

# Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending after *NFIB v. Sebelius*\*

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*The Clean Air Act, like many federal environmental statutes, relies upon the cooperation of state environmental agencies for its execution and enforcement. If states do not cooperate, the Clean Air Act obligates the federal government to regulate in their stead as well as to impose potentially draconian sanctions. Specifically, the Act calls for the revocation of federal highway funds in noncooperative states. There are reasons to suspect that the Clean Air Act's sanction regime is unconstitutional, particularly in the wake of National Federation of Independent Business v. Sebelius, which enforced a limit on the federal government's ability to induce states to cooperate with federal programs. Most significantly, NFIB held that conditioning receipt of federal Medicaid funds on a state's willingness to participate in a dramatic expansion of the program was unconstitutionally coercive. Combined with the Court's prior holding in South Dakota v. Dole, NFIB raises questions about the constitutionality of the Clean Air Act's highway fund sanctions and may open the door to challenges to other portions of the Act as well.*

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#### INTRODUCTION

The Clean Air Act (CAA) is the nation’s most far-reaching federal environmental law. It is a model of “cooperative federalism”<sup>1</sup> and a source of persistent federal-state conflict.<sup>2</sup> Like many federal environmental laws, the CAA relies upon the cooperation of state environmental agencies for its

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

2. States routinely challenge CAA provisions and implementing regulations in federal court. *See, e.g.,* *Texas v. EPA*, 829 F.3d 405, 410 (5th Cir. 2016) (challenging Environmental Protection Agency’s (EPA) disapproval of regional haze plans); *Michigan v. EPA*, 135 S. Ct. 2699, 2705–06 (2015) (challenging the regulation of mercury emissions from coal-fired power plants); *Utah v. EPA*, 765 F.3d 1257, 1258 (10th Cir. 2014) (challenging EPA’s partial rejection of state implementation plan); *North Dakota v. EPA*, 730 F.3d 750, 755 (8th Cir. 2013) (challenging EPA’s partial rejection of state implementation plan); *Mississippi v. EPA*, 744 F.3d 1334, 1339 (D.C. Cir. 2013) (challenging the National Ambient Air Quality Standards (NAAQS) revisions); *Oklahoma v. EPA*, 723 F.3d 1201, 1204 (10th Cir. 2013) (challenging EPA’s rejection of Oklahoma’s emission control plan); *Texas v. EPA*, 726 F.3d 180, 182 (D.C. Cir. 2013) (challenging EPA’s rules on greenhouse gas emission permits); *Texas v. EPA*, 690 F.3d 670, 673–74 (5th Cir. 2012) (challenging EPA’s rejection of state implementation plan); *North Carolina v. EPA*, 531 F.3d 896, 901 (D.C. Cir. 2008), *reh’g in part granted*, 550 F.3d 1176 (D.C. Cir. 2008) (challenging the Clean Air Interstate Rule); *New Jersey v. EPA*, 517 F.3d 574, 577 (D.C. Cir. 2008) (challenging the hazardous air pollutant regulations); *New York v. EPA*, 443 F.3d 880, 883–84 (D.C. Cir. 2006) (challenging EPA’s New Source Review regulations); *New York v. EPA*, 413 F.3d 3, 10 (D.C. Cir. 2005) (challenging EPA’s implementation of New Source Review program); *West Virginia v. EPA*, 362 F.3d 861, 864 (D.C. Cir. 2004) (challenging the regulations governing nitrogen oxide emissions); *Michigan v. EPA*, 268 F.3d 1075, 1077–78 (D.C. Cir. 2001) (challenging EPA rules on CAA permits on Indian lands); *see also* John Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1209–10 (1995).

execution and enforcement. It operates on the expectation that state officials will develop implementation plans, issue permits, and enforce emission limitations. If states do not cooperate, the CAA obligates the federal government to regulate in their stead. Perhaps more significantly, the CAA also authorizes (and in some cases, requires) the imposition of sanctions on noncooperating states. When states fail to adopt adequate plans for meeting federal air quality standards, the CAA authorizes the imposition of more stringent regulatory requirements and the revocation of federal highway funds.

Since the CAA's enactment, states have chafed against the CAA.<sup>3</sup> In the 1970s, states successfully opposed efforts to force their compliance with the CAA.<sup>4</sup> Subsequent efforts to obtain relief from the CAA's inducements have been unavailing—but that could change. As federal air quality standards become more stringent and more difficult for states to meet, states are more likely to challenge the constitutionality of the sanctions for noncompliance. More significantly, under *National Federation of Independent Business v. Sebelius (NFIB)*,<sup>5</sup> states have a new set of arguments against the CAA regime, including an argument that the most severe sanctions for noncompliance are unconstitutional.

In *NFIB* the Court reaffirmed that Congress may not force states to implement federal programs. Specifically, the Court concluded that Congress sought to coerce states into accepting a dramatic expansion of the federal Medicaid program by threatening to withhold funding for the pre-existing Medicaid program.<sup>6</sup> This use of conditional spending, seven Justices concluded, crossed the line from permissible inducement to unconstitutional coercion.<sup>7</sup> In the process, the Court reaffirmed that the Constitution creates a federal government of limited and enumerated powers,<sup>8</sup> and that the federal

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3. See, e.g., Thomas O. McGarity, *Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 PAC. L.J. 1521, 1548–49 (1996) (discussing local resistance to CAA implementation); Jackson B. Battle, *Transportation Controls Under the Clean Air Act—An Experience in (Un)cooperative Federalism*, 2 LAND & WATER L. REV. 1, 2–3 (1980) (describing conflict over CAA implementation); see also *supra* note 2 and sources cited therein.

4. See *infra* notes 91–97 and sources cited therein.

5. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012).

6. *Id.* at 2603–04; *id.* at 2666 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

7. The seven Justices were Chief Justice Roberts, joined by Justices Breyer and Kagan on this point, and the four dissenting Justices, Scalia, Kennedy, Thomas, and Alito. *Id.* at 2603–04 (majority opinion); *id.* at 2659–61 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

8. *Id.* at 2577 (majority opinion) (“The Federal Government is acknowledged by all to be one of enumerated powers. . . . The enumeration of powers is also a limitation of powers, because the enumeration presupposes something not enumerated. . . . [T]he Federal Government can exercise only the powers granted to it.” (internal quotations omitted)). On *NFIB*'s embrace and embodiment of this principle, see Jonathan H. Adler, *The Conflict of Visions in NFIB v. Sebelius*, 62 DRAKE L. REV. 937, 969 (2014).

government's so-called spending power<sup>9</sup> is subject to judicially enforceable limits.<sup>10</sup>

The Supreme Court previously articulated limits on the use of conditional spending in *South Dakota v. Dole*.<sup>11</sup> This decision purported to set outer limits on the extent of Congress's spending power, but these limits were never enforced.<sup>12</sup> *Dole* itself found that Congress acted within the scope of its spending power and, until *NFIB*, the Court had never found a congressional spending condition unconstitutional.<sup>13</sup> As one might expect, lower courts were anything but eager to get ahead of the Court on this front.<sup>14</sup> With little guidance on how to apply *Dole*'s test, there was little reason for lower courts—or Congress—to take the *Dole* limits seriously.<sup>15</sup>

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9. *NFIB*, 132 S. Ct. at 2603–04. The existence of federal power to expend funds is well established, but there is some academic debate as to the source of this power, such as whether it is tied to the specific enumeration of powers in Article I, section 8. See, e.g., Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 23 (2003) (“It is clear that the Constitution gives Congress the power to raise, and to spend, money” even though “there really is no ‘Spending Clause.’”); see also Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1348 (1988); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 19–20 (1994); Jeffrey T. Renz, *What Spending Clause? (Or, the President’s Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 86–88 (1999).

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

11. *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987).

12. With one exception, lower courts that applied the *Dole* test routinely upheld conditional spending statutes against constitutional challenge. See, e.g., *Madison v. Virginia*, 474 F.3d 118, 122 (4th Cir. 2006) (rejecting conditional spending challenge to Religious Land Use and Institutionalized Persons Act); *Cutter v. Wilkinson*, 423 F.3d 579, 590 (6th Cir. 2005) (rejecting conditional spending challenge to Religious Land Use and Institutionalized Persons Act); *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1170 (D.C. Cir. 2004) (rejecting conditional spending challenge to Civil Rights Remedies Equalization Act); *Kansas v. United States*, 214 F.3d 1196, 1203 (10th Cir. 2000) (rejecting conditional spending challenge to Personal Responsibility and Work Opportunity Reconciliation Act); *Nevada v. Skinner*, 884 F.2d 445, 446–47 (9th Cir. 1989) (rejecting conditional spending challenge to speed limit requirement). The one exception was *Virginia Department of Education v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997) (en banc) (per curiam) (holding a successful conditional spending challenge to Department of Education’s implementation of Individuals with Disabilities in Education Act).

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

14. In the five years after the Supreme Court’s decision in *United States v. Lopez*, invalidating the Gun-Free School Zones Act for exceeding the scope of the Commerce Clause, only one federal appellate court declared a federal law unconstitutional on equivalent grounds. After the Supreme Court found another law to have exceeded the scope of the Commerce Power in *United States v. Morrison*, however, lower courts began to apply greater scrutiny in commerce cases. See Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 758, 761–62 (2005).

15. One of the authors nonetheless argued that the CAA’s highway fund sanctions were constitutionally suspect under the *Dole* test. See Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 448–49 (2005).

In *NFIB* the Court fleshed out what it means for a conditional spending statute to be unconstitutionally coercive and affirmed that the doctrinal limits articulated in *Dole* should be enforced.<sup>16</sup> The Court's willingness to strike down a portion of the Patient Protection and Affordable Care Act (PPACA) should trigger greater scrutiny of statutory provisions utilizing conditional spending to induce state cooperation with federal policies.<sup>17</sup> The CAA is an obvious target for such litigation.<sup>18</sup> It is a continuing source of regulatory obligations and appears to be one of the statutes most vulnerable to attack, particularly insofar as the CAA conditions the receipt of federal highway funds on state willingness to implement various CAA requirements.<sup>19</sup> Although several post-*NFIB* analyses concluded that *NFIB* does not threaten the constitutionality of the highway fund sanction,<sup>20</sup> this Article reaches the opposite conclusion. Moreover, although the CAA's highway fund sanctions are the most vulnerable, anti-coercion challenges may be raised against other parts of the statute as well.<sup>21</sup>

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

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16. See Joondeph, *supra* note 13, at 815 (noting the Court "re-conceptualized what constitutes a federal command to the states" (emphasis added)).

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

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

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

20. See, e.g., Sarah Buckley, *Clean Air Post-Health Care: The Federalism Limits of the Spending Power and the Future of Environmental Regulation*, 101 VA. L. REV. 807, 827 (2015); Erin Ryan, *The Spending Power and Environmental Law after Sebelius*, 85 U. COLO. L. REV. 1003, 1058–59 (2014); Georgina Jones Suzuki, Note, *Clearing the Air Following National Federation of Independent Business v. Sebelius: The Clean Air Act and the Constitutionality of Highway Sanctions*, 93 B.U. L. REV. 2131, 2518 (2013); David Baake, *Federalism in the Air: Is the Clean Air Act's "My Way or No Highway" Provision Constitutional After NFIB v. Sebelius?*, 37 Harv. Envtl. L. Rev. F. 1, 4, 6 (2012), <http://harvard.elr.org/?p=887>; 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>.

21. See *infra* Part V.

I. COERCION, COOPERATIVE FEDERALISM, AND CONDITIONAL SPENDING

The federal government has extensive power to enact environmental and other regulatory measures.<sup>22</sup> The federal government also has a range of measures to induce state cooperation with federal regulatory initiatives. Such power is not unlimited, however. Although the federal government may seek state cooperation, it may not coerce state participation in federal programs or initiatives.

Under existing doctrine, the federal government is precluded from “commandeering” state governments to implement federal regulatory programs. The federal government may regulate private firms directly, it may preempt states from regulating in ways that are contrary to federal policy, and it may even authorize state regulations that, in the absence of federal legislation, might run afoul of the Dormant Commerce Clause. The federal government may not, however, require states to regulate on its behalf.<sup>23</sup> As the Supreme Court explained in *New York v. United States*: “The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States . . . .”<sup>24</sup> Chief Justice Roberts reaffirmed this principle in *NFIB*, noting Congress may not “conscript state [agencies] into the national bureaucratic army.”<sup>25</sup>

Whether to ensure sufficient disposal capacity for low-level radioactive waste<sup>26</sup> or remedy lead contamination in drinking water,<sup>27</sup> the federal government cannot require state governments to adopt specific policy measures. State governments remain “sovereign” and cannot be commandeered by the

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22. For a general discussion of the federal government’s authority to regulate in the environmental context and a survey of federalism limitations on such authority, see Adler, *supra* note 15, at 381–88. For a broader discussion of the intersection of environmental and constitutional law, see James R. May, *Introduction: The Intersection of Constitutional and Environmental Law*, in *PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW* (James R. May ed., 2011).

