

CLEAN AIR POST-HEALTHCARE: THE FEDERALISM LIMITS OF
THE SPENDING POWER AND THE FUTURE OF
ENVIRONMENTAL REGULATION

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MODERN environmental regulation was born in the 1970s, at a time when federalism limits to congressional power were essentially an afterthought. Since then, U.S. constitutional law has undergone a federalism revival as Justices of the Rehnquist and Roberts Courts have sought to articulate principled limits to the federal power that ballooned during and after the New Deal. Because of federal environmental law's expansive scope,¹ many commentators have predicted that this growing revolution could soon change the face of federal environmental regulation.²

Emblematic of federalism's shifting landscape is the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*,³ the politically charged controversy challenging the constitutionality of President Barack Obama's healthcare reform package, the Patient Protection and Affordable Care Act ("PPACA"). While the majority of headlines about the case reported the Court's dramatic split over whether the controversial "individual mandate" provision was permissible under the Commerce Clause,⁴ the less discussed yet perhaps more significant

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¹ Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 *Iowa L. Rev.* 377, 379–80 (2005) (stating that environmental regulation is "arguably . . . the most ambitious and far-reaching assertion of federal regulatory authority") [hereinafter Adler, *Judicial Federalism*].

² See, e.g., *id.* at 434; John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 *Md. L. Rev.* 1183, 1185 (1995).

³ 132 S. Ct. 2566 (2012).

⁴ U.S. Const. art. I, § 8, cl. 3.

holding concerned the constitutionality of the “Medicaid expansion” and the scope of the Spending Clause.⁵ This new gloss on the Spending Clause could “seriously threaten the constitutionality of a broad swath of federal spending legislation,”⁶ including environmental laws.⁷

At the top of the endangered statutes list is the Clean Air Act (“CAA”).⁸ The CAA, like many environmental statutes, employs a “co-operative federalism” structure that requires states to take responsibility for administering a federal regulatory program. As “Congress’s most aggressive effort to induce state regulation through the use of conditional spending,”⁹ the CAA is considered the most vulnerable environmental statute—and perhaps the most vulnerable statute *period*—to a federalism challenge post-*Sebelius*.¹⁰ Just as the PPACA conditioned the receipt of existing Medicaid funds on adopting an expanded Medicaid program, the CAA conditions the receipt of some federal highway funds on the implementation of an air pollution control program tightly managed by the Federal Environmental Protection Agency (“EPA”).¹¹ This “leveraging” of funds from one program to secure compliance for another was a major factor in the *Sebelius* majority’s conclusion that the PPACA’s Medicaid expansion was unconstitutional. And although federal highway funds make up a much smaller portion of state budgets than does Medicaid assistance, which might indicate less potential for impermissi-

⁵ U.S. Const. art. I, § 8, cl. 1.

⁶ Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 *Geo. L.J.* 861, 864 (2013) [hereinafter Bagenstos, *Anti-Leveraging*].

⁷ *Id.*; see also Jonathan Adler, *Could the Health Care Decision Hobble the Clean Air Act?*, Percolator, <http://perc.org/blog/could-health-care-decision-hobble-clean-air-act> (last visited Dec. 3, 2013) [hereinafter Adler, Percolator]; 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>.

⁸ See Bagenstos, *Anti-Leveraging*, *supra* note 6, at 865; Adler, Percolator, *supra* note 7; 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>. But see Zasloff, *supra* note 7 (questioning the analogy between Medicaid and the CAA).

⁹ Adler, *Judicial Federalism*, *supra* note 1, at 447.

¹⁰ *Id.*; cf. Michael R. Barr, *Introduction to the Clean Air Act: History, Perspective, and Direction for the Future*, in *The Clean Air Act Handbook* 1, 2 (Julie R. Domike & Alec C. Zacaroli eds., 3d ed. 2011) (“The CAA is a showcase for federalism in action as states, EPA, courts, and other players at all levels of government interact.”).

¹¹ Adler, Percolator, *supra* note 7.

ble “coercion,” federal funds do make up a large proportion of states’ transportation budgets.¹²

EPA’s recent greenhouse gas (“GHG”) rulemakings are a prime example of how the CAA may be vulnerable to a Spending Clause challenge. Chief Justice Roberts’s majority opinion in *Sebelius* pictured conditional spending as a contract with states, suggesting that Congress exceeds the scope of its Spending Clause power when the terms of that contract—of how states participate in the federal program—change drastically in contravention of states’ reasonable expectations.¹³ Although the requirements of the CAA are always in flux as EPA crafts national air pollution control policy to conform to new science and changing environmental priorities, the GHG rulemakings represent the largest non-statutory change in the Act’s scope in its forty-year history.¹⁴

This Note will explore the implications of the new Spending Clause jurisprudence for the CAA and how the doctrinal trajectory signaled by the *Sebelius* decision can undermine both the goals of federal environmental policy and those of our system of federalism itself. Many scholars have already offered assessments of the constitutionality of the CAA after *Sebelius*, and most have concluded that the Act will stand.¹⁵ While

¹² See Adler, Percolator, *supra* note 7; *infra* Section III.B.

¹³ Nat’l Fed’n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566, 2602 (2012) (“We have repeatedly characterized . . . Spending Clause legislation as ‘much in the nature of a *contract*.’” (quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002))).

¹⁴ Adler, Percolator, *supra* note 7 (“[T]he recent inclusion of greenhouse gases as pollutants subject to regulation under the Act has radically altered states’ obligations, such that states will now have to do many things they could not have anticipated when the Clean Air Act was last revised in 1990.”). The scope of EPA’s GHG rulemaking under the CAA’s “Prevention of Significant Deterioration” (“PSD”) and Title V stationary source permitting was limited by the Supreme Court’s decision in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), but the Court upheld EPA’s assertion of authority to regulate sources accounting for approximately eighty-three percent of GHGs nationwide, see *id.* at 2438–39, and EPA has recently announced proposed rules to regulate GHGs from electricity generating units (“EGUs”) under § 111(d) of the Act. 79 Fed. Reg. 34,830 (June 18, 2014).

¹⁵ See, e.g., 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); Bagenstos, *Anti-Leveraging*, *supra* note 6, at 864; Erin Ryan, *The Spending Power and Environmental Law After Sebelius*, 85 *U. Colo. L. Rev.* 1003, 1003–04 (2014) [hereinafter Ryan, *The Spending Power*]; Georgina Jones Suzuki, *Note, Clearing the Air Following National Federation of Independent Business v. Sebelius*, 93 *B.U. L. Rev.* 2131, 2132 (2013); Erin Ryan, *Environmental Law After Sebelius: Will the Court’s New Spending Power Limits Affect Environmental State-Federal Partnerships?*, Issue Brief (Am. Constitutional Soc’y, Washington D.C.) Oct. 2013, at 15–18, available at http://www.acslaw.org/sites/default/files/Ryan_After-Sebelius.pdf [hereinafter Ryan, *Environmental Law After Sebelius*].

this Note will concur with this conclusion, I hope to offer a more detailed look into the operation and effect of the highway funding sanction in Section 179 of the Act and apply *Sebelius* in the context of EPA's controversial GHG rulemaking. Most importantly, this Note will point out the danger of injecting a stronger brand of Tenth Amendment federalism into the Court's Spending Clause jurisprudence and will discuss how *Sebelius* might signal a dangerous trajectory for environmental policy and cooperative federalism regulatory schemes in general.

The argument will proceed in four parts. Part I will summarize the structure of the CAA and the importance of cooperative federalism within that structure. Part II will then dissect the Court's Spending Clause precedents in *South Dakota v. Dole*¹⁶ and *Sebelius*, and will dig deeper into the concept of "coercion" from those cases. Part III will apply the new *Sebelius* test to the CAA and EPA's GHG rulemaking. Finally, Part IV will discuss why this episode in the Court's federalism revival may hurt environmental policymaking—and may actually marginalize rather than elevate the power of states in our federal system.

I

Today the Clean Air Act is the "core and driving force for all air pollution legislation in the United States," providing a massive regulatory structure that touches nearly every aspect of the U.S. economy.¹⁷ The CAA is also a dynamic example of federalism in action, the product of cooperation and conflict between state and federal legislators, administrators, and courts.¹⁸ Yet the significance of this triumph of both federal power and cooperation may be lost without a broader historical context: For most of the country's history, the concept of environmental regulation—and particularly *federal* environmental regulation—would have been completely foreign. While federal involvement in pollution control began in the 1940s,¹⁹ prior to 1970, the federal government's role consisted primarily of federal research directives and "unworkable procedures to referee and abate interstate pollution problems."²⁰

¹⁶ 483 U.S. 203 (1987).

¹⁷ Barr, *supra* note 10, at 8.

¹⁸ *Id.* at 2.

¹⁹ Nancy E. Marion, *Making Environmental Law: The Politics of Protecting the Earth* 9 (2011).

²⁰ Dwyer, *supra* note 2, at 1190–91; see also Marion, *supra* note 19, at 12–14 (describing the development of environmental law from the 1960s to the 1970s).

As public salience of the environment and human capacity to alter and harm it rose through the 1960s, the demand for federal involvement in environmental regulation grew.²¹ In 1970, the year of the first Earth Day, Congress passed the Clean Air Act (“CAA”), the first major substantive statute in a flood of environmental legislation that included the Clean Water Act in 1972 and the Endangered Species Act in 1973, among many others.²² In the CAA, Congress declared its intention “to protect and enhance the quality of the nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”²³

While the CAA represented considerable growth in federal regulatory power over air pollution, it, like many federal environmental statutes, “reserve[s] a substantial role for states . . . in the implementation and enforcement of federal standards.”²⁴ In this model, known as “cooperative federalism,”²⁵ the federal government establishes a regulatory framework setting a mandatory baseline of procedural or substantive rules. States are then encouraged, often through the offer of federal grants or simply the threat of federal preemption, to adopt and administer the federal program, but each state is usually given some flexibility to tailor the program to its particular needs. Participating states are usually subject to some degree of federal oversight, and the requirements of the federal program can be continually updated through administrative rulemaking or new legislation. In some cases, where a state chooses not to participate, the federal agency tasked with administration of the statute—EPA for the CAA—will administer a federal program for that state, preempting state regulation in that area.²⁶

This structure of “[s]hared responsibility and authority . . . lies at the heart of the [CAA].”²⁷ The core of the CAA, the National Ambient Air Quality Standards (“NAAQS”) program, exemplifies this cooperative structure. Under Sections 108 and 109 of the Act, EPA must identify certain “criteria” air pollutants, which include sulfur dioxide, nitrous ox-

²¹ Adler, *Judicial Federalism*, supra note 1, at 382.

²² See *id.* at 382–83.

²³ 42 U.S.C. § 7401(b)(1) (2012).

²⁴ Dwyer, supra note 2, at 1184.

²⁵ See *New York v. United States*, 505 U.S. 144, 145 (1992).

²⁶ Adler, *Judicial Federalism*, supra note 1, at 384.

²⁷ Barr, supra note 10, at 3.

ides, and particulate matter.²⁸ For each criteria pollutant, EPA must establish national air quality standards, known as NAAQS, at levels sufficient to protect public health and welfare.²⁹ States are then charged under Section 110 with creating “state implementation plans” (“SIPs”) that set out specific regulations for how each NAAQS will be met in the air quality control regions within their jurisdiction.³⁰

The SIP is also the vehicle for implementing many other aspects of the CAA at the state level. Besides meeting the NAAQS, SIPs must conform to various EPA standards for non-criteria pollutants,³¹ including, but not limited to, technology-based standards to reduce hazardous air pollutants (“HAPs”),³² and permitting programs for new stationary sources (the “New Source Review” and “Prevention of Significant Deterioration” programs) based on a geographic area’s NAAQS attainment status.³³ Thus, the success of federal air pollution control is dependent on states’ engagement: Congress and EPA establish national minimum air quality standards and guidelines to be implemented at the local level by states.

