section 179 of the CAA.

At the same time, *NFIB* has reinvigorated debate over whether other methods of inducement also create unconstitutional coercion. While *NFIB* itself was confined to the question of conditional spending, the Court’s willingness to find coercion within the PPACA’s choice

²⁴⁷ The majority of the arguments against the lawfulness of the CPP concern whether the EPA has the authority to impose such regulations on existing power plants under Section 111(d) of the Clean Air Act. In addition, there is an argument that the potential disruption of state-level electricity markets and displacement of state regulatory authority is a factor that courts should consider when interpreting Section 111(d). Such arguments depend upon the canon of construction that instructs courts to interpret statutes so as not to interfere with traditional areas of state authority and is not dependent upon a conclusion that the CPP itself would constitute unconstitutional coercion if constitutional.

architecture opens the door to coercion arguments in other contexts, and could facilitate challenges to the CAA’s offset provisions and perhaps even to the Clean Power Plan as well.

While the arguments against these provisions, and the CPP in particular, seem to require a significant extension of the coercion arguments accepted in *NFIB*, were it not for this decision, these arguments would have no purchase at all.

Although the Clean Air Act’s highway fund sanctions may be suspect after *NFIB*, conditional spending under other federal environmental statutes appear to be far less vulnerable. At present, most other federal environmental statutes simply impose conditions on how funding for state-level environmental programs is to be spent or do no more than threaten conditional preemption.²⁴⁸ Nonetheless, the Court’s willingness to accept a coercion-based argument against the use of conditional spending creates opportunities to alter the entire landscape of this doctrine. In the meantime, there is reason to believe that, under *NFIB*, at least part of the CAA is unconstitutional.

²⁴⁸ Ryan, *supra* note ____, at 1039–49.