23. See generally *Printz v. United States*, 521 U.S. 898 (1997) (holding unconstitutional a federal law requiring state officers to perform background checks on handgun purchasers); *New York v. United States*, 505 U.S. 144, 149 (1992) (holding unconstitutional a federal law requiring states to accept ownership of waste or regulate according to instructions of Congress).

24. *New York*, 505 U.S. at 188.

25. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2606–07 (2012) (quoting *FERC v. Mississippi*, 456 U.S. 742, 775 (1982)).

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

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

federal government.<sup>28</sup> Articulated by the Supreme Court in clear and unequivocal terms, the anti-commandeering principle admits no exceptions.<sup>29</sup>

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

[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. This arrangement . . . has been termed "a program of cooperative federalism" . . . .<sup>30</sup>

In effect, the federal government can say to the states, "Regulate X, or we will do it for you."

The threat of conditional federal regulation may provide a sufficient incentive for states to act. Among other things, state policy makers may conclude that state-level regulation will be more sensitive to local conditions and preferences. Where the threat of conditional federal regulation by itself is not sufficient inducement, Congress may combine incentives, simultaneously offering to fund compliant state programs and threatening to preempt noncompliant programs, as it did in the CAA.<sup>31</sup> Particularly when used in

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28. See *NFIB*, 132 S. Ct. at 2578 (noting "State sovereignty is not just an end in itself" and that dual sovereignty helps ensure "that powers which 'in the ordinary course of affairs, concern the lives liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy") (quoting THE FEDERALIST NO. 45 (James Madison)).

29. See *Printz v. United States*, 521 U.S. 898, 935 (1997) ("[N]o case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."). There is language in *Printz* that suggests purely ministerial requirements might be exempt from the anti-commandeering rule, but the federal courts have not, as of yet, found an attempted commandeering that was sufficiently ministerial to warrant an exception. See *id.* at 936 (O'Connor, J., concurring) (noting the Court "appropriately refrains from deciding whether other purely ministerial reporting requirements" represent unconstitutional commandeering of state governments). This may be due, in part, to the fact that relatively few statutes commandeer state governments. Conditional spending programs, on the other hand, are quite common.

30. *New York*, 505 U.S. at 167, 173–74 (explaining "where Congress has the authority to regulate private activity," Congress may "offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation.") (citations omitted). The Court had made this point before. See *Mississippi*, 456 U.S. at 764–65; see also *Hodel v. Va. Surface Min. & Reclamation Ass'n*, 452 U.S. 264, 288 (1981) ("If a State does not wish to submit a proposed permanent program that complies with [federal law] and implementing regulations, the full regulatory burden will be borne by the Federal Government."); *Texas v. EPA*, 726 F.3d 180, 196 (D.C. Cir. 2013) (noting the Supreme Court has "repeatedly affirm[ed] the constitutionality of federal statutes that allow States to administer federal programs but provide for direct federal administration if a State chooses not to administer it.>").

31. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) ("[W]e have held . . . that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions."); see also *NFIB*, 132 S. Ct. at 2579 (noting Congress's power to tax and spend "gives the Federal Government considerable influence even in

combination, these incentives “may well induce the States to adopt policies that the Federal Government itself could not impose.”<sup>32</sup>

The prospect of federal regulation, in itself, may be insufficient to induce states to adopt their own regulations. State regulation may be more attuned to local needs and priorities, but it can be costly as well. As a consequence, some states may prefer not to cooperate in the imposition of regulatory burdens on local constituencies, even if only to avoid being held responsible for the costs of such regulations. States may also believe that leaving implementation and enforcement in federal hands may impede the imposition of regulatory requirements because of resource and other constraints.<sup>33</sup>

Where states are reluctant to implement federal regulatory requirements, the most straightforward way to encourage states to implement the desired regulatory programs is to pay them.<sup>34</sup> As interpreted by the Supreme Court, “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”<sup>35</sup> Thus, Congress may offer states financial support to enact policies that Congress could not enact itself. Such financial inducement is often enough to spur state policy makers into action. Such funding can serve to multiply state investments in a given field, as well as to provide political benefits to state policy makers.<sup>36</sup> Imposing conditions on the receipt of such funding can

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areas where it cannot directly regulate”). For a discussion of the use of conditional spending under the CAA, see *infra* Part II.

32. *NFIB*, 132 S. Ct. at 2579.

33. It should be noted that state resistance to federal policy can occur both inside and outside the cooperative federalism model. See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256 (2009).

34. As Professor Roderick Hills notes, “[t]he federal government can purchase the services of state and local governments whenever it is cost-effective to do so; it has no more need to conscript such services than it has to conscript the services of secretaries, FBI agents, janitors, or Supreme Court Justices.” 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, 819 (1998).

35. *United States v. Butler*, 297 U.S. 1, 66 (1936); see *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937) (affirming Congress’s power to determine when spending serves the “general welfare”). Although this question is settled as a matter of constitutional doctrine, prior to *Butler* there was extensive debate as to whether the Constitution afforded Congress the power to spend moneys for purposes other than those expressly identified in the Constitution. Alexander Hamilton, for one, argued that the federal power to raise and spend money was “plenary” and “indefinite.” See ALEXANDER HAMILTON, *REPORT ON MANUFACTURES* (1791), reprinted in *THE FOUNDERS’ CONSTITUTION* 446–47 (Philip B. Kurland & Ralph Lerner eds., 1987). James Madison, on the other hand, feared that such a broad construction of the spending power would produce a “general power of legislation, instead of the defined and limited one” otherwise provided for in the Constitution. See 30 *THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES* 212 (1817); see also John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 *CHAP. L. REV.* 63 (2001) (defending a narrower construction of the spending power); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 *U. KAN. L. REV.* 1 (2003) (same); but see Engdahl, *supra* note 9, at 5 (“No one today candidly denies that Hamilton’s view of the spending power was correct.”).

36. See Ilya Somin, *Closing Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 *GEO. L.J.* 461, 484 (2002) (“While state governments have



also ensure that state policies are implemented consistent with federal objectives.<sup>37</sup>

The power to offer conditional federal funding is quite expansive, but it is also subject to limits. In *United States v. Butler*, the Supreme Court embraced a capacious understanding of the “general welfare” Congress may pursue through federal spending, but it also constrained Congress’s ability to use financial inducements “to regulate and control” matters “beyond the powers delegated to the federal government,”<sup>38</sup> a category of matters far more limited when *Butler* was decided in 1936 than it is today.<sup>39</sup>

Since *Butler*, the Court has loosened its restraints on the scope of federal power, but also reaffirmed that the power to impose conditions accompanying federal funds is limited so as to ensure that such power is not used to circumvent other structural limits on federal power.<sup>40</sup> Most notably, in *South Dakota v. Dole*, the Supreme Court identified a set of restraints upon Congress’s use of conditional federal spending.<sup>41</sup>

The *Dole* test consists of four requirements. First, the appropriation of funds must be for the “general welfare” and not for a narrow special interest.<sup>42</sup> In making this determination, however, courts should “defer substantially to the judgment of Congress.”<sup>43</sup> Second, there can be no independent constitutional bar to the condition imposed upon the federal spending.<sup>44</sup> In other words, Congress may not seek to use the spending power to induce states to engage in conduct that would otherwise be unconstitutional. These first two requirements are easy to meet and are rarely issues in conditional spending cases.

The third requirement is that any conditions imposed upon the federal funds must be clear and unambiguous.<sup>45</sup> Recipients of federal funds must have notice of any conditions with which they must comply, and the scope of their

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strong political incentives to resist ordinary federal legislation that inhibits their authority, they have incentives to accept and even lobby for conditional federal grants.”).

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

38. *Butler*, 297 U.S. at 68.

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

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

41. *Dole*, 483 U.S. at 207–08.

42. *Id.* at 207.

43. *Id.*

44. *Id.*

45. *Id.*

obligation.<sup>46</sup> As the Court noted in *Pennhurst State School and Hospital v. Halderman*, “[t]he legitimacy of Congress’ power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”<sup>47</sup> States are not bound to comply with conditions that were not made clear when the funds were accepted.

Fourth, and perhaps most significantly, the conditions imposed must be related to the federal interest that the exercise of the spending power is itself supposed to advance.<sup>48</sup> As the Court further explained in *New York*, the “conditions must . . . bear some relationship to the purpose of the federal spending, otherwise, of course the spending power could render academic the Constitution’s other grants and limits of federal authority.”<sup>49</sup> Thus, in upholding the spending condition challenged in *Dole*, the Court observed that “the condition imposed by Congress is directly related to one of the main purposes for which . . . funds are expended.”<sup>50</sup>

In addition to this four-part test, *Dole* also declared that Congress may not use its power to impose conditions on federal funding to “coerce” the states. Specifically, the Court noted 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.’”<sup>51</sup> This point has been reiterated in subsequent cases, albeit without significant elaboration.<sup>52</sup>

Although not explaining what amount or degree of financial inducement would be enough to turn “pressure” into “compulsion,” the *Dole* majority noted Congress only conditioned “a relatively small percentage of certain federal highway funds”<sup>53</sup>—specifically 5 percent of the funds from specific highway grant programs—on compliance with the applicable condition. Such an imposition was not coercive because it represented “relatively mild encouragement,” and left states with the ability to decline to cooperate.<sup>54</sup> This language in *Dole* suggests the measure of coercion may be the amount of money

46. See Engdahl, *supra* note 9, at 78 (noting “sufficient clarity is required not only as to the fact that an obligation is being assumed, but also as to the scope or scale of that obligation”).

47. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The interpretive rule urged in *Pennhurst* is arguably in tension with *Chevron* deference for agency interpretations of ambiguous statutory language. See David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism and the Administrative State*, 82 TEX. L. REV. 1197, 1212 (2004).

48. *Dole*, 483 U.S. at 207–08 (noting “conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs’” (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion))).

49. *New York v. United States*, 505 U.S. 144, 167 (1992) (citations omitted).

50. *Dole*, 483 U.S. at 208.

51. *Id.* at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

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

53. *Dole*, 483 U.S. at 211.

54. *Id.*

at stake, and the extent to which the money in question places an intolerable degree of pressure on state policy makers. Alternatively, insofar as the inquiry is designed to safeguard state sovereignty, the coercion inquiry could turn on whether the manner in which the conditions were imposed “interferes with [a] state’s sovereign accountability.”<sup>55</sup>

As written, *Dole* does not make clear whether this prohibition is an independent requirement for the use of conditional spending—a fifth prong to *Dole*’s test—or a gloss on the doctrine. One possibility is that the degree of scrutiny with which courts should apply the four-part test is dependent, in part, on the amount of money at stake. Alternatively, as some scholars have suggested, conditional spending requirements that readily satisfy *Dole*’s four stated requirements may nonetheless be unconstitutionally coercive.<sup>56</sup>

Justice O’Connor dissented in *Dole*, challenging the majority’s superficial treatment of the four-pronged inquiry. Significantly, she did not dispute the Court’s test or question the underlying federalism concerns animating it. Rather, Justice O’Connor found the majority’s application of the test “ cursory and unconvincing.”<sup>57</sup> In her view, the federal requirement that South Dakota raise its drinking age in order to receive federal highway funds was not “reasonably related” to the purposes for which the federal government funds highway construction.<sup>58</sup> Consequently, she believed, the condition failed the test outlined by the majority.<sup>59</sup> Without a reasonable relationship between the purpose of the federal funds and the conditions that Congress imposed, she warned, the conditions were tantamount to federal regulation of the state and jeopardized state sovereignty.<sup>60</sup>

Although the *Dole* Court clearly stated that Congress’s power to impose conditions on the receiving federal funds is limited, federal appellate courts have been extremely reluctant to strike down federal programs for exceeding the scope of the spending power.<sup>61</sup> The “general welfare” prong is treated as a “complete throw away,”<sup>62</sup> and the other prongs have not fared much better.<sup>63</sup> The

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

56. See, e.g., Mitchell N. Berman, *Coercion without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 36–38 (2001); Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911, 1954 (1985).

57. *Dole*, 483 U.S. at 213 (O’Connor, J., dissenting).

58. *Id.* at 213–14.

59. *Id.* at 213.

60. *Id.* at 215.

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

62. See Baker & Berman, *supra* note 40, at 464.

63. *Id.* (“[T]he lower courts, quite predictably, have found little use for three of the five elements of the test.”); *id.* at 466 (The other two elements have not fared much better, as most lower courts have

relatedness prong of the *Dole* test perhaps has the greatest potential for constraining the use of conditional spending. It is repeatedly referenced by the lower courts, but rarely examined in any detail.<sup>64</sup> The concept of “coercive” uses of federal spending has attracted some attention as well, but “the coercion theory is somewhat amorphous and cannot easily be reduced to a neat set of black-letter rules of application.”<sup>65</sup>

Most lower court challenges to conditional spending provisions under *Dole* have been unsuccessful, with one notable exception. In *Virginia Department of Education v. Riley*, the U.S. Court of Appeals for the Fourth Circuit, sitting *en banc*, concluded that the Department of Education could not condition state receipt of federal funds under the Individuals with Disabilities Education Act on compliance with terms not explicit in the statute itself.<sup>66</sup> According to the court’s majority, “[l]anguage which, at best, only implicitly conditions the receipt of federal funding on the fulfillment of certain conditions is insufficient to impose on the state the condition sought.”<sup>67</sup> Six of the thirteen judges in *Riley* went further, suggesting that the withholding of \$60 million in Individuals with Disabilities Education Act funds on such a basis would also be unconstitutionally “coercive” even if it had been explicitly authorized by Congress.<sup>68</sup> In *Dole*, states only risked losing a small portion of federal funding for failing to adopt a higher drinking age. But in *Riley*, the Department sought to withhold “the entirety of a substantial federal grant” because Virginia refused “to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign states.”<sup>69</sup>

Before *NFIB*, *Riley* had been the exception. Although often cited, the *Dole* limitations had yet to be meaningfully enforced. *Dole* itself had found that Congress acted within the scope of its spending power, and until *NFIB*, the Court had never found a congressional spending condition unconstitutional. With little guidance on how to apply *Dole*’s test, or what use of the conditional spending power might exceed constitutional bounds, there was little reason for lower courts—or Congress—to take the *Dole* limits seriously.