While states in theory have discretion to design their air quality programs, they are nonetheless substantially constrained in both the substantive and procedural details of their implementation plans. States are required, for instance, to allow public participation in the formulation of the SIP; to provide assurances that they have adequate personnel, funding, and authority to carry out the plan; and to analyze and monitor air quality data and provide that data to EPA.³⁴ If EPA deems a state’s plan inadequate for any reason, it may require that state to revise it. “In short, the states’ role, if they accept it, is subject to a great deal of federal specification, oversight, and approval.”³⁵

Where a state fails to meet federal demands, the CAA authorizes sanctions should EPA make one of four “findings”: (1) that the state

²⁸ 42 U.S.C. § 7409(a) (2012); National Ambient Air Quality Standards, EPA, <http://www.epa.gov/air/criteria.html> (last visited Nov. 9, 2014).

²⁹ §§ 7408, 7409.

³⁰ § 7410.

³¹ § 7410(a)(2)(F).

³² § 7412(I).

³³ §§ 7411, 7470, 7501–7503.

³⁴ § 7410(a)(2); see also Alec C. Zaccaroli, Meeting Ambient Air Standards: Development of the State Implementation Plans, *in* The Clean Air Act Handbook, *supra* note 10, at 47 (listing the basic elements required for SIPs under the CAA).

³⁵ Dwyer, *supra* note 2, at 1194.

failed to make a required submission or revision of an implementation plan; (2) that the state's plan is "incomplete" according to EPA criteria; (3) that EPA disapproves the state's plan; or (4) that the state is not actually implementing a requirement of a plan that has been approved.³⁶ If the state does not correct the deficiency that is the basis of EPA's finding within eighteen months, EPA must impose one of two mandatory sanctions.³⁷ First, EPA may, with the approval of the Secretary of Transportation, withhold federal highway funds for projects within "nonattainment area[s]"—specific geographic areas that have not met the national standards for one or more of the criteria pollutants.³⁸ Notwithstanding the sanction, the CAA provides that highway funds will remain available in these areas for certain types of highway projects, including those intended to address a "demonstrated safety problem," "construction or restriction of certain roads or lanes solely for the use of passenger buses or high occupancy vehicles," and other projects that presumably would have an ameliorative effect on air quality.³⁹ Second, EPA may increase the ratio of pollution offsets required in order for states to authorize the construction of new stationary facilities with the capacity to emit air pollutants in ozone nonattainment areas from the typical ratio of between 1.15:1 and 1.5:1 pollutant reduction to pollutant addition, to 2:1.⁴⁰ In other words, a new major stationary source would have to find a way to reduce pollution elsewhere within the nonattainment area in which it intends to operate by twice as many tons of emissions as the new source will create. After a state has been deficient for twenty-four months, EPA must apply both the highway and offset sanctions.⁴¹

Another "sanction" of sorts applies if a state chooses not to submit a SIP or submits a SIP that EPA deems inadequate: EPA must promulgate a federal implementation plan ("FIP") to replace or stand in for the deficient SIP within two years of such a finding.⁴² The FIP may cover all elements of the CAA regulatory program or just the discrete part for

³⁶ 42 U.S.C. § 7509(a); see also *Missouri v. United States*, 918 F. Supp. 1320 (E.D. Mo. 1996) (explaining when the CAA allows sanctions to be imposed against states).

³⁷ § 7509(a).

³⁸ § 7509(b)(1)(A).

³⁹ § 7509(b)(1)(A)–(B).

⁴⁰ § 7509(b)(2); Clean Air Act Requirements, EPA, http://www.epa.gov/dfe/pubs/pwb/tech_rep/fedregs/regsecta.htm (last visited Nov. 15, 2014).

⁴¹ § 7509(a).

⁴² § 7410(c).

which the state is in noncompliance. For instance, when EPA found seven states out of compliance with its “Prevention of Significant Deterioration” (“PSD”) permitting regulations for GHGs, it promulgated FIPs for those states solely addressed to the GHG element of that program.⁴³

The cooperative federalism structure of the CAA has many benefits from both a practical and policy perspective. Placing responsibility for implementation in the hands of states is widely believed to create a regulatory system that is more effective at responding to disparate local conditions in our geographically and economically diverse country.⁴⁴ The system also allows states to fill their role as laboratories of democracy when they retain the flexibility to adapt federal standards to local conditions. Practically speaking, state implementation is an administrative necessity; the federal government simply lacks the resources to implement a massively detailed regulatory program in each of the states.⁴⁵ Congressman Harley Orrin Staggers, the floor manager for the House’s version of the CAA bill in 1970, noted that if the federal government had sole implementation and enforcement responsibility for the CAA, “we would have about everybody on the payroll of the United States.”⁴⁶ Politically, state implementation may also dilute local opposition to what may be perceived as overbearing federal mandates. To that end, shifting the details of implementation to the states may be responsible for the very existence of the CAA, as a cooperative structure helps to “shift[] politically sensitive issues to state officials.”⁴⁷ Professor Douglas Arnold has advanced a theory that congressional proponents of legislation offering broad, diffuse benefits—what he terms legislation for the “general interest”—can overcome anticipated opposition by powerful, concentrated interests, such as particular geographic or industrial groups, through the manipulation of factors affecting public salience of the costs and benefits of that legislation.⁴⁸ Perhaps by shifting the details of regu-

⁴³ Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan, 75 Fed. Reg. 82,246, 82,247 (Dec. 30, 2010).

⁴⁴ See Adler, *Judicial Federalism*, *supra* note 1, at 386.

⁴⁵ *Id.* at 385–86; cf. Jim Wedeking, *Environmental Federalism*, in *Principles of Constitutional Environmental Law* 117, 120 (James R. May ed., 2011) (“EPA would find it nearly impossible to regulate environmental matters across all media in every state.”).

⁴⁶ Dwyer, *supra* note 2, at 1192 (quoting 116 Cong. Rec. 19,204 (1970) (comments of Rep. Staggers)).

⁴⁷ *Id.* (footnote omitted).

⁴⁸ See R. Douglas Arnold, *The Logic of Congressional Action* 3–16 (1990).

lation first to an agency—in this case, the EPA—and then to the states, advocates in Congress could keep their hands clean of the costly realities of implementation but retain the immediate political benefit of voting for the politically popular abstract concept of “clean air.” Whether or not cooperative federalism was responsible, it is amazing to consider that the CAA was passed by unanimous vote.

The CAA’s cooperative federalism structure is arguably imperative both to its political existence and its practical success. Yet, after *Sebelius*, that structure is what makes the Act vulnerable to attack under the new Spending Clause doctrine. The parts that follow discuss the Court’s precedents on the limits of Congress’s spending power, whether the CAA rests on shakier constitutional ground after *Sebelius*, and why these developments are negative for both clean air and federalism values.

II

Article I, Section 8 of the Constitution grants Congress the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”⁴⁹ It is widely accepted that Congress may generally use this power to encourage states to enact particular legislation or adopt a particular regulatory program by “attach[ing] conditions to the receipt of federal funds.”⁵⁰ Nevertheless, it is also generally recognized that Congress may not exercise that power to the point of “outright coercion.”⁵¹

The scope of congressional power under the Spending Clause is potentially massive. In one early case, *United States v. Butler*, the Court held that “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution”;⁵² in other words, Congress can in essence regulate through spending conditions in ways otherwise prohib-

⁴⁹ U.S. Const. art. I, § 8, cl. 1.

⁵⁰ *South Dakota v. Dole*, 483 U.S. 203, 206 (1987); see, e.g., *New York v. United States*, 505 U.S. 144, 166–67 (1992); *Oklahoma v. U.S. Civil Serv. Comm’n*, 330 U.S. 127, 144 (1947) (“The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.”).

⁵¹ *Virginia v. Browner*, 80 F.3d 869, 881 (4th Cir. 1996) (quoting *New York v. United States*, 505 U.S. at 166); see also, e.g., *Dole*, 483 U.S. at 211 (recognizing that “the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion” (internal quotation marks omitted)).

⁵² 297 U.S. 1, 66 (1936).

ited under its other enumerated powers. The Spending Clause also provides an avenue for Congress to achieve policy ends when, even though it *could* constitutionally achieve them through the exercise of direct power, it is more desirable for political or policy reasons to achieve them through state-by-state implementation.

Despite the proliferation of programs promulgated under the spending power, until *National Federation of Independent Business v. Sebelius*, no court had ever struck down a federal statute on Spending Clause grounds.⁵³ As the first case to do so, *Sebelius* marked an important shift from prior doctrine, with the Court reading a Tenth Amendment gloss onto the scope of the spending power that it had rejected in the past. The following sections will recount the prevailing doctrine before *Sebelius*, as set out in *South Dakota v. Dole*, and then turn to the test that Chief Justice Roberts, writing for a fractured majority,⁵⁴ set out in *Sebelius*. Finally, Section C will elaborate the slippery concept of coercion, the crucial limiting principle of both *Dole* and *Sebelius*.

A

The Court's seminal Spending Clause case, *South Dakota v. Dole*, concerned a statute directing the Secretary of Transportation to withhold five percent of federal highway funds from states in which persons under twenty-one years old could purchase or possess alcohol.⁵⁵ South Dakota permitted those nineteen or older to purchase some alcohol, and asserted that its power to establish the minimum drinking age within its jurisdiction was expressly protected by Section 2 of the Twenty-First Amendment.⁵⁶ Without ruling on the scope of the states' power under that amendment, the Supreme Court held that Congress acted constitutionally within its Spending Clause authority, even if it could not set a minimum drinking age directly, because "[i]ncident to [its Spending

⁵³ See, 132 S. Ct. at 2630 (Ginsburg, J., concurring in part and dissenting in part).

⁵⁴ Just two Justices, Breyer and Kagan, joined this part of Chief Justice Roberts's opinion. Four Justices, Scalia, Kennedy, Thomas, and Alito, issued a joint opinion dissenting from the majority holding on the individual mandate but also holding the Medicaid expansion unconstitutional on much broader grounds. See *id.* at 2656–68 (Scalia, J., concurring in part and dissenting in part). I will refer to this opinion as being from the "dissenting bloc," despite its concurrence with Chief Justice Roberts's judgment on the Commerce Clause and Medicaid expansion.

⁵⁵ 483 U.S. at 205, 211.

⁵⁶ *Id.* at 205.

Clause] power, Congress may attach conditions on the receipt of federal funds.”⁵⁷

The Court articulated the following limits on Congress’s power: First, “the exercise of the spending power must be in pursuit of the general welfare.”⁵⁸ Second, the conditions on the receipt of federal funds must be set out “unambiguously” so that states can be “cognizant of the consequences of their participation” in the federal scheme.⁵⁹ Third, the Court suggested that there must be a sufficient nexus between the purpose of the condition and the purpose of the underlying federal spending.⁶⁰ Finally, “other constitutional provisions may provide an independent bar to the conditional grant of federal funds.”⁶¹ Notably, this meant that Congress could not use the spending power to induce states to take actions that the Constitution independently barred the *state* from taking, such as a classification that would violate the Equal Protection Clause.⁶²

The most important contribution of *Dole*, however, was its articulation of a final limitation that “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”⁶³ Although the Court did not specify where that point lies, it implied that while the adoption of a federally encouraged program “remains the prerogative of the States not merely in theory but in fact,”⁶⁴ the condition is not coercive. Further, the fact that many or all states *did* adopt the law was not evidence of its co-

⁵⁷ Id. at 206.

⁵⁸ Id. at 207 (internal quotation marks omitted).

⁵⁹ Id. (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

⁶⁰ Id. Justice O’Connor dissented on the application of this limitation to the minimum drinking age condition. “In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.” Id. at 213–14 (O’Connor, J., dissenting).

⁶¹ Id. at 208.

⁶² Id. at 210.

⁶³ Id. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). The Court in *Steward Machine Co.* had gestured at this idea of coercion versus persuasion, stating:

It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line.