## II. COERCION, COOPERATION, AND THE CLEAN AIR ACT

Most major federal environmental statutes adopt a form of “cooperative federalism,” incorporating some combination of incentives in order to encourage

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read them “to be toothless, even nonjusticiable, en route to sustaining a wide range of conditional federal spending legislation.”).

64. *Id.* at 466–67. *But see* *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1168 (D.C. Cir. 2004) (discussing the relatedness prong).

65. *West Virginia v. U.S. Dep’t of Health & Human Servs.*, 289 F.3d 281, 288 (4th Cir. 2002).

66. 106 F.3d 559, 561 (4th Cir. 1997) (*en banc*) (*per curiam*).

67. *Id.*

68. *Id.*

69. *Id.* at 570 (Luttig, J., dissenting).

state cooperation.<sup>70</sup> Under most of these statutes, the federal government outlines the contours of a given regulatory program, typically through statutory mandates elaborated upon by regulatory measures. States are then encouraged to implement the program in lieu of the federal government, in accordance with federal guidelines. Provided these standards are met, states are free to tailor the details of their individual programs to accommodate local conditions and concerns. In most cases the federal standards operate as a floor—albeit a highly prescriptive one—and states remain free to adopt more stringent measures.<sup>71</sup> State programs that meet federal standards are typically eligible for federal financial assistance.<sup>72</sup> States that fail to adopt adequate programs are not only denied the relevant federal funding, but also can be subject to various sanctions and federal preemption of their programs.<sup>73</sup> That is, if states refuse to regulate in accordance with federal guidelines, the federal government may regulate in their place. With the threat of conditional federal preemption hanging over them, states do not always view their involvement as purely voluntary. Despite its “cooperative” appellation, federal-state interactions in environmental policy can be a source of substantial friction.<sup>74</sup>

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70. For a breakdown of which major statutes use which incentives to encourage state cooperation, see Ryan, *supra* note 20, at 1039. For a broader survey of cooperative federalism programs, see David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544 (2005).

71. Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1534 (1995) (“The essence of cooperative federalism is that states take primary responsibility for implementing federal standards, while retaining the freedom to apply their own, more stringent standards.”). A notable exception is the case of product standards. As a general matter, federal product standards, such as vehicle emission standards, tend to preempt more stringent state standards. See, e.g., 42 U.S.C. § 7543(a) (2012) (preemption of state automobile emission standards); 42 U.S.C. § 7545(c)(4)(A) (2012) (preemption of state fuel standards).

72. See, e.g., 33 U.S.C. § 1256 (2012) (authorizing financial support for state water pollution control programs that adopt desired pollution control policies); See also Robert V. Percival, *Symposium - Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1173 (1995) (noting the use of federal funding to encourage land-use planning and solid waste management).

73. See, e.g., 42 U.S.C. § 7509 (1990) (detailing sanctions for failure to attain NAAQS under the CAA); see also Percival, *supra* note 72, at 1174 (noting under most environmental laws, the federal government will adopt and enforce a federal regulatory program in the absence of a sufficient state program).

74. See Percival, *supra* note 72, at 1144 (“[F]ederal environmental standards have been a chronic source of friction for federal-state relations . . .”). According to one study, state officials “resent what they believe to be an overly prescriptive federal orientation toward state programs, especially in light of stable or decreasing grant awards.” See DENISE SCHEBERLE, *FEDERALISM AND ENVIRONMENTAL POLICY: TRUST AND THE POLITICS OF IMPLEMENTATION* 199 (1997). As noted earlier, this friction often leads to litigation. See *supra* note 2 and cases cited therein; see also *Nebraska v. EPA*, 331 F.3d 995 (D.C. Cir. 2003) (challenging federal drinking water standards for arsenic); *New Mexico v. EPA*, 114 F.3d 290 (D.C. Cir. 1997) (challenging the federal government’s criteria for certification of compliance with disposal regulations for radioactive waste from national defense activities); *Ohio v. EPA*, 997 F.2d 1520 (D.C. Cir. 1993) (challenging the federal government’s cost-benefit analysis, cancer risk range, federal/state cost sharing requirements, and basis for departing from past policy, all promulgated under the Comprehensive Environmental Response, Compensation, and Liability Act); *Wash. State Dep’t of Transp. v. EPA*, 917 F.2d 1309 (D.C. Cir. 1990) (challenging decision by the EPA to include property owned by the state agency on list of contaminated environmental areas subject to federal cleanup under the Superfund program); *California v. EPA*, 689 F.2d 217 (D.C. Cir. 1982) (challenging the EPA’s deferral of funding

Among all federal environmental statutes, the CAA continues to be the greatest source of federal-state conflict.<sup>75</sup> The CAA relies upon conditional preemption in addition to conditional spending in order to encourage state compliance. It also represents Congress's most aggressive effort to induce state regulation through conditional spending, and is therefore the most vulnerable to a spending power challenge. Whereas many federal environmental statutes attach conditions on federal funding for state environmental programs, the CAA relies upon the threat of withholding funding allocated for other purposes, specifically federal highway funds, to ensure state cooperation.

Under the CAA, the Environmental Protection Agency (EPA) sets National Ambient Air Quality Standards (NAAQS) for criteria air pollutants, such as ozone (smog) and particulate matter (soot).<sup>76</sup> These standards must be set at a level "the attainment and maintenance of which in the judgment of the Administrator . . . are requisite to protect the public health," allowing for "an adequate margin of safety."<sup>77</sup> The EPA is authorized to propose NAAQS for additional pollutants and is required to review the existing NAAQS every five years.<sup>78</sup> With one exception,<sup>79</sup> this process has led to a fairly consistent tightening of existing NAAQS, as additional scientific evidence has emerged detailing the potential health effects of criteria air pollutants at lower levels.<sup>80</sup>

Most recently, in 2015, the EPA announced it was again revising the NAAQS for ozone, lowering it to 70 parts per billion.<sup>81</sup> Almost immediately after this new standard was finalized, several states and industry groups filed suit.<sup>82</sup> Opponents of the tighter standards cited the high costs of compliance, as

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for two advanced waste treatment projects pursuant to EPA policy memorandum, seeking declaratory judgment that memorandum was invalid, injunction against its use, and order requiring the EPA to apply certain other procedures to its review of advanced waste treatment projects in lieu of those created by memorandum).

75. See *supra* note 2.

76. See § 7408(a)(1).

77. See § 7409(b)(1); see also *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (upholding NAAQS provisions against nondelegation challenge and holding the primary NAAQS must be set without regard to cost). The CAA also provides for the establishment of "secondary" NAAQS that are intended to "protect public welfare." § 7409(b)(2).

78. See § 7409(d).

79. See Revisions to the National Ambient Air Quality Standards for Photochemical Oxidants, 44 Fed. Reg. 8202 (Feb. 8, 1979) (codified at 40 C.F.R. § 50.9) (2016). This loosening of the standard was upheld in *American Petroleum Institute v. Costle*, 665 F.2d 1176, 1184-86 (D.C. Cir. 1981). The standard was subsequently tightened in 1997. See National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) (codified at 40 C.F.R. § 50.10).

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

81. See National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292, (Oct. 26, 2015) (to be codified at 40 C.F.R. pts. 50, 51, 52, 53, 58).

82. See *Murray Energy Corp. v. EPA*, No. 15-1385 (consolidated with Nos. 15-1392, 15-1490, 15-1491, and 15-1494) (D.C. Cir. filed Apr. 22, 2016).

well as the difficulty of attaining an ozone NAAQS that, in some parts of the country, may be approaching background ozone levels.<sup>83</sup>

States with areas that fail to attain NAAQS are required to draft State Implementation Plans (SIPs), which they submit to the EPA for its approval. Among other things, an adequate SIP must include “enforceable emission limitations . . . as well as schedules and timetables for compliance,”<sup>84</sup> monitoring systems,<sup>85</sup> a fee-based permitting system for stationary sources,<sup>86</sup> an enforcement program,<sup>87</sup> and provisions for sufficient public participation in the SIP process.<sup>88</sup> The 1990 CAA Amendments added additional requirements for state permitting programs for stationary sources.<sup>89</sup> This SIP process is the “heart” of the CAA.<sup>90</sup>

In the 1970s, the EPA sought to force states to implement the CAA in accordance with the agency’s dictates. In a series of cases, the EPA argued that states were simply required to implement various regulatory measures, such as vehicle emission testing programs, mandated by federal law.<sup>91</sup> The EPA maintained that courts should order uncooperative state officials to adopt EPA-mandated measures.<sup>92</sup> Although the Supreme Court had not yet decided *New York* or *Printz*, this claim was generally rejected in the courts of appeals.<sup>93</sup> These courts rested their holdings on the CAA’s text and structure, but several noted that the EPA’s position raised serious constitutional questions.<sup>94</sup> As the U.S. Court of Appeals for the D.C. Circuit noted, the EPA was “attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program

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83. *Id.* at 40. See also Reitze, *supra* note 80, at 445–48. As Professor Arnold Reitze notes: “Where background concentrations are large relative to the impact of controllable man-made sources of NOX and VOC emissions within the U.S., effective control is difficult or impossible, especially in locations with few remaining opportunities for local emission reductions.” *Id.* at 448.

84. 42 U.S.C. § 7410 (a)(2)(A) (2012).

85. § 7410 (a)(2)(B).

86. § 7410 (a)(2)(L).

87. § 7410 (a)(2)(C), (E).

88. States must provide “reasonable notice” and public hearings on SIPs, and consult with affected local entities. § 7410 (a)(2), (a)(2)(M).

89. See 42 U.S.C. § 7651o (2012).

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

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

92. *Brown*, 521 F.2d at 831.

93. *Id.* at 832; *Maryland*, 530 F.2d at 227; *Train*, 521 F.2d at 984. A fourth federal appeals court found in favor of the EPA. See *Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974); see also Arnold W. Reitze, Jr., *Air Quality Protection Using State Implementation Plans – Thirty-Seven Years of Increasing Complexity*, 15 VILL. ENVTL. L.J. 209, 345–48 (2004) (discussing litigation in 1970s and resulting uncertainty as to whether the EPA could force states to implement air pollution control measures).

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

against the owners of motor vehicles.”<sup>95</sup> Upholding such an assertion of federal regulatory authority, the U.S. Court of Appeals for the Ninth Circuit observed, “would reduce the states to puppets of a ventriloquist Congress.”<sup>96</sup> The Supreme Court initially accepted petitions for certiorari to consider the commandeering question, but the federal government confessed error prior to argument and the decisions were vacated.<sup>97</sup> From that point on, it was uncontested that the EPA could not simply tell states to implement the federal government’s preferred air pollution control measures.

Although the EPA may not simply order the states to cooperate in the implementation and enforcement of the CAA, the Act provides the EPA with substantial leverage over state officials. Failure to cooperate with CAA implementation places federal funding of state programs at risk.<sup>98</sup> Most significantly, if a state fails to submit a fully adequate SIP by the appropriate deadlines, it is subject to federal sanctions (including the loss of federal highway funds and increased offset requirements for new development), and the imposition of a Federal Implementation Plan (FIP) that the EPA will enforce.<sup>99</sup> A state’s failure to comply can also prompt the EPA to deny permit applications in nonattainment areas.<sup>100</sup>

The primary sanctions provisions are contained in CAA section 179.<sup>101</sup> Section 179(b) provides for two sanctions: (1) a prohibition on federal highway funding within the relevant nonattainment area, save for funding related to safety improvements and mass transit programs,<sup>102</sup> and (2) an increase in the offset requirements imposed on new or modified sources.<sup>103</sup> Under section 179(a), the EPA Administrator “shall apply” one of these two sanctions to states that fail to submit a fully compliant SIP unless any deficiencies are corrected within eighteen months.<sup>104</sup> If, after an additional six months, the state still has not complied with the applicable SIP requirements, the EPA Administrator is required to impose whichever sanction has not already been imposed.<sup>105</sup>

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95. *Train*, 521 F.2d at 992.

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

97. *Brown*, 431 U.S. at 103–04.

98. See, e.g., 42 U.S.C. § 7509(a)(4) (2012) (air quality planning grants); § 7616 (water pollution control grants).

99. § 7509.

100. See § 7413.

101. § 7509.

102. § 7509(b)(1).

103. § 7509(b)(2).

104. § 7509(a). The provision further provides that both sanctions shall apply if the Administrator “finds lack of good faith.” *Id.*

105. *Id.*



Sanctions must remain in place “until the Administrator determines that the State has come into compliance.”<sup>106</sup>

As provided for under section 179, these sanctions are mandatory.<sup>107</sup> Under regulations that the EPA promulgated in 1994, the offset sanction is to be imposed first.<sup>108</sup> The highway fund sanctions are then to be applied if the state fails to come into compliance within six months of the offset sanction being imposed.<sup>109</sup> Under these regulations, as under section 179, the relevant sanctions “shall apply” when the relevant conditions are met.<sup>110</sup>

Section 110(m) provides the EPA Administrator the additional discretionary authority to impose sanctions “at any time” in “any portion of the State the Administrator determines reasonable and appropriate,” after having made the requisite findings of noncompliance specified in section 179.<sup>111</sup> In other words, the EPA may impose sanctions throughout a state even if the relevant SIP deficiency only applies to a smaller area.<sup>112</sup> The EPA may not, however, impose sanctions statewide within twenty-four months of an initial finding of noncompliance “where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such

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106. *Id.*

107. *See* Miss. Comm’n on Env’tl. Quality v. EPA, 790 F. 3d 138, 175 (D.C. Cir. 2015) (noting the CAA “requires the EPA to impose sanctions on a State that fails to submit an adequate [State Implementation] plan or implement an approved plan if it does not correct the deficiency within 18 months” (citing § 7509(a)) (emphasis added)).

Some commentators have made the claim that the imposition of sanctions under section 179 may be avoided once the federal government imposes and implements a FIP. *See, e.g.,* Ryan, *supra* note 20, at 1050; Baake, *supra* note 20, at 6–8. Professor Erin Ryan and David Baake cite 40 C.F.R. § 93.120 (2008) in support of this proposition. Yet this regulation implements the transportation conformity provision in CAA section 176, not the sanctions provisions in CAA section 179. The EPA’s regulations interpreting and implementing section 179 are found elsewhere, at §§ 52.30 and 52.31, and do not suggest that the imposition of a FIP removes the threat of sanctions.

Baake also cites the EPA’s Federal Register notice explaining why the adoption of a FIP for cross-state air pollution does not trigger sanctions for further support of this point. *See* Baake, *supra* note 20, at 7; Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 71 Fed. Reg. 25,328 (Apr. 28, 2006) (to be codified at 40 C.F.R. pts. 51, 52, 72, 73, 74, 78, 96, 97). Yet, as this notice explains, the reason the EPA’s FIP does not trigger sanctions is not because the existence of a FIP eliminates the sanction threat, but because of the specific CAA provisions under which the EPA took this action. As the EPA explained, “[t]he findings do not start a sanctions clock pursuant to section 179 because the findings do not pertain to a part D plan for nonattainment areas required under section 110(a)(2)(I) and because the action is not a SIP Call pursuant to section 110(k)(5).” 71 Fed. Reg. at 25,333. In other words, there was no threat of sanctions here not because of the existence of a FIP, but because the EPA did not make the necessary findings under the relevant provisions of the CAA to trigger the sanctions clock.

108. 40 C.F.R. § 52.31(d) (2016).

109. § 52.31(d)(1).

110. *Id.*

111. *See* 42 U.S.C. § 7410(m) (2000).

112. *See* Reitze, *supra* note 93, at 356 (“Once a finding under section 179(a) has been made, the Administrator may, pursuant to section 110(m), apply the sanctions to any portion of the State. Using section 110(m) allows sanctions to be applied to a larger area than sanctions imposed pursuant to section 179(a).”).

deficiency.”<sup>113</sup> In other words, the EPA may not punish an entire state for the failings of one or more of its subdivisions—at least not right away.

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

Although the EPA may be reluctant to impose painful sanctions on noncompliant states, its discretion is limited due to the CAA’s citizen suit provisions. Under these provisions, individual citizens and activist groups may force the EPA’s hand through citizen suits seeking to enforce the express requirements of the CAA and associated regulations.<sup>114</sup> Thus, short of corrective legislation, states’ ability to seek compromise over CAA enforcement is constrained.<sup>115</sup> In addition to the sanction provisions, a separate set of CAA provisions—the so-called “conformity” provisions—require local transportation projects to be in compliance with, or “conform” to, an EPA-approved SIP in order to be eligible for federal funding.<sup>116</sup>

The EPA threatens to impose sanctions far more frequently than it actually imposes them.<sup>117</sup> Since the CAA was last amended in 1990, sanctions have been threatened hundreds of times.<sup>118</sup> Between 1990 and 1999, for instance, the EPA made noncompliance findings that triggered the sanctions clock over 850 times.<sup>119</sup> In only 18 of the instances, however, were sanctions actually imposed.<sup>120</sup> The threat of sanctions is usually enough to induce even reluctant states to comply.<sup>121</sup> Where sanctions are imposed, they usually do not remain in

113. Section 110(m) specifically requires the EPA to promulgate regulations to ensure “such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.” The required regulation, setting forth criteria governing when sanctions may be imposed on a statewide basis, is at 40 C.F.R. § 52.30 (2016).

114. 42 U.S.C. § 7604 (2012). In 2015, for example, environmentalist organizations threatened to sue the EPA for failing to enforce SIP requirements for the 2008 revisions to the ozone NAAQS. *See* Reitze, *supra* note 80, at 440; *see also* Anuradha Sivaram, *Why Citizen Suits Against the States Would Ensure the Legitimacy of Cooperative Federalism Under the Clean Air Act*, 40 *ECOLOGY L.Q.* 443 (2013).

115. *See* § 7604.

116. § 7506.

117. *See* JAMES E. MCCARTHY, CONG. RESEARCH SERV., RL30131, HIGHWAY FUND SANCTIONS AND CONFORMITY UNDER THE CLEAN AIR ACT 3 (1999) (“Imposition of sanctions is a relatively rare event, but their invocation to prompt state action is not.”).

118. *Id.*

119. *Id.*

120. *Id.* at 4.

121. In some cases, sanctions are threatened because a state SIP submission is technically deficient, but due to a drafting error or a minor deficiency, and not due to a state’s effort to resist the relevant

place for long.<sup>122</sup> For most states, the threat of losing highway funds is a very powerful incentive to cooperate.<sup>123</sup>

Three cases have considered state challenges to the constitutionality of the CAA sanction provisions. Two of the cases focused on the application of *Dole* to the sanction provisions. The third solely considered the implications of *NFIB*. None of these challenges was successful.

In 1995, Missouri and Virginia each alleged that the EPA's decision to impose sanctions, if not the statutory provisions authorizing sanctions themselves, unconstitutionally infringed upon state sovereignty.<sup>124</sup> According to these two states, the CAA impermissibly authorized the EPA to impose severe sanctions for their failure to comply with the EPA's interpretation of the Act.<sup>125</sup> Both claimed that the highway fund sanction was an unconstitutional use of the federal spending power. Neither state succeeded.

In *Virginia v. Browner*, the U.S. Court of Appeals for the Fourth Circuit found that the CAA's provisions passed constitutional muster "because although its sanctions provisions potentially burden the states, those sanctions amount to inducement rather than 'outright coercion.'"<sup>126</sup> The District Court for the Eastern District of Missouri in *Missouri v. United States* reached a similar conclusion, relying upon dicta in *New York* that "conditions [on receipt of federal funds] must . . . bear *some* relationship to the purpose of federal spending."<sup>127</sup> For the *Missouri* court, "the appropriate focus is not on the alleged impact of a statute on a particular state program . . . but whether Congress has 'directly compel[led]' the state 'to enact a federal regulatory program.'"<sup>128</sup> Although the *Missouri* court

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requirements. Therefore, the total number of cases in which sanctions are threatened likely overstates the degree of state resistance to the CAA's SIP requirements.

122. In April 2003, for example, the EPA imposed offset sanctions in the San Francisco Bay area. See Approval and Promulgation of Ozone Attainment Plan and Finding of Failure to Attain; State of California, San Francisco Bay Area, 66 Fed. Reg. 48,340 (Sept. 20, 2001) (to be codified at 40 C.F.R. pt. 52). These sanctions were only in place for three months, however, as they were stayed upon the submission of a corrected SIP. See Interim Determination That State of California Has Corrected Deficiencies and Stay and Deferral of Sanctions; San Francisco Bay Area, 68 Fed. Reg. 42,172 (July 16, 2003).

123. According to Professor Richard Stewart, "such a condition," the combination of a burden on citizens and loss of funds, "accompanying funds which the state cannot afford to forgo, intensifies federal interference with local mechanisms of political accountability by compelling states to enforce against their constituencies restrictions the constituencies oppose." Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1255 (1977).

124. See *Virginia v. Browner*, 80 F.3d 869, 880 (4th Cir. 1996); *Missouri v. United States*, 918 F. Supp. 1320, 1322 (1996), *vacated*, 109 F.3d 440 (1997).

125. See *Virginia*, 80 F.3d at 873; *Missouri*, 918 F. Supp. at 1326. Virginia also argued that the EPA was wrong to conclude that its stationary source permit program failed to comply with Title V of the CAA. *Virginia*, 80 F.3d at 872-73.

126. *Id.* at 881 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

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

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

only addressed the question of whether such sanctions were unconstitutional on their face, it implied that an as-applied challenge would not fare any better.<sup>129</sup>

More recently, in *Mississippi Commission on Environmental Quality v. EPA*, the D.C. Circuit rejected arguments by Texas and Mississippi that the “[CAA]’s sanctions for noncompliant states impose such a steep price that State officials effectively have no choice but to comply—in contravention of the Supreme Court’s decision in [*NFIB*].”<sup>130</sup> The court found the CAA highway funds sanctions “not nearly as coercive as those in the ACA.”<sup>131</sup> This third case is the only challenge to the imposition of highway fund sanctions since *NFIB*. Interestingly enough, the petitioners in this case relied exclusively on *NFIB* and did not claim the imposition of highway fund sanctions was unconstitutional under *Dole*.<sup>132</sup>

More challenges could be on the horizon. As of September 2015, only a handful of nonattainment areas were subject to or under threat of sanctions. In nearly all jurisdictions that were on the sanctions clock, the EPA stayed or suspended the sanctions once the jurisdiction in question fixed whatever deficiencies the EPA had found or otherwise demonstrated attainment with the relevant NAAQS.<sup>133</sup> This could change.

With the adoption of more stringent NAAQS in 2008 and 2015, the costs of CAA compliance are increasing for both private regulated firms as well as for state and local governments. As these costs increase—and standards become more difficult to meet—state resistance and noncompliance with the applicable SIP requirements are likely to increase. The amount of money at risk is potentially significant. On average, federal highway funds account for between 3-4 percent of each state’s budget,<sup>134</sup> or approximately one-third of state transportation spending.<sup>135</sup> Transportation spending also accounts for one of the larger components of state budgets, after Medicaid and education spending.<sup>136</sup> A loss of federal highway funding would be quite significant. As a consequence,

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

130. Miss. Comm’n on Env’tl. Quality v. EPA, 790 F. 3d 138, 175 (D.C. Cir. 2015).

131. *Id.* at 177.

132. *See id.* at 176 n.21.

133. *See Status of Sanctions Clocks Under the Clean Air Act*, FED. HIGHWAY ADMIN., U.S. DEPT. TRANSP., [http://www.fhwa.dot.gov/environment/air\\_quality/highway\\_sanctions/sanctionslock.cfm](http://www.fhwa.dot.gov/environment/air_quality/highway_sanctions/sanctionslock.cfm) (last updated Dec. 16, 2015).

134. Authors’ calculations based upon data from the National Association of State Budget Officers (NASBO). *See Archive of State Expenditure Report*, NASBO, <http://www.nasbo.org/mainsite/reports-data/state-expenditure-report/state-expenditure-archives>. The state average was 3.97 percent in FY 2013 and 3.85 percent in FY 2014. In states with large land areas and relatively small populations, however, federal highway funds may account for as much as 10 percent of a state’s budget. In FY 2013, this was true of Montana and South Dakota. *Id.*

135. *Id.* In FY 2013 and FY 2014, for example, federal funds accounted for 32.2 percent and 31.1 percent of total state transportation spending, respectively.

136. *Id.*

additional litigation challenging the constitutionality of CAA sanctions is likely.<sup>137</sup>

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

The success of future challenges to the CAA sanction regime may turn on how courts interpret the Supreme Court's decision in *NFIB v. Sebelius*. The primary challenge to the constitutionality of the PPACA in *NFIB* was directed at the minimum coverage requirement, a.k.a. the "individual mandate."<sup>138</sup> Private and state petitioners maintained that this provision exceeded the scope of the federal government's power to "regulate Commerce . . . among the several States" as supplemented by the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."<sup>139</sup> They also maintained that the individual mandate could not be justified as an exercise of the federal government's taxing power. The petitioners prevailed on the first claim, but the individual mandate was ultimately upheld on the latter.<sup>140</sup>

State petitioners also brought a claim concerning the PPACA's provisions expanding the federal Medicaid program. Specifically, the state petitioners (representing a majority of the states) argued that Congress exceeded the scope of the spending power by conditioning receipt of all Medicaid funds on state willingness to accept a dramatic increase in the scope of the program.<sup>141</sup> Commentators largely dismissed this claim when the lawsuit against the PPACA began,<sup>142</sup> yet this claim was ultimately more successful than those made against the individual mandate. It could also prove to be the most consequential, particularly for environmental law.