301 U.S. at 591.

⁶⁴ *Dole*, 483 U.S. at 211–12.

ercive nature.⁶⁵ The Court found it important that South Dakota would lose only a small amount of its federal highway funds (five percent) if it chose not to adopt the twenty-one-year-old drinking age, which the Court characterized as “relatively mild encouragement.”⁶⁶

It is important to reiterate that concerns about state sovereignty expressed in the Tenth Amendment did *not* constitute the sort of “independent constitutional bar” to an exercise of the spending power envisioned by the Court.⁶⁷ In support, the *Dole* Court recapitulated the holding in *Oklahoma v. U.S. Civil Service Commission*, which held that Congress could condition the receipt of federal funds on conformity with the Hatch Act, which regulated the political activities of state officials whose employment was financed by federal grants.⁶⁸ The Act did not violate Oklahoma’s sovereignty because the State could “adopt[] the ‘simple expedient’ of not yielding” to what it characterized as federal coercion.⁶⁹ In other words, the Court intimated no concern about the impact of exercises of the Spending Clause on federalism values. The measure of unconstitutionality was coercion alone, separate and apart from the boundaries of state sovereignty and power. This is a point from which the *Sebelius* Court would radically depart.

B

NFIB v. Sebelius arose from the political turmoil surrounding the 2010 Patient Protection and Affordable Care Act (“PPACA”),⁷⁰ colloquially known as “Obamacare.” In addition to mounting a Commerce Clause challenge to the “individual mandate,” twenty-six state plaintiffs challenged the Act’s “Medicaid expansion” as exceeding Congress’s power under the Spending Clause.⁷¹ The Medicaid expansion broadened

⁶⁵ Id. at 211 (“We cannot conclude . . . that a conditional grant of federal money . . . is unconstitutional simply by reason of its success in achieving the congressional objective.”).

⁶⁶ Id.

⁶⁷ Id. at 209–10; cf. *Butler*, 297 U.S. at 66 (holding that the taxing power’s limits “are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress”). Justice Brennan disagreed with this premise in his dissent. *Dole*, 483 U.S. at 212 (Brennan, J., dissenting) (arguing that Congress’s spending power was limited by the powers reserved to states under the Twenty-First Amendment).

⁶⁸ *Oklahoma v. U.S. Civil Serv. Comm’n*, 330 U.S. 127, 143–44 (1947).

⁶⁹ Id. (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923)).

⁷⁰ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the Internal Revenue Code and Title 42 of the United States Code).

⁷¹ *Sebelius*, 132 S. Ct. at 2580, 2582.

the scope of this low-income health insurance program, originally enacted in 1965 to provide federal funding to assist certain classes of poor and otherwise needy individuals.⁷² The expansion required states to provide Medicaid coverage for all adults under sixty-five with incomes up to 133% of the federal poverty line.⁷³ In exchange, the Act offered increased federal funding to cover the majority of the costs of the expansion. Further, if states refused the expansion, they would lose all federal Medicaid funding.⁷⁴ Overall, the federal share of all state Medicaid spending amounted to over \$233 billion in 2010 and federal Medicaid spending accounted for about ten percent of most states' budgets.⁷⁵

While it acknowledged Congress's power under the Spending Clause to make conditional grants to states that "encourage a State to regulate in a particular way,"⁷⁶ Chief Justice Roberts's controlling plurality opinion invalidating the expansion marked a dramatic departure from the *Dole* doctrine. *Dole* cast the limitations on Congress's spending power as being tied to the Spending Clause itself; the *Dole* limits describe the contours of Congress's affirmative powers. The *Sebelius* opinion recasts the limitations as arising *externally*, imposed by the contours of the states' sovereignty rights under the Tenth Amendment. The important question, for Chief Justice Roberts, was not how far Article I permits Congress's spending power to emanate, but the point at which that power must end because it bumps up against the states' sphere of power.⁷⁷

Where *Dole* disclaimed that the Tenth Amendment exercised any limitations on the spending power, the limits of federalism were the starting point in *Sebelius*. Articulating the limits of this power, the Chief wrote, "is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal

⁷² Id. at 2581.

⁷³ Id. at 2601 (citing 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2012)). By contrast, at the time the case was decided, there was "no mandatory coverage for most childless adults," and "[o]n average States cover[ed] only those unemployed parents who make less than 37 percent of the federal poverty level, and only those employed parents who make less than 63 percent of the poverty line." Id.

⁷⁴ Id. at 2582 (citing 42 U.S.C. § 1396c (2012)).

⁷⁵ Id. at 2581; Nat'l Ass'n of State Budget Officers, 2010 State Expenditure Report 47 (2011), available at http://www.nasbo.org/sites/default/files/2010%20State%20Expenditure%20Report_0.pdf.

⁷⁶ *Sebelius*, 132 S. Ct. at 2601–02 (internal quotation marks omitted).

⁷⁷ See, e.g., id. at 2602 ("[W]hen pressure turns into compulsion, the legislation runs contrary to our system of federalism." (citation omitted) (internal quotation marks omitted)).

system.”⁷⁸ Chief Justice Roberts explicitly related his coercion analysis under the Spending Clause to the Court’s anti-commandeering precedents, which hold that the federal government cannot compel a state or a state’s officers to administer a federal regulatory program.⁷⁹ “[T]he Constitution simply does not give Congress the authority to require the States to regulate,” he wrote. “That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.”⁸⁰

This federalism concern animated Chief Justice Roberts’s reinterpretation of the *Dole* coercion test. First, he asked whether the conditions attached to the receipt of federal monies serve simply to “preserve [Congress’s] control over the use of federal funds,” or whether the conditions are “a means of pressuring the States to accept policy changes.”⁸¹ To determine whether pressure, rather than mere conditions, exists, Chief Justice Roberts relied on a version of the “nexus” factor from *Dole*, which this Note will characterize as an “anti-leveraging” principle, a term borrowed and adapted from Professor Samuel R. Bagenstos.⁸² Where conditions imposed pursuant to some program *X* threaten other “significant independent grants” of an unrelated program *Y*, the conditions are leveraging program *Y* to ensure compliance with program *X*. As such, they are properly considered “a means of *pressuring* the States to accept policy changes.”⁸³

⁷⁸ *Id.*

⁷⁹ *Id.*; see *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992); see also Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 *Vand. L. Rev.* 1629, 1657 (2006) (“There does not seem to be much difference between conditional spending and commandeering in terms of regulatory control.”).

⁸⁰ *Sebelius*, 132 S. Ct. at 2602 (quoting *New York v. United States*, 505 U.S. at 178) (internal quotation marks omitted).

⁸¹ *Id.* at 2603–04.

⁸² Bagenstos, *Anti-Leveraging*, *supra* note 6, at 865. Professor Bagenstos uses “anti-leveraging” to stand for a unified principle: Where the Court finds that spending conditions (1) are “attached to large amounts of federal money” (“a too-big-to-refuse principle”), (2) represent a “change [in] the terms of participation in entrenched cooperative programs” (“a no-new-conditions principle”), and (3) “tie together separate programs into a package deal” (“a no-conditions-about-separate-programs principle”), then the conditions are unconstitutional. *Id.* at 861, 865. I repurpose the term because I think it illustrates well the concept that Congress cannot use monies tied to independent programs as “leverage” to pressure states to adopt a separate program.

⁸³ *Sebelius*, 132 S. Ct. at 2604 (emphasis added).

Once a court finds such leveraging, and thus “pressure,” it must then determine whether that pressure is coercive.⁸⁴ The Chief Justice found two factors particularly relevant to the existence of coercion: (1) the size of the financial inducement, and (2) the strength of the state’s reliance interest in the status quo allocation of funds and conditions.⁸⁵ In considering the first factor, Roberts noted that the threatened highway funds in *Dole* made up less than half of one percent of the state’s budget. By contrast, the federal money threatened by the Medicaid expansion amounted to over ten percent of an average state’s budget.⁸⁶ Rather than “relatively mild encouragement,” Roberts found that threatening such a large allotment of funds constituted “economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”⁸⁷

Roberts then considered the states’ reliance interest—in other words, the incongruity of the new condition with states’ reasonable expectations about what would be required of them to receive the grant. The Chief assumed that states were entitled to rely on the continued existence of Medicaid in substantially its current form. While the Medicaid statute contains provisions reserving “[t]he right to alter, amend, or repeal any provision”⁸⁸ of the statute, Justice Roberts characterized the Medicaid expansion as a “retroactive condition[]” that “accomplishes a shift in kind, not merely degree,” of states’ obligations.⁸⁹

Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.⁹⁰

Because states would not have anticipated a change of this nature and scope, Roberts reasoned, the conditions of the Medicaid expansion were disruptive of the states’ settled understanding of the terms of their in-

⁸⁴ Bagenstos, *Anti-Leveraging*, supra note 6, at 869 (“[T]he determination that Congress has threatened ‘to terminate . . . significant independent grants’ is the *trigger* for conducting a coercion analysis, not the *conclusion* of that analysis.” (footnote omitted)).

⁸⁵ *Sebelius*, 132 S. Ct. at 2604.

⁸⁶ *Id.* at 2605.

⁸⁷ *Id.* at 2604–05.

⁸⁸ 42 U.S.C. § 1304 (2012).

⁸⁹ *Sebelius*, 132 S. Ct. at 2605–06 (internal quotation marks omitted).

⁹⁰ *Id.* at 2606.

volvement in the program. Requiring states to adopt the expansion in order to continue in the Medicaid program at all constituted a “retroactive condition[]”⁹¹ that was impermissibly burdensome and coercive.

While the disruption of states’ expectations is clearly central to the new Spending Clause coercion test, the precise degree of disruption needed for lawful “pressure” to become unconstitutionally coercive remains unclear. Just as the *Dole* Court held only that the drinking-age law was clearly permissible, the *Sebelius* Court held only that “[i]t is enough for today that wherever that line [where persuasion gives way to coercion] may be, this statute is surely beyond it.”⁹² Some combination of leveraging, the size of the threatened grant, and the fact that the expansion was held to be outside of what states had “voluntarily and knowingly accept[ed]”⁹³ created the new constitutional boundary.

C

The *Sebelius* Court’s inability to articulate a clear test for coercion is unexceptional; the Court has struggled with drawing the line “between duress and inducement” since at least 1937.⁹⁴ Given *Sebelius*’s somewhat unsatisfying explication of coercion, however, it is worth an attempt to develop the concept, to highlight how the new Spending Clause doctrine opens up conceptual possibilities that could have huge consequences for federal lawmaking.

Webster’s Third states that to coerce is “to compel to an act or choice by force, threat, or other pressure.”⁹⁵ The concept of *choice* is central to the operation of laws promulgated under the Spending Clause. In enacting a conditional spending scheme, Congress necessarily sets up a choice for the states: do *X*, receive *Y*; do not do *X*, do not receive *Y* (and sometimes do not receive *Y* and lose *Z*). The choice between these options is coerced if the disparity between the options is so stark that it

⁹¹ *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981)) (internal quotation marks omitted).

⁹² *Id.*

⁹³ *Id.* at 2602 (quoting *Pennhurst*, 451 U.S. at 17). The opinion frequently cites *Pennhurst* for the proposition that Spending Clause conditions operate “much in the nature of a contract.” *Id.* (emphasis omitted) (internal quotation marks omitted). The *Pennhurst* Court stated: “The legitimacy of Congress’ power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’” 451 U.S. at 17.

⁹⁴ See *Steward Machine Co. v. Davis*, 301 U.S. 548, 586 (1937).

⁹⁵ Webster’s Third New International Dictionary 439 (1976).

overwhelms the states' ability to make a "real" choice, "so that the States' choice whether to enact or administer a federal regulatory program is rendered illusory."⁹⁶ So the question is when is the "do not receive *Y*"—or, more likely, the "do not receive *Y* and lose *Z*"—option *so* burdensome that in some sense the state "must" do *X*.

Professor Mitchell Berman suggests that coercion in this context exists where any sort of penalty, legal or otherwise, attaches to the exercise of a constitutional right (unless the penalty is "justified").⁹⁷ A penalty is a burden which is imposed "*for the purpose* of discouraging or punishing" the assertion of that right.⁹⁸ A state's constitutional right would be its sovereign imperative to make "fundamental . . . decisions" about how or whether to exercise its regulatory or legislative authority.⁹⁹ Thus, it is unconstitutionally coercive when the federal government "penalize[s] the exercise of a state's right to legislate (or not to legislate)."¹⁰⁰

What constitutes a penalty? By their nature, Spending Clause cases usually involve some monetary penalty: In both *Dole* and *Sebelius*, the Court was concerned about the threatened withdrawal of funding for highways and Medicaid, respectively. For four dissenters in *Sebelius*, the magnitude of the monetary penalty was sufficient by itself to constitute coercion.¹⁰¹ There is nothing inherent in the idea of "coercion," however, that limits it to monetary penalties alone.

Money is just half of the picture in some Spending Clause cases; the other half is *control*. The nature of a conditional spending program is

⁹⁶ *Sebelius*, 132 S. Ct. at 2660 (Scalia, J., dissenting); see also *id.* ("If a federal spending program coerces participation the States have not 'exercise[d] their choice'—let alone made an 'informed choice.'" (alteration in original) (quoting *Pennhurst*, 451 U.S. at 17, 25)); *Steward Machine Co.*, 301 U.S. at 590 (holding there was no coercion without evidence that the state was not acting other than through "her unfettered will"); Bagenstos, *Anti-Leveraging*, *supra* note 6, at 870 ("[T]he threat must actually take away the states' ability, not merely in theory but in fact, to choose whether to accept a funding condition." (footnote omitted) (internal quotation marks omitted)).

⁹⁷ Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 *Geo. L.J.* 1, 46–47 (2001).

⁹⁸ *Id.* at 35 (emphasis added).

⁹⁹ *Nat'l League of Cities v. Usery*, 426 U.S. 833, 851 (1976); see also *FERC v. Mississippi*, 456 U.S. 742, 761 (1982) ("Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature.").

¹⁰⁰ Berman, *supra* note 97, at 40.

¹⁰¹ See *Sebelius*, 132 S. Ct. at 2661–62 (Scalia, J., dissenting) (arguing that the immense size of a grant can be coercive because expensive federal programs are funded by expensive federal taxation, which hinders the ability of a State to collect a tax to pay for an alternative to the federal program).

that states trade some measure of their regulatory prerogative in exchange for federal money. But, in the normal course of federal governance, states retain their sovereign prerogative only insofar as the federal government has not already exercised *its* sovereign powers to displace state control by operation of the Supremacy Clause. In cases in which Congress could otherwise regulate directly through the exercise of its enumerated powers, a state's refusal to participate in a cooperative federalism scheme means that Congress can just regulate preemptively and destroy state regulatory prerogative. For instance, under the Surface Mining Control and Reclamation Act ("SMCRA"), states whose surface mining regulatory programs conform to minimum federal standards are granted exclusive jurisdiction; in states where programs are not approved, the Federal Office of Surface Mining has exclusive jurisdiction.¹⁰² Professor Neil Siegel calls this "conditional non-preemption":¹⁰³ to retain *any* regulatory control (in other words, to prevent preemption), states must regulate in conformity with federal directives.

In contrast with its many suggestions over the years that conditional spending could be unconstitutionally coercive, the Court has consistently held that the threat of preemption is not. In *New York v. United States*, one of the Court's leading Tenth Amendment cases, the Court acknowledged "Congress' power to offer States the choice of regulating . . . activity according to federal standards or having state law preempted by federal regulation."¹⁰⁴ The Court has also upheld the constitutionality of the "conditional non-preemption" regime of SMCRA in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, stating, "We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role" rather than simply preempting the field.¹⁰⁵ And in upholding the Public Utility Regulatory Policies Act ("PURPA"), the five-Justice majority in *FERC v. Mississippi* held that "the Federal Government may displace state regulation even though this serves to 'curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important."¹⁰⁶

¹⁰² 30 U.S.C. §§ 1253–1254 (2012).

¹⁰³ Siegel, *supra* note 79, at 1676.

¹⁰⁴ 505 U.S. 144, 167 (1992).

¹⁰⁵ 452 U.S. 264, 290 (1981).

¹⁰⁶ 456 U.S. 742, 759 (1982) (quoting *Hodel*, 452 U.S. at 290).

Despite this difference in treatment, it is difficult to see the distinction between a conditional spending and a conditional preemption scheme with respect to coercion. In both cases, the federal government is holding out an incentive for states to regulate in a certain way. In the preemption context, states are asked to give up *some* control to avoid giving up *all* control. In the spending context, states are asked to give up some control to avoid giving up some pot of money. If we are to believe that the states' sovereign prerogative is as important as the states and the Court often make it out to be, it seems that the preemption bargain is a much starker choice (not to mention the fact that in the spending context, states are often getting an additional benefit—funding—for giving up control, which is not true in the conditional preemption context).

Concern about the coercive effects of conditional preemption is evident in Justice O'Connor's dissent in *FERC v. Mississippi*, which was decided 5-4. She lambasted the majority for "sidestep[ping]" the question of whether PURPA impaired the states' sovereign prerogative. The choice between submitting to federal direction or "escap[ing] PURPA simply by ceasing regulation of public utilities," she wrote, "is an absurdity, for if its analysis is sound, the Constitution no longer limits federal regulation of state governments."¹⁰⁷

To a certain extent, the lax attitude of the Court toward conditional preemption regimes as exhibited in *New York v. United States*, *Hodel*, and *FERC v. Mississippi* may be a product of the Court's theretofore weak conditional spending jurisprudence. The majority in *FERC* wrote that because federal enactments could "be designed to induce state action in areas that otherwise would be beyond Congress's regulatory authority," the use of preemption to "move the States to act in a given way, or even to 'coerc[e] the States'" could not be constitutionally determinative.¹⁰⁸ Perhaps with a vigorous *Sebelius* coercion doctrine, and as the ongoing federalism revival of the Roberts Court gives the Tenth Amendment more bite, the idea of coercive preemption could gain trac-

¹⁰⁷ Id. at 781 (O'Connor, J., dissenting in part) (emphasis added). Disparaging the label "cooperative federalism" in this context, she continued: "[T]here is nothing 'cooperative' about a federal program that compels state agencies either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to state authority. Yet this is the 'choice' the Court today forces upon the States." Id. at 783-84 (footnote omitted).

¹⁰⁸ Id. at 766 (majority opinion) (quoting *Hodel*, 452 U.S. at 289).

tion.¹⁰⁹ Such a result foreshadows massive effects on the scope and efficacy of federal regulation. Yet, even without such a long trip down the slippery slope, *Sebelius* hands potential litigants a new tool to combat federal regulation that could have disruptive effects on the ability of the federal government to design and execute effective policy.

III

Prior to *Sebelius*, at least two courts had held that the sanctions provisions of the Clean Air Act did not violate the Spending Clause under the more permissive *Dole* test.¹¹⁰ The U.S. Court of Appeals for the Fourth Circuit in *Virginia v. Browner*, for instance, discussed the fact that the sanction imposed against Virginia in its particular case was smaller than the amount of money at risk in similar post-*Dole* Spending Clause challenges and that there was a sufficient nexus between the goals of the CAA and the highway-funding program.¹¹¹ The same year, the U.S. District Court for the Eastern District of Missouri held that so long as “the cost of noncompliance” with the CAA “is subjection to sanctions . . . that fall within Congress” enumerated powers, as the highway sanction did, the condition was constitutional.¹¹²

After *Sebelius* was decided, commentators immediately suggested that the metric for constitutionality had fundamentally changed, and that that change could endanger the CAA. At the Environmental Law Insti-

¹⁰⁹ Cf. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 Mich. L. Rev. 813, 817–18 (1998) (questioning the distinction between the Court’s treatment of unconditional federal demands—anti-commandeering—and “demands extracted by threats of federal preemption of state law”). In a lawsuit challenging EPA’s recent GHG regulations, Texas argued that coercive tools besides federal grants could violate the Tenth Amendment. The state alleged that EPA’s regulation carried the threat of “unprecedented and unlawful sanctions [in the form of a construction moratorium]” because noncomplying states could not issue new construction permits without including limitations on GHG emissions in the new source’s PSD permit. That, Texas claimed, “constitutes coercion and commandeering of the organs of State government, in violation of the Tenth Amendment.” *Texas v. EPA*, 726 F.3d 180, 182–83, 196 (D.C. Cir. 2013).

¹¹⁰ See *Virginia v. Browner*, 80 F.3d 869, 881 (4th Cir. 1996); *Missouri v. United States*, 918 F. Supp. 1320, 1333, 1336 (E.D. Mo. 1996) (holding that it is a valid exercise of the Spending Clause power when Congress “condition[s] the receipt of federal funds in a way reasonably calculated to address [the] particular impediment to a purpose for which the funds are expended” (alterations in original) (quoting *South Dakota v. Dole*, 483 U.S. 203, 209 (1987))).

¹¹¹ 80 F.3d at 881–82.

¹¹² *Missouri v. United States*, 918 F. Supp. at 1331.

tute's 2012 Supreme Court Review, Professor Laurence Tribe predicted that the Medicaid expansion decision was "bound to unleash an avalanche of constitutional attacks on any number of environmental and other laws," particularly the CAA.¹¹³ Professor Jonathan Adler wrote that the *Sebelius* decision might give states that are "chafing under the Clean Air Act's requirements . . . a tool to relieve the burden."¹¹⁴ The handful of commentators who have considered the issue in depth, however, have concluded that the CAA is not likely to be declared unconstitutional anytime soon.¹¹⁵

This Part will largely concur, but will find that even if *Sebelius* itself does not invalidate the CAA, its injection of Tenth Amendment constraints into the Spending Clause signals a trajectory that may yet endanger the CAA as we now know it. Section A will describe in detail how the *Sebelius* coercion test might apply in the CAA context. This Section will conclude that the bare fact that the CAA penalizes SIP inadequacy with a highway funds sanction is not likely, in itself, to be declared unconstitutional under the current state of the law. Section B will also consider how the implementation of a major new regulatory program like EPA's greenhouse gas program post-*Massachusetts v. EPA* could be analyzed under the "reliance" factor of the new Spending Clause jurisprudence. Then, Section B will discuss how the continuing Tenth Amendment revival and the growing importance of federalism as a substantive limit on congressional power may yet signal that "conditional preemption" tools like the threatened imposition of a federal implementation plan ("FIP") may soon also be perceived as a coercive threat.

A

Under Chief Justice Roberts's *Sebelius* analysis, we first look to whether the condition placed on receiving federal money simply directs

¹¹³ Laurence H. Tribe, Supreme Court Review and Preview: *NFIB v. Sebelius* and *Sackett v. EPA*, 42 *Env'tl. L. Rep.* 11091, 11095 (2012), available at <http://elr.info/news-analysis/42/11091/supreme-court-review-and-preview-nfib-v-sebelius-and-sackett-v-epa>; see also Ryan, *The Spending Power*, supra note 15, at 1034 (identifying the CAA as potentially vulnerable due to its "crossover conditioning of federal highway funds").

¹¹⁴ Adler, *Percolator*, supra note 7.

¹¹⁵ See, e.g., Baake, supra note 15, at 3; Ryan *The Spending Power*, supra note 15, at 1052–59; Zasloff, supra note 7 ("[A]t first blush, it appears that federal highway funding and the Clean Air Act is easily distinguishable by any court that wishes to do so.").

how the money should be spent *or* is used to pressure the states into accepting the program.¹¹⁶ If the conditions threaten “significant independent grants,” they constitute per se pressure. The Clean Air Act has struck some observers as particularly vulnerable post-*Sebelius* on these anti-leveraging grounds, because, unlike other environmental statutes, the CAA contains a mandatory sanction of federal highway funds from non-attainment areas within a state for noncompliance with the CAA or EPA regulations.¹¹⁷ If pressure exists, we then ask whether it amounts to coercion.

1. *The Existence of Pressure: Leveraging*

Section 179 of the CAA provides for a mandatory highway funds sanction against states found to be noncompliant with the Act in four specific ways.¹¹⁸ Are these highway funds a “separate and independent grant”? In the past, courts have held that the CAA and Congress’s highway funding programs were sufficiently related to meet *Dole*’s earlier—and more forgiving—nexus test. In *Virginia v. Browner*, the Fourth Circuit found evidence in various transportation funding programs that the purpose of one major highway program was “to develop a National Intermodal Transportation System that is . . . environmentally sound.”¹¹⁹ The Eastern District of Missouri, which heard *Missouri v. United States* in the same year as *Browner*, also found the Congress had “air quality improvement goals for federal transportation funding.”¹²⁰ Further, the CAA was clearly concerned with air pollution from transportation. “Congress may ensure that funds it allocates are not used to exacerbate the overall problem of air pollution.”¹²¹ “Congress declared, in its findings for the declaration of purpose behind the CAA, that one reason it passed the Act was that the growth in the amount of air pollution

¹¹⁶ See *supra* Section II.B.