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137. An additional factor that is likely to contribute to renewed legal challenges against the federal highway fund sanctions is the increasingly oppositional posture of state attorneys general. In recent years, state attorneys general have become particularly aggressive in challenging perceived federal regulatory overreach in federal court. The decision of twenty-seven states to challenge the lawfulness of the Clean Power Plan is but one example. *See infra* part V.B.

138. For an overview of the constitutional challenges to the PPACA that culminated in *NFIB v. Sebelius*, see JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (2013).

139. U.S. Const. art. I, § 8.

140. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591, 2600 (2012).

141. *Id.* at 2582 ("[T]he state plaintiffs in the Eleventh Circuit argued that the Medicaid expansion exceeds Congress's constitutional powers" and "the threatened loss of all federal Medicaid funding violates the Tenth Amendment by coercing them into complying with the Medicaid expansion.").

142. *See, e.g.*, Mark A. Hall, *Clearing Out the Underbrush in Constitutional Challenges to Health Insurance Reform*, 364 N. ENGL. J. MED. 793, 794–95 (2011) (noting coercion arguments "found very little support among constitutional scholars" and have "little realistic chance" to succeed); Sara Rosenbaum, *The States' Medicaid 'Coercion' Claim: More Rhetoric Than Fact*, HEALTH AFFAIRS BLOG (Dec. 14, 2011), <http://healthaffairs.org/blog/2011/12/14/the-states-medicaid-coercion-claim-more-rhetoric-than-fact/> ("[T]he states' arguments are predicated on erroneous factual assertions that fly directly in the face of Medicaid's entire history and structure"); *see also* David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2014 U. ILL. L. REV. 805, 815 n.62 (2014) (collecting additional examples).

*A. The Medicaid Expansion*

Medicaid is, in many respects, a “prototypical” program of cooperative federalism.<sup>143</sup> It has achieved widespread participation despite being a source of continued federal-state friction.<sup>144</sup> As with other cooperative federalism programs, the federal government provides states with substantial funding in return for state implementation of the program in accordance with federal requirements. The program, as created in 1965 and subsequently amended, provides for medical assistance for women, children, needy families, the blind, the elderly, and the disabled.<sup>145</sup> The various federal conditions placed on the program concern who is eligible for medical care through the program, what services are covered, and under what conditions. Over the years, states have become highly dependent on federal Medicaid funding for the maintenance of their programs. By the time *NFIB* was litigated, federal Medicaid funding accounted for over 10 percent of the typical state’s annual budget.<sup>146</sup>

The PPACA expanded the Medicaid program well beyond the initial targeted populations with the express purpose of expanding health insurance coverage among uninsured populations.<sup>147</sup> Most notably, the PPACA obligated states to expand eligibility to cover all adults with incomes below 133 percent of the federal poverty line.<sup>148</sup> In return, the federal government agreed to cover the lion’s share of the added costs for the first several years of the program.<sup>149</sup> If a state were to refuse this expansion, however, the PPACA provided that a state would lose all of its Medicaid funding, both funding allocated to pay for the expansion as well as all funding for the pre-existing Medicaid program. By leveraging state reliance on existing state funding to induce state cooperation with the expansion, state petitioners argued, the federal government was engaging in unconstitutional “coercion” of the states, contrary to *Dole*.

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143. See *NFIB*, 132 S. Ct. at 2629 (Ginsburg, J., dissenting) (“Medicaid is a prototypical example of federal-state cooperation in serving the Nation’s general welfare.”); see also James F. Blumstein & Frank A. Sloan, *Health Care Reform Through Medicaid Managed Care: Tennessee (TennCare) as a Case Study and a Paradigm*, 53 VAND. L. REV. 125, 136–49 (2000) (discussing and analyzing Medicaid as a cooperative federalism program).

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

145. 42 U.S.C. § 1396d(a) (2012); *NFIB*, 132 S. Ct. at 2572.

146. *NFIB*, 132 S. Ct. at 2581 (“Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States’ total revenue.”); *id.* at 2657 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“For the average State, the annual federal Medicaid subsidy is equal to more than one-fifth of the State’s expenditures” with federal funds covering 50 to 83 percent of those costs.).

147. See Huberfeld, *supra* note 144, at 450.

148. See 42 U.S.C. § 1396a(k) (2012).

149. The degree of federal funding has been described as a “supermatch.” See Huberfeld, *supra* note 144, at 451.

*B. The Medicaid Ruling*

Seven Justices were ultimately convinced that the Medicaid expansion, as written, was unconstitutionally coercive. In two separate opinions—one by the Chief Justice and the other by Justices Scalia, Kennedy, Thomas, and Alito—the Court declared that these provisions of the PPACA exceeded the bounds of Congress’s spending power. The Court did not settle on a single rationale. Nonetheless, *NFIB* marked the first time the Court invalidated conditions placed on federal spending in over seventy years, and (arguably) the first time the Court has ever found the use of conditional spending to be unconstitutionally “coercive.”<sup>150</sup> While acknowledging Congress’s broad authority to set conditions on federal funds, a majority of the Court reaffirmed that this authority is subject to judicially enforceable limits.

The Chief Justice, joined by Justices Breyer and Kagan, concluded that Congress unconstitutionally coerced the states by presenting them with an offer that could not be refused.<sup>151</sup> Long-standing state reliance on Medicaid funds made states vulnerable to this coercion. Insofar as Congress told states that their continued receipt of this funding depended upon adopting what was, in practical terms, a new and different program,<sup>152</sup> Congress was impermissibly leveraging state reliance on the preexisting Medicaid program.<sup>153</sup> It is one thing to place conditions on how money is to be spent, the Chief Justice explained. This happens all the time. It is something else entirely, however, when the conditions placed on the receipt of federal money “take the form of threats to terminate other significant independent grants.”<sup>154</sup> In such cases, “the conditions are properly viewed as a means of pressuring the States to accept policy changes.”<sup>155</sup> And such pressure, if sufficiently severe, is potentially coercive. The cure for this infirmity, according to the Chief Justice, was to sever the two programs. Only funding for the Medicaid expansion would depend on a state’s willingness to accept the conditions of the expansion. Traditional Medicaid funding, on the other hand, would only be conditioned on state compliance with the traditional requirements of that program.

The joint dissent adopted a broader rationale and sought a broader remedy. According to the joint dissent, the constitutional problem was not the federal government’s attempt to leverage long-standing state participation in Medicaid so much as the federal government’s willingness to put so much money at stake. Because federal and state tax dollars ultimately come from the same source—

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

151. *NFIB*, 132 S. Ct. at 2608 (majority opinion).

152. *Id.* at 2607.

153. See Bagenstos, *supra* note 19, at 866–67.

154. *NFIB*, 132 S. Ct. at 2604.

155. *Id.*

American taxpayers—threatening to withhold large enough sums of money from noncooperative states is, itself, potentially coercive.<sup>156</sup> Although states retained the legal option to turn down the federal government’s offer, no state could actually make that choice because a nonconsenting state would be unable to make up for the loss of federal funding for state programs.<sup>157</sup>

Because the Chief Justice’s opinion adopted a narrower holding, it is the focus of this Article’s analysis. Traditionally, the narrowest opinion is viewed as the controlling opinion, and the one most likely to be followed by lower courts.<sup>158</sup> Insofar as the CAA or other federal statutes are vulnerable to constitutional challenge after *NFIB*, it will likely be because they fail to satisfy the analysis offered by the Chief Justice.

### C. *NFIB and Dole*

Even after *NFIB*, the extent of the constitutional limits on the use of conditional spending is unclear. Although many rightly see Chief Justice Roberts’s controlling opinion as “giving teeth” to the Court’s earlier spending power jurisprudence—crystallized in the four-part test announced in *Dole*—some confusion lingers over the relationship between *NFIB* and *Dole*, as well as how courts should now apply *Dole* and *NFIB* in future cases. Some scholars have even suggested that Chief Justice Roberts’s “opaque . . . application of the four *Dole* factors” effectively announces “a new judicial approach to Medicaid and other Spending Clause cases.”<sup>159</sup> Another commentator has criticized *NFIB* for creating “a wholly new constitutional limit”<sup>160</sup> while neglecting *Dole* and failing to provide “a more satisfying integration with preceding spending power precedent.”<sup>161</sup> In our view, *NFIB* is best understood as an extension and application of the principles articulated in *Dole*, focusing on those aspects of the doctrine that were most relevant to the specific question of the Medicaid expansion’s constitutionality.

Chief Justice Roberts’s treatment of the *Dole* factors was regrettably “unclear and disorganized.”<sup>162</sup> But, as Professors Nicole Huberfeld, Elizabeth

156. See *id.* at 2662 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

157. *Id.* at 2663 (“[T]he sheer size of this federal spending program in relation to state expenditures means that a State would be very hard pressed to compensate for the loss of federal funds by cutting other spending or raising additional revenue.”).

158. See *Mayhew v. Burwell*, 772 F.3d 80, 88–89 (1st Cir. 2014) (noting that the Roberts opinion rejected the conditions placed upon Medicaid funding on narrower grounds than did the joint dissent). As Professor Samuel Bagenstos notes, under *Marks v. United States*, 430 U.S. 188, 193 (1977), where “no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” See Bagenstos, *supra* note 19, at 868 n.24.

159. Nicole Huberfeld, et al., *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 BOSTON U. L. REV. 1, 58 (2013); see Joondeph, *supra* note 13, at 815–16.

160. Ryan, *supra* note 20, at 1026.

161. *Id.* at 1022 n.92.

162. Huberfeld, et al., *supra* note 159, at 50.



Weeks Leonard, and Kevin Outterson (hereinafter Huberfeld, et al.) have observed, “[t]he *NFIB* opinions relied heavily, but indirectly, on the elements of the *Dole* test.”<sup>163</sup> Indeed, they acknowledge, the “elements of the *Dole* test feature prominently in the plurality opinion, though not identified as such.”<sup>164</sup>

Despite a rather disorganized treatment of *Dole*, Chief Justice Roberts’s opinion raised the same animating concerns and relied upon the same spending power cases as *Dole*. As noted above, *Dole*’s four-part test requires: (1) that the spending at issue be “in pursuit of ‘the general welfare’”; (2) that conditions on the states’ receipt of federal funds be stated “unambiguously . . . , enabl[ing] the States to exercise their choice knowingly”; (3) that the conditions on federal grants be related to the federal interest in the funded project; and (4) that no other constitutional provisions bar the conditional grant.<sup>165</sup>

The *Dole* majority provided a perfunctory explanation of the first three of these four factors because South Dakota did not argue that the conditional spending in question was “inconsistent with any of the first three restrictions.”<sup>166</sup> In fact, “the basic point of disagreement between the parties” turned largely on “whether the Twenty-first Amendment constitute[d] an ‘independent constitutional bar’ to the conditional grant of federal funds.”<sup>167</sup> Thus, the *Dole* Court had little reason to elaborate on the first three limitations on the spending power—they were uncontested. Regarding the “relatedness” factor, the *Dole* majority merely observed that “rather than challenging the germaneness of the condition to federal purposes,” South Dakota “never contended that the congressional action was . . . unrelated to a national concern in the absence of the Twenty-first Amendment.”<sup>168</sup> Accordingly, the Court was content to note that because South Dakota did not argue a “relatedness” or “germaneness” concern (terms that this Article and the Court use interchangeably), no further analysis of “whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power” was needed.<sup>169</sup>

Similarly, insofar as the parties and the lower courts in *NFIB* did not prominently discuss the *Dole* factors, the *NFIB* Court’s treatment of those factors was less than methodical. Nevertheless, in striking down the PPACA’s conditions, the Chief Justice’s opinion invoked the same constitutional limitations and principles set forth in *Dole*. Perhaps more importantly, his opinion reaffirmed the fundamental principle and federalism concerns expressed

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163. *Id.* at 50–51.

164. *Id.* at 51.

165. *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (quoting *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937)).

166. *Id.* at 208.

167. *Id.* at 209 (quoting *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 269–70 (1985)).

168. *Id.* at 208 (quoting Brief for Petitioner at 52, *South Dakota v. Dole*, 483 U.S. 203 (1987) (No. 86–260)).

169. *Id.* at 208 n.3.

summarily by the *Dole* majority, but explained more fully by Justice O'Connor's "relatively narrow" disagreement with the Court's application of the principle in her dissent.