¹¹⁷ 42 U.S.C. § 7509(b)(1)(A) (2012). EPA has executed a highway funds sanction only once, in 1996, for violations in East Helena, Montana. Ryan, *The Spending Power*, *supra* note 15, at 1051 & n.214.

¹¹⁸ 42 U.S.C. § 7509(a); see *supra* text accompanying note 36.

¹¹⁹ Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102–240, 105 Stat. 1914 (1991) (codified as amended at 23 U.S.C. §§ 103, 133 (National Highway System and Surface Transportation Program) (2012)); accord *Browner*, 80 F.3d at 881–82.

¹²⁰ *Missouri v. United States*, 918 F. Supp. at 1334.

¹²¹ *Browner*, 80 F.3d at 882.

brought about, in part, by the ‘increasing use of motor vehicles’ has endangered public health and welfare.”¹²²

Despite this charitable reading by the lower courts before *Sebelius*, the Roberts Court would likely be more skeptical. For one, Chief Justice Roberts seemed unconcerned with the extent to which the minimum drinking age and the safety goals of Congress’s highway appropriations in *Dole* were related. Because “the condition was not a restriction on how the highway funds . . . were to be used,” the Chief Justice assumed that its purpose was to pressure states.¹²³ Rather than “nexus” analysis, Roberts’s *Sebelius* opinion relied more on a contract idea of relatedness to determine whether old Medicaid funds could be considered separate and independent from the new Medicaid expansion program. Even though Congress “styled the expansion a mere alteration of existing Medicaid,” he pointed out that Congress created a separate funding provision to cover the costs of the expansion and that this provision reimbursed states at a higher rate than for “regular” Medicaid costs (50% to 83% for regular Medicaid; compared to a minimum of 90% reimbursement for the expansion).¹²⁴

The argument that the goals of the CAA and highway funding overlap is likely to be unavailing after *Sebelius*. Highway funds are appropriated under a completely different section of the code, and they were certainly not part of the same enactment. The CAA, while concerned with emissions associated with highways, does not purport to impose conditions on how highways are constructed; the condition for removing highway funds is a state’s failure to issue a particular regulatory program, not whether a particular highway project or highway building in general is directly adverse to air quality interests.¹²⁵ Under the new *Sebelius* analysis, then, the threatened highway funds are easily demonstrated to be “independent grants.”

2. *Size of the Grant*

Because highway funds can be reasonably construed to be a separate and independent grant threatened for the purpose of “pressuring” states,

¹²² *Missouri v. United States*, 918 F. Supp. at 1334 (quoting 42 U.S.C. § 7401(a)(2) (2006)).

¹²³ *Sebelius*, 132 S. Ct. at 2604.

¹²⁴ *Id.* at 2606.

¹²⁵ Ryan, *The Spending Power*, supra note 15, at 1053 (“[P]reparing a SIP is not about building a highway.”).

this Part next considers whether the pressure exercised is coercive. The first part of the coercion inquiry is whether the amount of money being threatened is sufficiently large. The \$614 million in highway funds at issue in *Dole*, comprising less than 0.5% of South Dakota's budget, is presumptively too small, and the \$233 billion of all federal Medicaid grants in *Sebelius*, comprising about 10% of the average state's budget, is definitely too big.¹²⁶

The CAA's highway sanction potentially jeopardizes federal transportation funding in air quality regions that are not in attainment of one or more of the NAAQS. In 2010, the year the PPACA was passed, transportation spending in all states totaled \$124.4 billion, or 7.7% of total state expenditures.¹²⁷ Federal funds accounted for 32.4% of that total, or \$40.2 billion,¹²⁸ plus about \$13.2 billion in federal funds for state capital expenditures on transportation.¹²⁹ Thus, in total, about 43% of state transportation spending is funded by federal dollars, or about 3.3% of the average state's budget, putting the potential CAA penalty somewhere between *Dole* and *Sebelius*.

Of all federal funding for transportation, however, only that expended in nonattainment areas would be threatened by the Section 179 highway sanction.¹³⁰ Forty-three states have at least one county in nonattainment for at least one criteria pollutant,¹³¹ and, as of 2013, about forty-one percent of the U.S. population (about 154.7 million people) lived in nonat-

¹²⁶ See *id.* at 1029.

¹²⁷ Nat'l Ass'n of State Budget Officers, *supra* note 75, at 62.

¹²⁸ *Id.* at 62, 64. David Baake reported that states received \$62 billion in federal highway funds and that that amount came out to 11% of total state expenditures. Baake, *supra* note 15, at 8. It appears that the \$62 billion figure comes from the Federal Highway Administration's ("FHA") disbursements report, and represents the combined appropriation of funds for the "National Highway System" (\$41.7 billion) and "Other" (\$20.4 billion), which in combination represent capital outlays for "all roads eligible for Federal aid." Disbursement for State-Administered Highways – 2010, Fed. Highway Admin., <http://www.fhwa.dot.gov/policyinformation/statistics/2010/sf21.cfm> (last visited Dec. 1, 2013). Perhaps the National Association of State Budget Officers ("NASBO") does not take into account this "Other" figure, but it is unclear why there is nonetheless a \$1.5 billion discrepancy between the NASBO and FHA numbers for highways. I have chosen to use the NASBO numbers for consistency.

Baake's 11% figure for the proportion of federal highway funds in total state expenditures appears to represent the percentage of total state expenditures that *total* federal expenditures make up. See Baake, *supra* note 15, at 8 n.54; Nat'l Ass'n of State Budget Officers, *supra* note 75, at 7.

¹²⁹ Nat'l Ass'n of State Budget Officers, *supra* note 75, at 79.

¹³⁰ 42 U.S.C. § 7509(b)(1)(A) (2012).

¹³¹ Current Nonattainment Counties for All Criteria Pollutants, EPA, <http://www.epa.gov/oaqps001/greenbk/ancl.html> (last visited Dec. 1, 2013).

tainment counties.¹³² There is therefore a substantial portion of the country that would be exempt from highway sanctions. Further, funding for transportation safety projects and projects that seek to reduce highway use and encourage mass transit are also exempt from the penalty,¹³³ which means that even nonattainment areas would not be totally deprived of federal transportation funds.

In addition to highway funds, the EPA Administrator is authorized to withhold some or all federal funding available under Section 105.¹³⁴ Section 105 authorizes the EPA Administrator to make grants of up to sixty percent of the cost of implementing an air quality control program to the “air pollution control agencies” having substantial responsibility for carrying out the SIP.¹³⁵ The President’s 2010 budget request for grants under Section 105 and Section 103 (which funds a research and development program) was for \$226.6 million.¹³⁶ This is a miniscule percentage of total state expenditures and of federal funding for states. Thus, even assuming all of that funding would be withdrawn, the loss of this funding would be a drop in the bucket.

Even if the highway sanction exceptions and exemptions were inoperative, the federal share of state transportation expenditures only amounts to about 3% of total state expenditures. While that is six times the penalty in *Dole*, it is only a third of the unconstitutionally large penalty in *Sebelius* before the potential loss is decreased by the exclusions discussed above. On the one hand, transportation is the fourth-largest category of state expenditures (7.7%) and the third-largest category of spending from federal funds, at 7.3%, after Medicaid (42.3%) and elementary and secondary education (12.8%).¹³⁷ On the other, the absolute amount of federal Medicaid funding absolutely dwarfs transportation funding. Because both the *Dole* and *Sebelius* Courts refused to “fix a line” at which the amount of money at risk is too great,¹³⁸ it is impossi-

¹³² Air Quality Trends, EPA, <http://epa.gov/airtrends/aqtrends.html> (last visited Dec. 1, 2013).

¹³³ 42 U.S.C. § 7509(b)(1) (2012).

¹³⁴ § 7509(a).

¹³⁵ § 7405(a)(1).

¹³⁶ Nat’l Ass’n of Clean Air Agencies, Testimony of the National Association of Clean Air Agencies Provided to the Senate Appropriations Committee 1 (May 14, 2009), available at <http://www.4cleanair.org/sites/default/files/Documents/SenateTestimony051409.pdf>.

¹³⁷ Nat’l Ass’n of State Budget Officers, *supra* note 75, at 5, 10.

¹³⁸ *Sebelius*, 132 S. Ct. at 2606; *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

ble to conclude with certainty, but it would be fair to conclude that the penalty is not per se coercive like the Court found the PPACA to be.

3. Reliance

The last element of the *Sebelius* test is the extent to which a new condition is outside the scope of the original terms and thus subverts states' reliance interests. To determine the contours of states' expectations, Chief Justice Roberts looked at what states might "reasonably assume" about the obligations they have taken on based on the statutory language and predictions about the scope of potential amendments.¹³⁹ Before doing the same for the CAA, it should be noted that the penalty here operates in a different way than that in *Sebelius*. Unlike that in the PPACA, the penalty threatened by the CAA is largely an enforcement mechanism, not a consequence of a state choosing not to adopt the CAA regulatory regime.¹⁴⁰ Although a state's failure to submit a SIP is one of the "findings" that must trigger Section 179 sanctions eighteen months after a state's failure to submit, EPA is required to issue a FIP two years after such failure.¹⁴¹ And although the CAA on its face does not indicate that the promulgation of a FIP alleviates the mandatory sanction—in other words, that the sanctions cease once a FIP has been issued to fill the regulatory gap—EPA regulations state that sanctions abate once a FIP is issued.¹⁴² In short, the Section 179 penalty is not being set out to compel adoption; it is a mechanism to enforce fidelity to the system that the state has already agreed to.¹⁴³

¹³⁹ *Sebelius*, 132 S. Ct. at 2605.

¹⁴⁰ See 42 U.S.C. § 7509(a) (2012). In theory, highway sanctions could be enforced in the short window between a state's failure to make a submission for its implementation program and the period after which EPA is required to promulgate a FIP. Mandatory sanctions—which may be either highway sanctions or a higher mitigation ratio for new sources—are supposed to be enforced eighteen months after a state's failure to submit, but a FIP only issues two years after such failure. § 7410(c). Thus, highway sanctions might be enforced in the six intervening months, but we have not seen this in practice. See *supra* note 117. Further, although the CAA on its face does not indicate that the promulgation of a FIP alleviates the mandatory sanction—in other words, that the sanctions apply while the state is not in compliance even if a FIP has been issued to fill the regulatory gap—EPA regulations state that sanctions abate once a FIP is issued. 40 C.F.R. § 93.120 (1997).

¹⁴¹ 42 U.S.C. §§ 7410(c), 7509(a) (2012). On its face, the statute would require the imposition of sanctions at least during this six-month gap between triggering sanctions and issuance of the FIP, but this has not occurred in practice. See *supra* note 117.

¹⁴² 40 C.F.R. § 93.120.

¹⁴³ A weakness of the current literature on this topic is a failure to acknowledge this difference. David Baake argues, for instance, that "[b]ecause the states retain a real, meaningful

This means the CAA would most likely be subject to an as-applied challenge based on a particular administrative rulemaking that adds to states' burdens to comply with the Act. Under Section 110(k)(5), the Administrator must require a state to revise its SIP whenever it is "substantially inadequate" to meet the NAAQS, mitigate interstate pollutant transport, or "otherwise comply with any requirement of this chapter."¹⁴⁴ This is sometimes called a "SIP call." If a state refuses to comply with a SIP call, the Administrator is required to impose either the highway sanction or the offsets sanction after eighteen months; after twenty-four months of noncompliance, both sanctions apply.¹⁴⁵ Thus, the plan revisions required by Section 110(k)(5) would be the administrative equivalent of the statutory enactment of the Medicaid expansion in the PPACA: The issuing body tells states that in order to keep participating in a program (CAA or Medicaid), they have to adopt new regulations; if they refuse to adopt the new regulations, they will be subject to sanctions.

A Spending Clause attack on the CAA therefore depends on the particular regulatory change alleged to be so outside the scope of the statute that it challenges states' reliance interests,¹⁴⁶ something that constitutes "a shift in kind, not merely degree."¹⁴⁷ While that will be a fact-specific inquiry, EPA's recent promulgation of rules bringing GHGs within the purview of the CAA for the first time provides a great test case. In fact, Texas has actually made Spending Clause coercion arguments in a law-

alternative to *promulgating a SIP*, Section 179's highway sanction is not coercive." Baake, supra note 15, at 6 (emphasis added). As discussed supra note 26 and accompanying text, however, the highway sanction's coercive effect adheres only after a state has opted into the program, but whose efforts have then been deemed insufficient; it conditions funds for one program on *compliance*, not adoption, with another program. Ryan, *The Spending Power*, supra note 15, at 1049–50. The necessity to "opt in" may be relevant to a *Sebelius* analysis that considers to what "terms" a state agrees in adopting a Spending Power "contract."

¹⁴⁴ 42 U.S.C. § 7410(k)(5) (2012).

¹⁴⁵ § 7509(a). Under EPA's "Order of Sanctions Rule," the Administrator will apply the offset sanctions first, after eighteen months of noncompliance, and the highway sanction second, after twenty-four months of noncompliance. Selection of Sequence of Mandatory Sanctions for Findings Made Pursuant to Section 179 of the Clean Air Act, 40 C.F.R. § 52.31(d) (2001).

¹⁴⁶ Cf. Baake, supra note 15, at 5 (assessing whether the CAA would survive an as-applied challenge); Ryan, *Environmental Law After Sebelius*, supra note 15, at 17 (arguing that "[i]f the program were later amended in some important and meaningful way" a constitutional case would be easier to make out); Adler, *Percolator*, supra note 7 (arguing that EPA's ability to change state requirements might "expose another vulnerability" in the CAA).

¹⁴⁷ *Sebelius*, 132 S. Ct. at 2605.

suit challenging EPA's SIP call for states to revise their Prevention of Significant Deterioration ("PSD") permitting programs to cover GHGs.¹⁴⁸

After the Court held in *Massachusetts v. EPA* that GHGs were "air pollutants" within the meaning of the CAA,¹⁴⁹ EPA in 2009 issued an "endangerment finding" bringing GHGs within the scope of the mobile sources regulations of Title II of the Act.¹⁵⁰ Shortly thereafter, EPA issued the Tailpipe Rule, which set GHG emissions standards for light-duty vehicles.¹⁵¹ Because GHGs were now regulated under some part of the CAA, EPA found that it was required to regulate GHGs under Part C of Title I of the CAA, the PSD preconstruction permitting program, and the Title V operating permit program for stationary sources.¹⁵² This finding is known as the "Triggering Rule."

On the one hand, EPA's current GHG rules are a much more organic extension of the CAA than the Medicaid expansion was of regular Medicaid. Where the Medicaid expansion created an entirely new insurance program with a different funding source and different minimum provisions than regular Medicaid, GHGs were incorporated into a pre-existing regulatory structure. The rules simply added another pollutant to the list for PSD/Title V permits. Further, GHGs fit rather naturally under the CAA's broad definition of "air pollutant," which encompasses "any air pollution agent or combination of such agents . . . which is emitted into or otherwise enters the ambient air."¹⁵³ The public "welfare" that the Act is intended to protect includes "effects on . . . weather, visibility, and climate."¹⁵⁴

But, although EPA has found ways to incorporate GHGs into the structure of the Act, there are many ways in which the CAA is an imper-

¹⁴⁸ *Texas v. EPA*, 726 F.3d 180, 196–97 (D.C. Cir. 2013).

¹⁴⁹ 549 U.S. 497, 528–29 (2007).

¹⁵⁰ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497, 66,499 (Dec. 15, 2009).

¹⁵¹ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324, 25,396–97 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600).

¹⁵² Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,007, 17,023 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50–51, 70–71). This interpretation was upheld by the D.C. Circuit in *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 115 (2012), cert. granted sub nom. *Chamber of Commerce v. EPA*, 134 S. Ct. 468 (2013).

¹⁵³ 42 U.S.C. § 7602(g) (2012).

¹⁵⁴ § 7602(h).

fect instrument for GHG regulation.¹⁵⁵ The Act is widely understood to have been directed at “eliminating localized manifestations of harmful air pollution.”¹⁵⁶ The cornerstone of the Act, the NAAQS, necessarily anticipates that concentrations of regulated pollutants will “vary from place to place” such that some areas would be in “attainment” and some not.¹⁵⁷ This variation is the basis for the cooperative federalism structure of the Act, which allows states to respond to different conditions in their jurisdictions. But GHGs by their nature are “well-mixed” in the atmosphere; their concentration does not vary. It should come as no surprise, then, that many commentators agree that “regulation [of GHGs] under the CAA is distinctly second-best.”¹⁵⁸

For the moment, EPA has chosen to regulate GHGs through the PSD and Title V permitting programs for large stationary sources and soon will regulate GHGs from electricity generating units (“EGUs”) through Section 111(d).¹⁵⁹ Yet, even the vehicle EPA initially chose to regulate GHGs, the PSD permitting program, was an imperfect fit. To prevent what even EPA deemed the “absurd results”¹⁶⁰ of plugging GHGs into this program, EPA had to adopt “Timing” and “Tailoring” rules to make sense of things. The rules operated as follows: The PSD program identifies “major emitting facilities,” which the statute defines as those facilities that emit or have the potential to emit 100 or 250 tons per year of any air pollutant (depending on the type of source) and then requires that these facilities apply “Best Available Control Technology” (“BACT”) to control emissions of “each pollutant subject to regulation under this chapter.”¹⁶¹ Thus, if a source emitted more than 250 tons per year of

¹⁵⁵ See Jacob Kavkewitz, *Jamming the Square Peg through the Round Hole: EPA’s Options for Climate Change Regulation under the Clean Air Act*, 4 *Ariz. J. Envtl. L. & Pol’y* 1001, 1001–03 (2013); Phillip A. Wallach, *U.S. Regulation of Greenhouse Gas Emissions*, (Governance Stud. at Brookings, Washington, D.C.), Oct. 2012, at 8–10, available at <http://www.brookings.edu/research/papers/2012/10/26-climate-change-wallach>.

¹⁵⁶ Wallach, *supra* note 155, at 5.

¹⁵⁷ Brief for the Federal Respondent at 22–23, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120) (“[K]ey provisions of the CAA cannot cogently be applied to [GHG] emissions.”).

¹⁵⁸ Wallach, *supra* note 155, at 8.

¹⁵⁹ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 *Fed. Reg.* 34,830, 34,830 (June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

¹⁶⁰ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 *Fed. Reg.* 31,514, 31,516 (June 3, 2010) (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)).

¹⁶¹ 42 U.S.C. §§ 7475(a)(4), 7479(1) (2012).

GHGs, the plain language of the statute would require EPA—or, more aptly, state permitting authorities—to classify the source as a major emitter and require that it apply BACT to every pollutant it emits in any amount. Because GHGs are emitted in exponentially greater amounts than other regulated pollutants, applying the 250 tons per year threshold to define a “major emitting facility” would have subjected thousands of facilities not otherwise subject to PSD to the program’s permitting and BACT requirements.¹⁶² To deal with this, EPA promulgated the Timing and Tailoring Rules to slowly phase GHGs into PSD and Title V permitting. The rules stated that, at first, only sources that were already “major emitting facilities” on the basis of some other pollutant had to adopt BACT for GHGs. Then, only those sources emitting at least 100,000 tons of GHGs per year—*one thousand times* the statutory threshold—could be considered “major emitting facilities” on the basis of GHGs alone.¹⁶³

A majority of the Supreme Court in *Utility Air Regulatory Group v. EPA* recently found that these acrobatics in the name of regulating GHGs were not a permissible interpretation of the CAA.¹⁶⁴ Holding that the 100 or 250 tons per year threshold was unambiguous, and accepting the absurdity of applying these thresholds in the context of GHGs, the Court, through Justice Scalia, held that “major emitting facility” status could not be triggered by GHG emissions alone.¹⁶⁵ Nevertheless, in the aftermath of this ruling, EPA still has the power to force states to regulate GHGs by requiring BACT¹⁶⁶ in those facilities independently subject to PSD permitting requirements, through Title V permitting requirements, and through Section 111(d).¹⁶⁷

¹⁶² Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,514, 31,533 (stating that applying the statutory threshold to GHGs would “greatly increas[e] the number of required permits, impos[e] undue costs on small sources, overwhelm[] the resources of permitting authorities, and severely impair[] the functioning of the programs”).

¹⁶³ Id. at 31,516.

¹⁶⁴ 134 S. Ct. 2427, 2449 (2014).

¹⁶⁵ Id.

¹⁶⁶ Justice Alito, in concurrence, argued that even BACT is “fundamentally incompatible” with GHGs because the concept of BACT is based on consideration of the “ambient air quality at the proposed site,” which, as discussed with respect to NAAQS, does not make sense for GHGs that are necessarily well-mixed in the atmosphere. Id. at 2456–57 (Alito, J., concurring).

¹⁶⁷ PSD and Title V are programs administered through the SIP process of § 110, and thus noncompliance with requirements under these Sections would trigger § 179 sanctions. It is

Notwithstanding the apparent mismatch of GHG regulation under the CAA, I predict that the GHG rules are not so far outside the scope of the statute that they subvert a state's expectations. To a certain extent, any new CAA rulemaking *must* be substantially within the scope of the CAA. Agency rulemaking, unlike congressional legislation, is constrained by existing statutory text. If a rule was a big enough deviation from what states were entitled to expect from the CAA, a state would more likely challenge the rule under the Administrative Procedure Act's "arbitrary and capricious" standard as an impermissible interpretation of the statutory text—as *Utility Air Regulatory Group* illustrates. It seems unlikely that an agency could win on this standard—getting, for instance, *Chevron* deference for its interpretation—then lose on coercion because the rule upended states' reasonable reliance interests. Thus, even if EPA were to decide to start imposing Section 179 sanctions for noncompliance with GHG regulations, and assuming that the amount of the sanctions was big enough to raise coercion concerns, it is unlikely that a state could successfully make out a *Sebelius* coercion claim.

B

In most post-*Sebelius* analyses of the constitutionality of the CAA's highway sanctions, the fact that the statute provides for a federal implementation option for nonconforming states substantially weakens the argument that the consequences of noncompliance are coercive.¹⁶⁸ In other words, rather than just two options (do X, get Y or do not do X and do not get Y and lose Z) there is a third option (do not do X, and EPA will do X instead). Professor Erin Ryan writes that the FIP option means that the CAA penalties do not impose the same "all-or-nothing dilemma" that the Medicaid expansion conditions did.¹⁶⁹ When the State petitioners in *Texas v. EPA* raised a coercion argument in their recent suit challenging EPA's GHG rules, the D.C. Circuit noted that the situation was "not comparable to Congress's coercive financial threat" in *Sebelius*, in part because of "precedent repeatedly affirming the constitutionality of

not settled whether those sanctions would apply to noncompliance with the EGU regulatory program under § 111(d).

¹⁶⁸ Baake, *supra* note 15, at 6; Ryan, *Environmental Law After Sebelius*, *supra* note 15, at 16 (arguing that the FIP option means that the CAA penalties do not impose the same all-or-nothing dilemma that the Medicaid expansion conditions did).

¹⁶⁹ Ryan, *Environmental Law After Sebelius*, *supra* note 15, at 16 ("Enabling the states to opt out without losing the funds at issue is the antithesis of *Sebelius* coercion.").

federal statutes that . . . provide for direct federal administration if a State chooses not to administer it.”¹⁷⁰

Even so, as discussed in Section II.C, the claim that threatening funding is coercive while threatening preemption is not is somewhat theoretically inconsistent. Beyond introducing a new coercion test for the Spending Clause, *Sebelius* represents the intrusion of the Tenth Amendment as a limiting principle in Spending Clause cases and an expansion of the “unconstitutional conditions” jurisprudence of *Dole* and the anti-commandeering cases. If the continuing federalism revival makes coercive conditional preemption cognizable, even to a small extent, then the combination of both the monetary penalty and the preemptive “penalty” together should increase the coercive effect of the CAA—perhaps enough to make up for the smaller monetary penalty.