From the beginning, the Chief Justice's opinion evinces a concern for federalism<sup>170</sup> and is mindful that Congress may not commandeer the states through the spending power. The Chief Justice understood the states to argue that the PPACA's threat to withhold all of a state's Medicaid grants unless the state accepted the expansion and its conditions would "violate[] the basic principle that the 'Federal Government may not compel the States to enact or administer a federal regulatory program.'"<sup>171</sup> These same concerns informed both the majority and dissenting opinions in *Dole*.

The spending at issue in *NFIB* was for the "general welfare," as the Court has long understood this term, and Congress did not require states to engage in unconstitutional conduct as a condition of receiving the funds. Thus, the PPACA spending conditions readily satisfied these two elements of the *Dole* test. Accordingly, the *NFIB* Court had no reason to discuss them. The PPACA's threat to withhold existing Medicaid funds from states that did not participate in the expansion, however, did raise constitutional concerns addressed by *Dole*'s other limitations.

Without expressly citing *Dole*'s four-part test, Chief Justice Roberts began his discussion of the Court's "recognized limits on Congress's power under the Spending Clause" by quoting *Pennhurst State School and Hospital v. Halderman*: "We have repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a contract.'"<sup>172</sup> Because of this "characterization," the Chief Justice explained, "[t]he legitimacy of Congress's exercise of the spending power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"<sup>173</sup> Without a voluntary and knowing acceptance of the terms of Congress's offer, the conditional spending is unconstitutional.<sup>174</sup>

Also relying on *Pennhurst*, the *Dole* Court had explained that "if Congress desires to condition the States' receipt of funds, it 'must do so unambiguously . . .

170. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) ("Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. . . . For this reason, 'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.'" (quoting *New York v. United States*, 505 U.S. 144, 162 (1992))).

171. *Id.* at 2601 (quoting *New York*, 505 U.S. at 188).

172. *Id.* at 2602 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

173. *Id.* (quoting *Pennhurst*, 451 U.S. at 17).

174. Scholars have debated whether conditional spending should be analogized to a "contract." See, e.g., Berman, *supra* note 17, at 1297–1309; Einer Elhauge, *Contrived Threats Versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503, 544–53 (2016); James F. Blumstein, *NFIB v. Sebelius and Enforceable Limits on Federal Leveraging: The Contract Paradigm, the Clear Notice Rule, and the Coercion Principle*, 6 J. HEALTH & LIFE SCI. L. 123, 129–30 (2013); James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011-12 CATO SUP. CT. REV. 67, 71–77 (2012).

, enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>175</sup> In *NFIB*, Chief Justice Roberts explained why this must be so: “Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system.”<sup>176</sup> And it is out of this critical concern for federalism that the Court will “strike down federal legislation that commandeers a State’s legislative or administrative apparatus for federal purposes,” and will “scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a ‘power akin to undue influence.’”<sup>177</sup> Congress’s “financial inducements” and “undue influence” only present constitutional concerns when they are used so as to “require the States to regulate,” effectively commandeering the states for federal purposes, and thus “undermin[ing] . . . our federal system.”<sup>178</sup>

Addressing the constitutional limits of the spending power, the Chief Justice invoked both *Pennhurst* and *Dole*, building upon the former’s “contract characterization” and the latter’s related requirement of “unambiguous notice.” He expounded on this concern, discussing coercion, political accountability, and “undue influence” as described in *Steward Machine*, before returning to confirm that “Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds.”<sup>179</sup> Because of the inherent tension between these two concerns the Court must first determine whether (1) the conditions at issue are merely Congress’s attempt to “preserve its control over the use of federal funds,” or a means of enlisting states in the federal regulatory apparatus; and (2) the conditions at issue have “crossed the line distinguishing encouragement from coercion.”<sup>180</sup>

The Chief Justice’s opinion later revisited the *Dole* “notice” factor, but it is at this point—in an effort to make these crucial determinations—that the Chief Justice’s analysis turned to how Congress structured the PPACA funding. As the opinion described, “[i]nstead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States’ existing Medicaid funds.”<sup>181</sup> The Chief Justice agreed with the states’ contention that “this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion,”<sup>182</sup> finding that the federal government was doing far more than conditioning the receipt of new funds on state willingness to comply with conditions on those funds. Rather, Congress was

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175. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst*, 451 U.S. at 17).

176. *NFIB*, 132 S. Ct. at 2602.

177. *Id.* (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

178. *Id.*

179. *Id.* at 2603 (discussing *Steward Machine Co.*, 301 U.S. 548 (1937) (upholding the unemployment compensation provisions of the Social Security Act of 1935 against claims these provisions constituted an unconstitutionally coercive use of the spending power)).

180. *Id.* (quoting *New York v. United States*, 505 U.S. 144, 175 (1992)).

181. *Id.*

182. *Id.*

conditioning prior funding to induce states to adopt new policies. And “such conditions [that] take the form of threats to terminate other significant independent grants . . . are properly viewed as a means of pressuring the States to accept policy changes.”<sup>183</sup>

Having found the purpose of the spending conditions at issue, the Chief Justice’s reasoning pivoted to another *Dole* factor without expressly invoking the *Dole* framework. Whether the PPACA’s condition threatens an “independent grant” is another way of asking whether the condition is reasonably related or “germane” to the federal interest in the program. Much of the subsequent discussion in the Chief Justice’s opinion concerned whether the Medicaid expansion was “properly viewed merely as a modification of the existing program,” whether the expansion “accomplishe[d] a shift in kind, not merely degree,” how the expansion was “structured,” and whether earlier Medicaid amendments “[e]ll into the same category as the one at stake here.”<sup>184</sup> These factors informed his determination that Congress had leveraged the states’ reliance on one program to induce them to participate in another, new program—and this made the spending conditions “unrelated” to the funding.

The distinction drawn by the Chief Justice between “old” and “new” Medicaid is questionable, to say the least.<sup>185</sup> Among other things, there is no meaningful division between the two programs in the U.S. Code. Huberfeld, et al. fear that, in nonetheless characterizing traditional Medicaid and the PPACA’s Medicaid expansion as separate programs, the Court “modified the ‘germaneness’ prong of the *Dole* test,” creating new opportunities for litigants to challenge the “relatedness” of new conditions on old sources of funding.<sup>186</sup>

To be sure, the Chief Justice engaged in a more rigorous application of the factors articulated in *Dole*, the relatedness and notice requirements in particular. One reason for this may have been the amount of money at stake: 10 percent or more of the average state’s budget in *NFIB* as opposed to “less than half of one percent of South Dakota’s budget” in *Dole*.<sup>187</sup> The more money there is on the line, the greater the risk that the federal government may be coercing the states by leveraging their reliance on a pre-existing federal program. This is not a new test, however.

The *Dole* majority did not much discuss the “relatedness” factor other than to note that South Dakota never contended that the condition was unrelated to the federal interest, and then to state summarily that the drinking age requirement was “directly related to one of the main purposes for which highway funds are

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183. *Id.* at 2604.

184. *Id.* at 2605–06.

185. See Huberfeld, et al., *supra* note 159, at 55 (criticizing “the artificial distinction . . . between ‘old’ and ‘new’ Medicaid”); see also *NFIB*, 132 S. Ct. at 2630 (Ginsburg, J., dissenting) (“Medicaid, as amended by the ACA, . . . is not two spending programs; it is a single program with a constant aim . . .”).

186. Huberfeld, et al., *supra* note 159, at 55.

187. *NFIB*, 132 S. Ct. at 2604.

expended—safe interstate travel.”<sup>188</sup> Huberfeld, et al., are correct to note that the “Court had not enforced relatedness in [the conditional spending] context,”<sup>189</sup> but only insofar as this means the Court had not yet found a condition so unrelated to the program that the Court had to strike it down. It is not that the relatedness principle had never been applied, it is merely that the Court had yet to be presented with a case in which the principle had been particularly challenged, let alone violated.

Although Justice O’Connor disagreed with the *Dole* majority’s rather superficial review of the “relatedness” principle, she took no issue with the principle itself. She did not offer a “new concept” of relatedness, but a more rigorous application of the existing concept articulated in *United States v. Butler*<sup>190</sup> and *Oklahoma v. CSC*.<sup>191</sup> Justice O’Connor found the *Dole* majority’s “application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended [to be] cursory and unconvincing.”<sup>192</sup> In her view, the minimum drinking age requirement was “not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.”<sup>193</sup> Instead, she argued:

[A] condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction. The only possible connection, highway safety, has nothing to do with how the funds Congress has appropriated are expended. Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such it is not justified by the spending power.<sup>194</sup>

Justice O’Connor’s insistence that the germaneness factor be more scrupulously applied stemmed from the same concern animating Chief Justice Roberts’s line of inquiry: federalism and the preservation of state sovereignty in the face of Congress’s spending power. Congress may not, she wrote, “insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State’s social and economic life because of an attenuated or tangential relationship to highway use or safety.”<sup>195</sup> Why? Because, in Justice O’Connor’s view, “if the rule were otherwise, the Congress could effectively regulate almost any area of a State’s social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced.”<sup>196</sup>

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188. *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

189. Huberfeld, et al., *supra* note 159, at 55.

190. *See* 297 U.S. 1, 58 (1936).

191. *See* 330 U.S. 127, 135–36 (1947).

192. *Dole*, 483 U.S. at 213 (O’Connor, J., dissenting).

193. *Id.* at 213–14.

194. *Id.* at 218.

195. *Id.* at 215.

196. *Id.*

The same animating concern drove the plurality opinion in *NFIB* to engage in similar scrutiny of the purported relationship between the purpose of the funding and the purpose of the condition attached to the receipt of that funding. Both Justice O'Connor's dissent in *Dole* and Chief Justice Roberts's opinion in *NFIB* focus on whether the spending conditions merely restrict the use of the expended funds, or whether they require states to make new policy choices. As Huberfeld, et al., suggest, the plurality and the joint dissent in *NFIB* both tacitly accepted Justice O'Connor's demand that the Court "carefully scrutinize the relatedness of conditions on federal programs, regardless of the way in which Congress structures those programs or describes their germaneness."<sup>197</sup> Accordingly, future challenges to federal spending conditions are likely to focus on whether "conditions unrelated to the program for which funding is offered [are] deemed non-germane, and therefore coercive, depending on the amount and percentage of funding at stake."<sup>198</sup> The Chief Justice referred to such nongermane conditions as "a means of pressuring the States to accept policy changes."<sup>199</sup> Justice O'Connor called them "regulations."<sup>200</sup>

The *NFIB* plurality did not open a new line of attack against spending power statutes, so much as it expanded the pre-existing terrain. *NFIB* applied *Dole*'s germaneness prong (albeit with more teeth) and echoed, without attribution, Justice O'Connor's explanation for how that prong was intended to apply—namely, that when a condition goes beyond specifying how the federal money must be spent, the condition becomes regulatory insofar as it requires a state to change its policy. For Justice O'Connor—applying the Court's spending power precedent and the *Dole* majority's factors—the dichotomy in such cases is not between "coercive" and "uncoercive" spending conditions, but rather between "how to spend the money" and "a regulation determining who shall be able to drink liquor."<sup>201</sup> In *NFIB*, Chief Justice Roberts applied the same precedent and principles at work in *Dole* and applied more rigorously by Justice O'Connor, and he concluded that the structure of the PPACA conditions worked not to ensure how the federal money is spent, but to force the states to change their Medicaid policies. The former is permissible; the latter is unconstitutional—just as it was in *Dole*.

Professor Erin Ryan has distilled Chief Justice Roberts's opinion similarly. Styling the plurality opinion as the "*Sebelius* doctrine," she argues that *NFIB* will require future cases to "distinguish (1) conditional funds that directly sponsor the program in question from (2) federal funds sponsoring one program that are conditioned on state participation in another program. While the former remain presumptively permissible, the latter are potentially coercive under the new

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197. Huberfeld, et al., *supra* note 159, at 57.

198. *Id.* at 58.

199. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2604 (2012).

200. *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting).

201. *Id.* at 218.

limit.”<sup>202</sup> She, too, laments the “cavalier manner” in which *NFIB* treated precedent, and argues that the Chief Justice’s opinion “lack[ed] the more satisfying integration with principal case law that one might expect from a new constitutional statement that does not purport to overrule prior cases.”<sup>203</sup> We agree with Ryan that after *NFIB*, courts may be more inclined to make this distinction, but, as we have argued, the constitutional limit requiring that spending conditions be “reasonably related to the expenditure of federal funds”<sup>204</sup> has been a long-standing element in the Court’s jurisprudence—not a “new limit” or a “new constitutional statement.”<sup>205</sup> It was perhaps a forgotten, toothless prong, but with *NFIB*, Chief Justice Roberts has given it some bite.

#### IV. THE CLEAN AIR ACT RECONSIDERED

After *NFIB*, the CAA’s requirement that the EPA withhold federal highway funds from noncompliant states appears vulnerable on several grounds. The CAA, perhaps more than any other statute, stretches the bounds set forth in *Dole* and expounded upon in *NFIB*. Although Congress has the authority to condition pollution control expenditures on compliance with federal pollution control priorities, there is a real question under *Dole* and *NFIB* as to whether it may condition the receipt of federal highway funds on the implementation of desired air pollution control measures.

First, the CAA “conditions” receipt of money for one program (highway construction) on compliance with requirements in a separate program (air pollution control). This conditioning stretches the relatedness prong in *Dole* and suggests impermissible coercion under *NFIB*. Second, the requirements imposed on states under the CAA are constantly changing as the EPA tightens or otherwise revises federal air quality standards and additional pollutants become subject to CAA regulation. Finally, the sheer amount of money at stake, in terms of its percentage of state transportation spending, state budgets, and even in absolute terms, itself suggests that the CAA may be unduly coercive under *NFIB*.

##### A. Relatedness

In *NFIB*, Chief Justice Roberts was concerned with whether the PPACA’s condition threatened an “independent grant[.]”<sup>206</sup> This concern informed his determination that Congress was leveraging the states’ reliance on one program to induce them to participate in another.<sup>207</sup> The Chief Justice found that the

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202. Ryan, *supra* note 20, at 1030.

203. *Id.* at 1031.

204. *Dole*, 483 U.S. at 212 (O’Connor, J., dissenting).

205. See Ryan, *supra* note 20, at 1003, 1030 (“new limit”); Ryan, *supra* note 20, at 1031 (“new constitutional statement”); see also *Dole*, 483 U.S. at 213 (“We have repeatedly said that Congress may condition grants under the spending power only in ways reasonably related to the purpose of the federal program.”).

206. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2604 (2012).

207. *Id.* at 2605–06.

PPACA's "new" Medicaid was sufficiently distinct from the "old" Medicaid such that the new spending conditions were effectively unrelated to the old Medicaid program.<sup>208</sup> But the connection between "old" and "new" Medicaid is much closer than any connection between the SIP requirements of the CAA and federal highway money. In fact, even under *Dole* the CAA's sanctions were constitutionally suspect, though lower courts thus far have upheld them.<sup>209</sup>

Federal highway legislation suggests many reasons why federal funding of highway construction supports the "general welfare," but environmental protection is not one of them. In *Dole*, however, both the highway legislation and the drinking age increase at issue were explicitly enacted to improve highway safety.<sup>210</sup> The connection between the CAA's purpose and transportation is, at best, attenuated. Nothing in the CAA requires any connection between the nature of the state's noncompliance and highways, mobile sources, or even the specific pollutants most associated with vehicular traffic. Instead, states can lose their highway funding for failing to meet *any* of the CAA's myriad SIP requirements.<sup>211</sup> For example, failure to adopt a sufficiently rigorous stationary source permit scheme, sufficiently stringent emission regulations on dry cleaners, bakeries, and other "area" sources, or even failure to provide adequate citizen suit access to state courts can provide the basis for rejecting a SIP and imposing sanctions.<sup>212</sup> The Federal Highway Administration, for its part, is candid about the real purpose of the sanction, declaring on its website that the highway fund sanction "could be air quality related in an area that is non-attainment for transportation related pollutants, but is intended primarily as an economic incentive to SIP submission."<sup>213</sup>

Congress has sought to connect highway construction to environmental protection, but it has still stopped short of claiming federal support for highway construction serves the *purpose* of environmental protection. The Federal-Aid Highway Act of 1970 instructed the Secretary of Transportation to ensure that federal highway programs were "consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the [CAA]."<sup>214</sup> Similarly, in 1991 Congress sought to create an environmentally sound interstate highway system with the

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208. *Id.* at 2606.

209. *See supra* notes 124–129 and accompanying text; *see also* Adler, *supra* note 15, at 447–52 (considering whether highway fund sanctions are consistent with *Dole*).

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

211. 42 U.S.C. § 7410(k) (2012) (SIP is inadequate if the EPA Administrator finds, *inter alia*, that the SIP fails to comply "with *any* requirement of this chapter") (emphasis added).

212. *See, e.g., Virginia v. Browner*, 80 F.3d 869, 880 (4th Cir. 1996) (upholding EPA ability to impose sanctions due to state's failure to make it sufficiently easy for citizen groups to challenge stationary source permits).

213. *Clean Air Sanctions*, FED. HIGHWAY ADMIN., U.S. DEPT. TRANSP., [http://www.fhwa.dot.gov/environment/air\\_quality/highway\\_sanctions/index.cfm](http://www.fhwa.dot.gov/environment/air_quality/highway_sanctions/index.cfm) (last updated Sept. 10, 2015).

214. Pub. L. No. 91–605, 84 Stat. 1713 (1970).



Intermodal Surface Transportation Efficiency Act of 1991.<sup>215</sup> In 1998, Congress reauthorized the Act with the Transportation Equity Act for the 21<sup>st</sup> Century,<sup>216</sup> again reiterating its intent to “minimize transportation-related fuel consumption and air pollution.”<sup>217</sup> These statements indicate Congress’s desire to ensure highway construction occurs in a manner consistent with federal environmental policy goals, not that environmental protection is itself a purpose of such funding.

Assessing the CAA’s vulnerability after *NFIB*, Ryan has argued that the CAA’s “conditions are sufficiently related to satisfy the germaneness requirements of *Dole*, because the use of state highways will contribute to that state’s ambient air-quality problems through automobile exhaust.”<sup>218</sup> We disagree.

Although Congress has repeatedly noted the potential environmental impacts of highway construction, none of these statutes establishes that a *purpose* of federal highway programs is environmental protection. Yet it is the *purpose* of federal funding that controls whether a given condition is sufficiently related under *Dole*.<sup>219</sup> These statutory highway provisions provide an indication of the sort of highways that Congress sought to fund; they do not establish environmental protection as a purpose of highway funding. In contrast, the federal statute calling upon states to raise the drinking age in *Dole* echoed the *explicit* purposes of the federal highway programs—safe highways.<sup>220</sup>

Merely because automobile exhaust contributes to ambient air quality problems is not in any way germane to the purpose of the highway funds. If the germaneness factor may be satisfied merely because roads may “contribute to” a state’s air quality concerns, then, as Justice O’Connor warned, “Congress could effectively regulate almost any area of a State’s social, political, or economic life on the theory that” air quality is somehow affected.<sup>221</sup> This germaneness interpretation, she understood, was not the law even after *Dole*. Were that not enough, it is also worth noting that other provisions of the CAA—specifically the section 176 conformity provisions—already serve to ensure that federal highway funds do not contribute to nonattainment of relevant air quality standards, so concerns about the relationship between highway funds and CAA compliance are taken care of separate from the sanction threat.<sup>222</sup>

We agree more with how Professor Samuel Bagenstos frames the CAA sanctions: “Congress has told states that wish to continue participating in the entrenched and lucrative federal highway program that they can do so only if

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215. Pub. L. No. 102–240, 105 Stat. 1914 (1991).

216. Pub. L. No. 105–178, 112 Stat. 107 (1998).

217. Pub. L. No. 105–178, 112 Stat. 170 (1998).

218. Ryan, *supra* note 20, at 1052.

219. *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

220. *See id.* at 208–09.

221. *Id.* at 215 (O’Connor, J., dissenting).

222. 42 U.S.C. § 7506 (2012).

they *also* agree to participate in a separate and independent program for reducing air pollution.”<sup>223</sup> The CAA already places air quality planning funds at risk in noncompliant states.<sup>224</sup> The addition of the highway fund sanctions serves the purpose of creating additional leverage—it is, in Professor Einer Elhauge’s terminology, a “contrived threat.”<sup>225</sup> It does not directly advance the CAA’s goals.

The CAA is not itself the source of the funds it conditions, making more tenuous the claim that the sanctions are an exercise of Congress’s spending power. In threatening to withhold highway funding, the CAA sanctions do not threaten to withhold CAA funds, but instead threaten the highway funding authorized under Title 23 as part of a completely separate federal program.<sup>226</sup> The Title 23 program and the CAA are so separate and independent, in fact, that Title 23 does not even mention the CAA’s so-called “conditions” for receiving federal highway funds. Title 23 itself does, however, mention other conditions placed upon the receipt of federal highway funds, including conditions related to vehicle weights and sizes, advertising near roadways, the minimum drinking age at issue in *Dole*, and employment discrimination rules and prevailing wage rates on highway projects.<sup>227</sup> States must comply with these conditions—all stated in Title 23—or risk a 10 percent reduction in their allocated highway funds.<sup>228</sup> This is a significant amount of money, but far less than is at stake with CAA noncompliance.

There is no real doubt that the CAA sanctions and the federal highway funds are separate and distinct federal programs that are “related” only in the most tangential terms. The CAA sanctions are intended, as Bagenstos has suggested (and the Federal Highway Administration has admitted), to convince potentially unwilling states to participate in the SIP process. Understood this way, the section 179 sanctions are vulnerable to a “relatedness” challenge under *Dole*, and even more so after the *NFIB* plurality struck down the PPACA’s threat to withhold “old” Medicaid funding because it “serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage.”<sup>229</sup>

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223. Bagenstos, *supra* note 19, at 917.

224. § 7509(a)(4) (2012).

225. See Elhauge, *supra* note 174, at 544–49.

226. § 7509(b)(1).

227. See, e.g., 23 U.S.C. § 113 (2012) (requiring states to pay laborers on highway projects a prevailing wage); § 127 (requiring states to police vehicle weight limits); § 131 (requiring states to enforce restrictions on outdoor advertising near roadways); § 140 (requiring nondiscrimination in employment practices in connection with highway projects); § 141 (requiring enforcement of vehicle sizes); § 158 (withholding funds for states that do not enforce a minimum drinking age of 21).

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

229. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2603 (2012).

*B. Notice*

There is some reason to question whether the sanctions under the CAA satisfy the “notice” requirement of *Pennhurst* as applied by *Dole* and *NFIB*. Both decisions adopt *Pennhurst*’s formulation of spending power legislation as being “much in the nature of a contract.”<sup>230</sup> In *NFIB*, the Chief Justice understood that the “legitimacy of Congress’s exercise of the spending power . . . ‘rests on whether the State voluntarily and knowingly accepts the terms of the contract.’”<sup>231</sup> The *NFIB* plurality therefore explored whether the PPACA’s Medicaid expansion had provided states with the requisite “notice” when they signed on to Medicaid. As the Chief Justice reiterated, “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”<sup>232</sup> Despite Medicaid provisions “expressly reserving ‘[t]he right to alter, amend, or repeal any provision’” of the Social Security Act, the *NFIB* plurality suggested that the expansion failed the notice prong insofar as it “accomplishes a shift in kind, not merely degree” that the states could not have anticipated when they signed on to the Medicaid program.<sup>233</sup> The expansion was such that “[a] State could hardly anticipate that Congress’s reservation of the right to ‘alter’ or ‘amend’ the Medicaid program included the power to transform it so dramatically,”<sup>234</sup> and that “[p]revious Medicaid amendments simply do not fall into the same category as the one at stake here.”<sup>235</sup> Turning again to *Pennhurst*, the Chief Justice explained that the spending power “does not include surprising participating States with post-acceptance or ‘retroactive’ conditions.”<sup>236</sup>

Applying such scrutiny to the CAA sanctions suggests that those sanctions may fail the “notice” test as well. Whereas the Medicaid program included express statutory provisions notifying states that Congress may amend the program’s terms, Title 23 includes no such similar warning that accepting highway funds could later require states to participate in CAA programs. The federal highway program also predates the CAA by decades.<sup>237</sup> Thus, any “conditions” imposed on the pre-existing, entrenched highway fund program by the subsequently enacted CAA would seem to violate the *NFIB* and *Pennhurst* bar on “surprising States with postacceptance or ‘retroactive’ conditions.” When states originally signed on to the highway program, they could not have

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230. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

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

232. *Id.* at 2605 (quoting *Pennhurst*, 451 U.S. at 17).

233. *Id.*

234. *Id.* at 2606.

235. *Id.*

236. *Id.* (quoting *Pennhurst*, 451 U.S. at 25).

237. The federal government began funding the interstate highway system with the Federal-Aid Highway Act of 1956. See *History of the Interstate Highway System*, FED. HIGHWAY ADMIN., U.S. DEPT. TRANSP, <http://www.fhwa.dot.gov/Interstate/history.cfm> (last updated July 12, 2016).

anticipated that highway funds would be conditioned on the “nonattainment” provisions of the CAA.

This is not to say that Congress may not create new, subsequent conditions related to the original purpose of the program. As a general matter, Congress remains free to alter the conditions imposed on the receipt of related federal funds provided such changes do not fundamentally transform the programs. Yet subsequent changes made by a regulatory agency—such as fleshing out regulatory requirements in new or unforeseen ways—are more suspect.<sup>238</sup> Particularly assuming that the states are protected by the “political safeguards of federalism” in the legislative process, it would follow that unambiguous statutory amendments to existing conditions would be more acceptable than the imposition of new conditions through the regulatory process.<sup>239</sup> Although the CAA itself outlines broad requirements for SIPs, many ambiguous details are left to a regulatory process. That process imposes constantly changing requirements that are not subject to the same political safeguards as legislative changes as the EPA tightens or otherwise revises federal air quality standards and the agency determines that additional pollutants merit CAA regulation.