If conditional preemption were recognized as coercive, then the court could draw on analogies to the *Sebelius* factors to determine the extent of the coercion. Where the size of the monetary penalty was relevant to the existence of coercion in *Sebelius*, the Court might consider whether the preempted field is a part of the “core sovereignty retained by the States”¹⁷¹ and the extent of the preemption threatened. In broad strokes, the CAA threatens preemption, to some extent,¹⁷² of air quality regulation. While control over air quality is not usually one of the fundamental incidents of sovereignty that are tossed around in states’ rights discussions, in *Massachusetts v. EPA* the Court made much of the states’ “quasi-sovereign” interest “in all the earth and air within its domain,” an interest which gave Massachusetts the right to “special solicitude” in the Court’s standing analysis.¹⁷³ More narrowly, the CAA requires states to adopt specific procedural changes that could be construed as “fundamental.” For instance, in *Virginia v. Browner*, Virginia alleged that the CAA required the State to adopt new rules of judicial standing by

¹⁷⁰ *Texas v. EPA*, 726 F.3d 180, 196–97 (D.C. Cir. 2013).

¹⁷¹ *Browner*, 80 F.3d at 880 (quoting *New York v. United States*, 505 U.S. 144, 159 (1992)).

¹⁷² Section 7416 of the CAA states that the Act does not preclude states from adopting their own air pollutant limitations or emissions standards, except with respect to mobile sources in Title II, and except that state or local standards cannot be less stringent than the federal standards. 42 U.S.C. § 7416 (2012). To some extent, though, the existence of federal standards limits the approaches that states may take, even to affect more stringent regulations (a different kind of permitting system that focuses on different metrics may be duplicative and costly to impose on stationary sources, for instance).

¹⁷³ 549 U.S. 497, 519–20 (2007).

providing for judicial review of permitting decisions under Section 502(b)(6), which “impinge[d] upon a fundamental element of state sovereignty, the state’s right to articulate its own rules of judicial standing.”¹⁷⁴ Several parts of the statute require the state to organize its regulatory boards in particular ways,¹⁷⁵ provide judicial review of state administrative decisions,¹⁷⁶ or provide public access to documents and information,¹⁷⁷ which may be invasive of state sovereignty interests.

As far as the scope of a FIP preemption, there are aspects of the CAA program that lessen the coercive effect of the conditional preemption. First, a FIP will only issue for those aspects of a state’s implementation plan that do not meet federal standards. In *Texas v. EPA*, for example, EPA promulgated only an implementation plan to administer the GHG portion of the state’s PSD permitting program.¹⁷⁸ Also, except for motor vehicle emissions standards,¹⁷⁹ the CAA simply establishes a regulatory floor. States may still adopt emissions standards or other air pollution control measures so long as they do not undercut the federal standard,¹⁸⁰ leaving them policy space to regulate and innovate on top of the federal minimum.

Even if the Clean Air Act can survive a challenge under the new *Sebelius* test, as seems likely, the threat of litigation may nevertheless impact the way EPA administers the CAA. Perhaps EPA will be more timid in threatening and applying sanctions, emboldening states to obstruct negotiation and delay implementation of federal standards.¹⁸¹ Professor Ryan points out that, in the wake of the Supreme Court’s decisions purporting to narrow the scope of EPA’s Clean Water Act jurisdiction, “the agency substantially pulled back from enforcement efforts,” dropping nearly 1500 major water pollution investigations “due

¹⁷⁴ *Browner*, 80 F.3d at 880.

¹⁷⁵ 42 U.S.C. § 7428 (2012).

¹⁷⁶ See, e.g., 42 U.S.C. § 7604(a) (citizen suits); § 7661a(b)(6) (judicial review for public commenters).

¹⁷⁷ See, e.g., § 7414(c) (inspection records); § 7661a(b)(8) (permit application and compliance plans).

¹⁷⁸ 726 F.3d at 198.

¹⁷⁹ 42 U.S.C. §§ 7543(a), 7545(c)(4) (2012).

¹⁸⁰ § 7416.

¹⁸¹ Ryan, *Environmental Law After Sebelius*, supra note 15, at 17, 19.

to the difficulty of establishing jurisdiction after these decisions.”¹⁸² The next Part will discuss why this new restraint, in the name of federalism, will hurt not only federal environmental policymaking, but may also hurt states themselves.

IV

Defenders of states’ rights have lamented that Congress’s spending power is “[t]he greatest threat to state autonomy.”¹⁸³ As the federal share of state expenditures grows, perhaps there is reason to fear that dependence on federal largess¹⁸⁴ will undermine states’ sovereign status, leaving them mere “vassals.”¹⁸⁵ Chief Justice Roberts’s *Sebelius* opinion responds to these fears by clearly stating that the Tenth Amendment imposes limits on the Spending Clause power that were more or less dismissed out of hand in *Dole*.

Despite my ultimate conclusion that the CAA would be upheld against a Spending Clause challenge under *Sebelius*, academics and policymakers should nevertheless be concerned about the trajectory that the *Sebelius* decision signals. At the very least, the decision takes away some of the discretion that Congress previously enjoyed in designing cooperative federalism schemes to ensure state participation and compliance. The decision already has and no doubt will continue to give dissenting states and others a platform to bring challenges against federal-state programs and agreements characterized as coercive, as Texas recently alleged in *Texas v. EPA*,¹⁸⁶ or as alleged by the American Farm Bureau Federation in ongoing litigation about the Chesapeake Bay Total Maximum Daily Load agreement under the Clean Water Act.¹⁸⁷ Thus,

¹⁸² *Id.* at 19.

¹⁸³ Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 *Chap. L. Rev.* 195, 195 (2001); cf. Berman, *supra* note 97, at 50–51 (“*Dole* stands as a potentially massive loophole threatening the Court’s recent efforts to cabin federal power vis-à-vis the states.”).

¹⁸⁴ In 2010, the federal government contributed over \$608 billion to state and local governments—37.5% of their expenditures. *Sebelius*, 132 S. Ct. at 2658 (Scalia, J., dissenting).

¹⁸⁵ Dwyer, *supra* note 2, at 1185.

¹⁸⁶ 726 F.3d 180 (D.C. Cir. 2013).

¹⁸⁷ *Am. Farm Bureau Fed’n v. EPA*, No. 1:11-cv-00067-SHR, at *58 (M.D. Pa. Sept. 13, 2013), available at http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/BayTMDLCourtDecision91313.pdf. In fact, some state policymakers have considered using the *Sebelius* precedent—however implausibly—as a platform for challenging the nationalized drinking age that was upheld in *South Dakota v. Dole*. Jeff Guo, *Did the Supreme Court Accidentally Allow States to Lower the Drinking Age with Impunity?*, *Wash. Post* (Feb. 6, 2015), <http://www.washingtonpost.com/>

while *Sebelius* may be framed as a victory for the Constitution and the states, it may have troubling consequences for policy, governance, and federalism.

Diminishing the power of federal agencies to implement and enforce environmental cooperative federalism schemes by undermining available tools to incentivize compliance will no doubt increase the costs of federal regulation. As cooperating with states becomes more costly and difficult, the shape of environmental regulation will change. First, Congress and EPA may choose to regulate less, leaving the states to deal with (or not) the environmental crises of the day. Second, they may choose to regulate in ways that do not involve the states, cutting them out of the conversation. Professor Ryan suggests that “Congress may lean toward smaller federal grants in cooperative programs of more limited duration, or toward programs that bypass the states entirely to avoid *Sebelius* impacts.”¹⁸⁸ Smaller grants mean either that states will shoulder a bigger portion of implementation and enforcement costs, or that the scope of regulation will shrink. Grants of more limited duration would reduce the magnitude of states’ reliance interests, thus allowing Congress to maintain more flexibility in shaping policy or changing the amount of the grant. However, they would also provide states with less certainty that money will be available in the long run, making investment in a long-term regulatory infrastructure riskier.

These predictions suggest that both those interested in preserving the environment and those seeking to preserve state sovereignty should be concerned by such a turn of events.

A

Perhaps counterintuitively, the success of *federal* environmental regulation depends on the participation of the states. However, corralling the states (for example, dealing with collective action problems and incentives to shirk) requires some means of control for federal regulators. Since they certainly cannot command participation and compliance through the use of civil and criminal penalties (see anti-commandeering), they are left with two options: grants and control. As

blogs.govbeat/wp/2015/02/06/did-the-supreme-court-accidentally-allow-states-to-lower-the-drinking-age-with-impunity/?tid=sm_tw.

¹⁸⁸ Ryan, *Environmental Law After Sebelius*, supra note 15, at 19.

this Note has discussed, the *Sebelius* decision creates uncertainty about how these tools can be used constitutionally.

Scaling back or endangering the tools that make cooperative federalism possible will increase both the monetary and political costs of federal regulation.¹⁸⁹ First, delegating implementation and other functions to the states obviously decreases the federal cost of regulation as states shoulder some of the burden. From 2005 to 2008, the average federal share of funding for state environmental agencies was only about thirty percent.¹⁹⁰ While the other seventy percent is certainly not devoted entirely to administering federal standards, it is easy to imagine that federal spending on environmental regulation would need to at least double to achieve the same regulatory reach if cooperative federalism becomes constitutionally untenable.

Besides simply making up the costs that are currently externalized to state regulators, the theory of cooperative federalism is that states can achieve regulatory goals at a lower cost than the federal government.¹⁹¹ The former Chair of the Texas Commission on Environmental Quality writes that “state and local governments’ direct accountability to real people has catalyzed creative and cost-effective solutions to air quality problems.”¹⁹² The cost of information acquisition would likely be higher for federal regulators, because state regulators are more familiar with local conditions.¹⁹³ State environmental regulators implementing both fed-

¹⁸⁹ Cf. Siegel, *supra* note 79, at 1644 (arguing that anti-commandeering doctrine similarly removes states from the regulatory process and “forces the federal government to internalize more of the financial and accountability costs associated with regulating”).

¹⁹⁰ Spending, *Env’t. Council of the States*, <http://www.ecos.org/section/states/spending> (last visited Dec. 4, 2013).

¹⁹¹ Senate Comm. on Env’t & Pub. Works, *Minority Report, Cooperative Federalism, Neglecting a Cornerstone Principle of the Clean Air Act: President Obama’s EPA Leaves States Behind*, at 6 (Oct. 31, 2013), available at http://www.sessions.senate.gov/public/_cache/files/4911941f-8727-4696-8744-718f27d6650b/cooperativedfederalism.pdf [hereinafter *Senate Minority Report*] (“Cooperative federalism also has a pragmatic basis. States and localities are best suited to design and implement compliance strategies to protect human health and the environment in a manner that appropriately accounts for local needs and conditions.”).

¹⁹² Senate Minority Report, *supra* note 191, at 6 (quoting Kathleen H. White, Heritage Foundation, *Clean Air Through Liberty: Reforming the Clean Air Act* (2012), available at http://thf_media.s3.amazonaws.com/2012/EnvironmentalConservation/Chapter4-Clean-Air-Through-Liberty.pdf).

¹⁹³ See Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act’s Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 *Ariz. L. Rev.* 799, 800 (2008) (“The states are in a better position than either the federal government or the market to address the individual behaviors responsible for a large proportion of the nation’s GHG emissions.”).

eral and state laws also likely achieve synergies that allow them to regulate at a lower cost. Finally, the cost of state personnel is lower: In 2005, the average salary of an EPA employee was about fifty percent higher than the average state environmental agency staffer.¹⁹⁴

There would also be political costs to a shift away from cooperative federalism. While Congress undoubtedly has the power to regulate air pollution under the Commerce Clause, the values of limited federal government are deeply embedded in American society, and thus there are political barriers to federal regulation. Professor Neil Siegel writes that, even under the current regime, EPA might hesitate to impose a federal implementation plan “because of the local anger generated when Washington, D.C. dictates such behavior as one’s personal driving and cooking habits.”¹⁹⁵ The cooperative federalism structure of centralized standard setting and delegated implementation may also help insulate federal regulators in a way that allows them to pass stricter standards. EPA undoubtedly feels political pressure from Congress and interest groups when it promulgates rules, but the acoustic separation from direct regulation within the states probably serves to focus EPA’s rulemaking on the science- and health-based standards required by the Act and produce more environmentally protective regulation. Cynically, it may be desirable or even *necessary* to dilute EPA’s accountability in order to serve the “general interest.”¹⁹⁶

A federal government that is weakened in its ability to enforce its standards against the states and constrained from certain policy choices because of a Tenth-Amendment-ized Spending Clause is likely less effective at solving environmental problems. Modern ecological understandings necessitate a strong federal role in formulating environmental policy.¹⁹⁷ Much of modern environmental policy is about identifying and ameliorating externalities between separate actors, and the federal government is in the unique position in the United States to encompass fully all of the environmental costs and benefits of regulation that may otherwise be shuffled between the states. Thus, there is reason to fear that,

¹⁹⁴ Comparison of State vs. Federal Staff Salaries in 2005, Spending, Env'tl. Council of the States, http://www.ecos.org/files/4355_file_States_vs_EPA_Staff_Salaries_2005.xls (last accessed Dec. 4, 2013).

¹⁹⁵ Siegel, *supra* note 79, at 1676 n.178.

¹⁹⁶ See Arnold, *supra* note 48, at 4.

¹⁹⁷ Adler, *Judicial Federalism*, *supra* note 1, at 380 (“The very premise of much environmental regulation is that ubiquitous ecological interconnections require broad, if not all-encompassing, federal regulation.”).

“[I]imited by federalism principles, the federal government may be unable to ensure adequate levels of environmental protection.”¹⁹⁸

B

It is unlikely that those fighting for traditional federalism values would be moved by the plight of the Clean Air Act under the new Spending Clause jurisprudence. By articulating real limits to the spending power, even at the cost of “good” policy, *Sebelius* seeks to vindicate federalism values and state sovereign power in an age of increasing federal reach. As Chief Justice Roberts wrote in the foreword to his *Sebelius* opinion, a system of divided sovereignty was designed by the Founders to protect individual liberty.¹⁹⁹ A limitless spending power “would present a grave threat” to the federal system, and thus liberty.²⁰⁰ *Sebelius* signals that the Roberts Court, like the Rehnquist Court before it, is concerned with articulating limits to federal power, because only in that limitation can there be room for the exercise of *state* power, and, thus, the protection of liberty.²⁰¹

Yet, if protecting state sovereignty means, at least in part, state retention of regulatory control, advancing a Spending Clause doctrine that incentivizes preemption over federal-state cooperation seems to do more harm than good to federalism values.²⁰² The sovereignty concept of federalism that seems to drive the Court’s opinions in *Sebelius*, the anti-commandeering cases, and the Commerce Clause cases *United States v. Lopez*,²⁰³ and *United States v. Morrison*,²⁰⁴ is arguably based on an archaic understanding of the U.S. federal system which Professor Roderick Hills calls “nationalistic dual federalism.”²⁰⁵ Rather than the nineteenth-century model of federalism that imagined sharp demarcations between

¹⁹⁸ *Id.* at 403.

¹⁹⁹ *Sebelius*, 132 S. Ct. at 2578 (stating that federalism “secures to citizens the liberties that derive from the diffusion of sovereign power” (quoting *New York v. United States*, 505 U.S. 144, 181 (1992))).

²⁰⁰ *Id.* at 2659 (Scalia, J., dissenting).

²⁰¹ *Id.* at 2578; see also *id.* at 2579 (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803))); Hills, *supra* note 109, at 816 (“[T]here must be a limit to federal power and a corresponding reservoir of state power if federalism is to have any meaning at all.”).

²⁰² Siegel, *supra* note 79, at 1634.

²⁰³ 514 U.S. 549 (1995).

²⁰⁴ 529 U.S. 598 (2000).

²⁰⁵ Hills, *supra* note 109, at 818.

state and federal power, the “state-federal power game”²⁰⁶ is now characterized by overlapping jurisdiction and cooperative governance.²⁰⁷

As Professor Neil Siegel wrote about the Court’s anti-commandeering jurisprudence, creating a system that arguably incentivizes preemption over cooperation eliminates the state’s role, keeping it from exercising regulatory control.²⁰⁸ Beyond retaining the mere formal power over implementing a federal regulatory program, though, cooperative federalism allows states to exercise immense power *within* the federal system. Professor Heather Gerken writes that a singular focus on sovereign power leads scholars to miss the sort of power states exercise “when they play the agent to the national government’s principal.”²⁰⁹ Federal reliance on state personnel, resources, and expertise in cooperative federalism systems gives states “a great deal of power to interpret, influence, even resist federal mandates.”²¹⁰

Robust cooperative federalism systems like that of the CAA advance many of the functional values associated with federalism. Vesting implementation authority at the state and local level creates “a robust space for participatory politics at levels closer to the people,” providing more avenues for public participation and ensuring more sensitivity and responsiveness in government at all levels.²¹¹ Supporters of federalism often tout its liberty-enhancing effects and increased governmental responsiveness of a decentralized system,²¹² which is something that cooperative regulatory systems foster. This also allows states to fulfill their roles as laboratories of democracy, promoting policy innovation even while constrained by collective goals articulated through federal baselines. “[E]fficient delivery of local public goods by states saves var-

²⁰⁶ Heather K. Gerken, *The Federalis(m) Society*, 36 *Harv. J.L. & Pub. Pol’y* 941, 942 (2013).

²⁰⁷ See *id.*; Hills, *supra* note 109, at 818–19 (“Yet the Court still invokes the slogans and concepts of this jurisprudence, and . . . provides a bad reason for a good rule—indeed, a justification that, if taken seriously, would deprive nonfederal officials of some of their most important functions.”).

²⁰⁸ Siegel, *supra* note 79, at 1630.

²⁰⁹ Gerken, *supra* note 206, at 944.

²¹⁰ *Id.*

²¹¹ Siegel, *supra* note 79, at 1649; see also *FERC v. Mississippi*, 456 U.S. 742, 789 (1982) (O’Connor, J., dissenting) (“[F]ederalism enhances the opportunity of all citizens to participate in representative government.”).

²¹² *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating that federalism “assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society”).

ious costs when they make more cost-effective choices than the federal government would make for the nation as a whole.”²¹³

By contrast, “[i]f direct federal regulation removes states from the regulatory scene, there is no meaningful sense in which” states can serve to protect these values.²¹⁴ As Justice Ginsburg wrote in dissent, the new Spending Clause jurisprudence “rigidif[ies] Congress’ efforts to empower States by partnering with them in the implementation of federal programs,”²¹⁵ incentivizing preemption over cooperation. Paradoxically, then, a robust application of the Tenth Amendment to the Spending Clause that seeks to limit Congress’s ability to set certain conditions on the receipt of federal funding undermines state power: “The alternative to conditional federal spending, it bears emphasis, is not state autonomy but state marginalization.”²¹⁶ If “tyranny prevention” is advanced “when multiple levels of government compete for political power,”²¹⁷ the lax *Dole* doctrine better serves liberty interests than *Sebelius*, insofar as *Sebelius* discourages cooperative governing.

Some may dispute this characterization of *Sebelius*’s effects, on the grounds that it either will not undermine cooperative federalism to this extent or that it *should*. Some scholars have said that the term “cooperative federalism” no longer accurately captures the power dynamics of many of the programs bearing that label. As affirmative federal power has grown, the baseline for what the federal government can demand from states in a “cooperative” arrangement has grown with it.²¹⁸ The growing number of demands on state implementation systems under the CAA from the 1970 CAA to the 1990 Amendments is a case in point. A minority report out of the Senate Committee on Environment & Public

²¹³ Siegel, *supra* note 79, at 1650.

²¹⁴ *Id.* at 1651.

²¹⁵ *Sebelius*, 132 S. Ct. at 2629 (Ginsburg, J., dissenting).

²¹⁶ *Id.* at 2632.

²¹⁷ Siegel, *supra* note 79, at 1648; see also *The Federalist* No. 51, at 265 (James Madison) (Ian Shapiro ed., 2009) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”).

²¹⁸ John Kincaid, *From Cooperative to Coercive Federalism*, 509 *Annals Am. Acad. Pol. & Soc. Sci.* 139, 148–49 (1990) (“[T]he habit of federal activism and the nationalist momentum built up under cooperative federalism continued forward. . . . Coercive federalism could advance, in part, because the U.S. Constitution no longer posed many barriers to federal action.”).

Works blasted EPA for “diminishing the role of the states” in the cooperative administration of the CAA.²¹⁹ “The federal will to cooperate has declined under coercive federalism such that, without some constitutional revision, state and local governments may not possess much leverage to compel cooperation.”²²⁰

Thus, perhaps giving states some extra leverage is necessary to balance out the growing tide of federal power. Professor Heather Gerken praised Chief Justice Roberts’s opinion for bolstering states’ power in cooperative governing, “ensur[ing] that the principal [the federal government] cannot pull the rug out from under the agent [state governments], even when the agent rebels.”²²¹ Gerken views states’ participation as dissidents in cooperative federalism schemes as a valuable role for policy and for federalism. By limiting the extent to which Congress can change the terms of a cooperative arrangement, *Sebelius* thus gave states a stronger negotiating position.

Yet, to state a cliché, in an increasingly global world with complex, cross-jurisdictional problems, exercise of centralized power to overcome collective action problems and internalize externalities may be both good policy²²² and inevitable. If so, reliance on cooperative federalism as the mechanism for executing federal policy can help ensure that the values that the federal system is intended to advance are protected. As Gerken writes:

Cooperative Federalism is where the action is. It is where the future is. And if you care about state power, it might be useful to devote some of the massive intellectual energy now spent on the well-worn sovereignty-process debate to thinking about how to ensure that states retain an important role in state-federal governance going forward.²²³

For the reasons discussed above, it is an unfortunate possibility that the *Sebelius* Spending Clause may undermine rather than advance states’ role in the federalism of the twenty-first century.

²¹⁹ Senate Minority Report, *supra* note 191, at 2.

²²⁰ Kincaid, *supra* note 218, at 151.

²²¹ Gerken, *supra* note 206, at 946.

²²² But see Adler, *Judicial Federalism*, *supra* note 1, at 455–56 (arguing that expansive federal authority can “cause substantial amounts of environmental harm”).

²²³ Gerken, *supra* note 206, at 942.

V

The *Sebelius* opinion marks a sea change in Spending Clause jurisprudence and emphasizes that the modern federalism revival lives on. The prospect of a constricted spending power, however, raises questions about the constitutionality of the hundreds of federal programs being implemented through cooperative federalism schemes. Most importantly for this Note, *Sebelius* may affect the Clean Air Act, particularly at a time of great change as EPA develops strategies for regulating climate change using the imperfect tools available in the CAA. Although this Note concludes that the CAA is in no imminent danger of being held unconstitutional, Texas's failed attempt to make a *Sebelius*-type argument in recent litigation is evidence that *Sebelius* will be a weapon for states to use in fighting federal control in cooperative federalism regimes, and may yet influence a risk-averse agency's behavior.

States are instrumental to the success of a CAA regulatory program, perhaps in ways that seem inimical to those with a strong view of state sovereignty. Yet the power of states within a cooperative federalism system may still serve federalism values. Unfortunately, the effect of *Sebelius* on the CAA and similar statutes may be to undermine these values by eliminating tools for enforcing state compliance with a federal scheme necessary to serve the federal function in overcoming collective action problems to advance the common good. Absent those tools, Congress and agency administrators may turn more to preemptive federal schemes that cut states out of the regulatory picture entirely. Thus, perhaps what looks like a victory for state power at the expense of federal priorities may turn out to be a threat to *both* clean air and federalism.