The text of the CAA, for example, may place a given state on notice that a given air quality determination will require the adoption of an “enhanced” vehicle inspection and maintenance program, but the precise contours and costs of such a program are left to the EPA.<sup>240</sup> Whether a given nonattainment area must adopt pollution control measures at all is, in part, a function of subsequent agency decisions, as is whether a given locality is considered to be part of one attainment area or another and what data to rely upon in making nonattainment determinations.<sup>241</sup> Under the CAA, the EPA is authorized—indeed, required—to reconsider the NAAQS every five years.<sup>242</sup> In recent years, the EPA has tightened air quality standards, thereby requiring states to adopt more stringent air pollution control measures than they may have anticipated.<sup>243</sup> At the same time, the EPA has adjusted SIP requirements over time to account for various

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238. See, e.g., *Va. Dep’t of Educ. v. Riley*, 106 F.3d 559, 560–61 (1997) (en banc) (per curiam).

239. Professor Ilya Somin notes, however, that the political safeguards argument is actually at its weakest in the context of spending power. While state governments will often have strong incentive to resist the assertion of federal power in areas traditionally left within state control, state governments “have incentives to accept and even lobby for conditional federal grants.” For this reason, Somin argues “there is a greater need for judicial intervention” in the Spending Clause context. Somin, *supra* note 36, at 484.

240. See 42 U.S.C. § 7511a(a)(2)(B), (b)(4), (c)(3) (2012); 40 C.F.R. § 51.350–373 (regulations detailing the requirements of vehicle emission inspection/maintenance programs).

241. For several examples of the range of specific determinations left to the EPA in implementing and enforcing the CAA’s nonattainment provisions see *Mississippi Commission on Environmental Quality v. EPA*, 790 F.3d 138, 161–64 (2015).

242. 42 U.S.C. § 7409(d) (2012).

243. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,861 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50); see also *Am. Trucking Ass’n, Inc. v. EPA*, 283 F.3d 355 (D.C. Cir. 2002), *modifying* 175 F.3d 1027 (D.C. Cir. 1999) (challenging EPA’s revision of NAAQS for ozone and particulate matter).

factors, such as changes in atmospheric modeling or revised estimates of upwind state contributions to downwind state pollution problems.<sup>244</sup>

The notice problem is compounded by the fact that, under section 110(m), the EPA has some discretion as to when and where sanctions apply. As discussed above, section 179 details mandatory sanctions that are to be imposed after eighteen and twenty-four months of state noncooperation.<sup>245</sup> EPA regulations provide that offset sanctions are imposed first, and highway sanctions second.<sup>246</sup> Section 110(m), however, enables the EPA to impose sanctions more quickly and, subject to some limits, beyond the boundaries of the nonattainment area for which the relevant SIP is inadequate.<sup>247</sup> This means that when and whether sanctions are to be imposed is *less* foreseeable than if it were fully governed by the statute. States have less notice and less certainty as to when and whether highway funds upon which they have come to rely may be placed at risk.

### C. Coercion

The most important doctrinal development in *NFIB* may be the focus on the amount of money at stake. Highway funds are raised from a dedicated revenue source in gasoline taxes and placed in the Highway Trust Fund.<sup>248</sup> Transportation spending is a major component of most states' budgets, and federal grants are typically a major share of state transportation expenditures.<sup>249</sup> These moneys are explicitly earmarked for transportation projects.<sup>250</sup> Conditioning the receipt of such funds on compliance with myriad federal environmental requirements—many of which have little to do with transportation, let alone with highways—seems to strain the *Dole* coercion prong, particularly when viewed against the background of the Court's broader federalism jurisprudence.

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244. See, e.g., Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,232 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, 97) (discussing revisions to 24-hour attainment demonstration methodology).

245. See 42 U.S.C. § 7509 (2012); see also *supra* notes 101-110 and accompanying text.

246. 40 C.F.R. § 52.31(d) (2016).

247. *Id.*

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

249. See *supra* notes 134-136 and accompanying text; see also Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147, 160 (2001) (claiming federal funds may account for as much as 95 percent of a state's transportation budget).

250. Massa, *supra* note 248, at 318. Some argue that the "trust fund" system within the federal budget is simply an accounting gimmick, and that there is not, in fact, a separate "fund" of highway moneys. See, e.g., Thomas G. Donlan, *Selling America Short*, BARRON'S (Aug. 10, 1998), <http://www.barrons.com/articles/SB902528915450938000> (suggesting federal "trust funds" are "budgetary gimmicks"). Whether this is true when the issue is deficit reduction, a strong argument can be made that the federal government has a moral, if not legal, obligation to expend money from the trust fund for road purposes and nothing else, as this is the express basis upon which the relevant moneys are raised.

*Dole* involved a modest loss of highway funds—only 5 percent, or less than half of a percent of South Dakota’s total state budget.<sup>251</sup> Yet under the CAA, virtually all highway funds are at risk, except for those designated for special purposes.<sup>252</sup> Federal highway funding does not rise to the level of federal Medicaid funding—typically 3-4 percent of a state’s budget<sup>253</sup> as opposed to 10-15 percent<sup>254</sup>—but it is far more significant than was at issue in *Dole*. For some states, particularly those with smaller populations and extensive interstates, federal highway funding actually approaches the funding levels seen in Medicaid.<sup>255</sup> *NFIB* did not evaluate the coerciveness of the Medicaid expansion on a state-by-state basis, however, so the fact that federal highway funding accounts for a different proportion of different states’ budgets does not appear determinative.

As Bagenstos reads *NFIB*, the Supreme Court has adopted an “anti-leveraging principle” for assessing the constitutionality of federal spending power statutes.<sup>256</sup> That principle, as noted above, “provides that when Congress takes an entrenched federal program that provides large sums to the states and tells states they can continue to participate in that program only if they *also* agree to participate in a separate and independent program, the condition is unconstitutionally coercive.”<sup>257</sup> Of particular concern and most vulnerable to litigation are statutes that impose “cross-over conditions.”<sup>258</sup> As both Bagenstos and Ryan<sup>259</sup> suggest, the CAA sanctions are cross-over conditions that “threaten to ‘withdraw future funds provided under some specific preexisting grant program’ if a state does not ‘enact some new federally mandated regulation.’”<sup>260</sup> The federal highway program is a large, entrenched, preexisting program on which states heavily rely, and, as Bagenstos acknowledges:

Insofar as they address stationary sources of pollution, the CAA’s requirements would appear . . . to be separate and independent from the highway-grant program. Those requirements do not govern how states should construct and maintain highways. Nor do they govern the processes

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251. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

252. 42 U.S.C. § 7509(b)(1) (2012). The EPA may not cut off highway funds for projects necessary to “resolve a demonstrated safety problem,” mass transit, carpooling programs, construction of high-occupancy vehicle (HOV) lanes, “programs to limit or restrict vehicle use in downtown areas,” and other programs that will “improve air quality and would not encourage single occupancy vehicle capacity.” § 7509(b)(1)(A), (B). In some jurisdictions, exempt funds will be a substantial portion of the available highway funding. *See Baake, supra* note 20, at 8.

253. *See NASBO, supra* note 134.

254. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2581 (2012).

255. *See NASBO, supra* note 134.

256. Bagenstos, *supra* note 19, at 864–65.

257. *Id.* at 865.

258. *Id.* at 906.

259. Ryan, *supra* note 20, at 1049 (“Because the CAA conditions the receipt of federal highway funds on a state’s performance of CAA duties that are only indirectly related to those highway funds, it comes closer than any other environmental law to the vulnerable crossover condition at the heart of the *Sebelius* doctrine.”).

260. Bagenstos, *supra* note 19, at 916–17.

by which states should choose *which* highways to construct and maintain. And they do not even govern the *use* of the highways constructed or maintained with federal funds.<sup>261</sup>

For Bagenstos, this marks the beginning of the coercion analysis. Courts would then need to determine “whether the threatened cutoff of funds leaves states with a prerogative to reject Congress’s desired policy, not merely in theory but in fact.”<sup>262</sup> This second analytical step looks to the amount of federal funds threatened or at stake and, as Bagenstos notes, “it is conceptually difficult to identify a point at which the amount of federal funds at stake is so great that a state has no realistic option to refuse.”<sup>263</sup> In *NFIB*, Chief Justice Roberts also declined to identify a point or draw that line, stating instead that “[i]t is enough for today that wherever that line may be, this statute is surely beyond it.”<sup>264</sup> Applying the anti-leveraging principle of *NFIB* to the CAA sanctions, Bagenstos distinguishes the substantial but comparatively smaller highway grants, concluding perhaps “[t]he threat to withhold federal highway funds thus may well trigger the Chief Justice’s principle that sometimes sovereign states ‘have to act like it.’”<sup>265</sup> Nevertheless, he recognizes that legal challenges to the CAA may raise serious questions under *NFIB* as it remains “unclear at exactly what point a state should be understood to lack a real choice to refuse a federal grant,” making it “impossible to predict precisely how courts will apply *NFIB* to the CAA.”<sup>266</sup>

To date, only the D.C. Circuit has considered this question and applied *NFIB* and the “coerciveness inquiry” to the CAA.<sup>267</sup> In *Mississippi Commission on Environmental Quality v. EPA* the court rejected a series of challenges to various determinations made in the process of making nonattainment determinations. Of particular relevance, the court rejected an attempt to challenge the nonattainment designation of Wise County, Texas, on the grounds that such designation is unconstitutional because the sanctions are unconstitutionally coercive under *NFIB*.<sup>268</sup> With a rather cursory (and somewhat sloppy) analysis, the court rejected this claim, and even questioned the need to make any “coerciveness inquiry” at all.<sup>269</sup>

The petitioners in *Mississippi Commission* argued that “the [CAA]’s sanctions for noncompliant states impose such a steep price that State officials effectively have no choice but to comply—in contravention of the Supreme Court’s decision in [*NFIB*].”<sup>270</sup> Framing the question as purely one of federal

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261. *Id.* at 918–19.

262. *Id.* at 919 (internal citations omitted); *see also* Joondeph, *supra* note 13, at 834.

263. Bagenstos, *supra* note 19, at 919.

264. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2606 (2012).

265. Bagenstos, *supra* note 19, at 920 (quoting *NFIB*, 132 S. Ct. at 2603).

266. *Id.*

267. *See* Miss. Comm’n on Envtl. Quality v. EPA, 790 F.3d 138, 175–79 (D.C. Cir. 2015).

268. *Id.* at 174–75.

269. *Id.* at 178.

270. *Id.* at 175.

coercion following *NFIB*, the D.C. Circuit's ruling focused almost exclusively on the disparate amounts of money at issue in *NFIB* and the highway funds threatened by the CAA. The principles outlined in *Dole*, and which underlie current conditional spending jurisprudence, made scarcely any appearance at all.

The *Mississippi Commission* court assumed for the sake of its "coercion analysis" that, as with the conditions at issue in *Dole*, the CAA sanctions are "not a restriction on how the highway funds are to be used, but rather an incentive to encourage States to take action in a related policy area."<sup>271</sup> Thus, the court did not engage in any meaningful consideration of whether the CAA was leveraging participation in an entrenched program to persuade unwilling states to comply with separate regulatory requirements or whether there was a sufficient connection between the highway fund sanctions and the purposes of federal highway spending.

The court gave two reasons for finding the CAA's sanctions "not nearly as coercive as those in the [PP]ACA."<sup>272</sup> First, the court found that "unlike the situation in *NFIB* and like that in *Dole*, a noncompliant State does not risk losing *all* federal funding for an existing program," only funding for highway projects in the nonattainment areas.<sup>273</sup> In reaching this conclusion, however, the Court only cited CAA section 179, and completely ignored the EPA's ability to apply highway fund sanctions more broadly under section 110.<sup>274</sup>

Second, the court opined, even if the EPA withheld all \$3 billion of Texas's highway funds for 2013, "it would still have amounted to less than 4 per cent of the State's 2013 budget."<sup>275</sup> Such a relatively small amount, "does not even approach the 'over 10 percent of a State's overall budget' at issue in *NFIB*."<sup>276</sup> Perhaps so, but it is still many times greater than the less than half of one percent of South Dakota's budget at issue in *Dole*, and nearly the amount of Medicaid funding at stake for some states in *NFIB*. Nonetheless, the *Mississippi Commission* court concluded that it was "clear that Texas does not risk losing anywhere near the percentage of its federal funding—either for the program at issue or of its overall budget—that the Court found fatal" when considering the Medicaid provisions of the PPACA.<sup>277</sup>

Such a perfunctory "coercion" analysis suggests that the court did not appreciate or take seriously *NFIB*'s anti-leveraging principle. Instead, the court simply compared the federal dollars threatened by the two statutes and conclude that the highway funds were not significant enough to constitute "coercion."<sup>278</sup>

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271. *Id.* at 177.

272. *Id.*

273. *Id.*

274. *See supra* notes 111-113 and accompanying text.

275. *Mississippi*, 790 F.3d at 178.

276. *Id.*

277. *Id.*

278. *Id.* at 177-79.



More troubling, however, are the *Mississippi Commission* court's treatment of *Dole* and misreading of the CAA. The *per curiam* opinion did not formally apply the *Dole* factors as, according to the opinion, the petitioners had not argued that the highway fund sanctions failed to satisfy "any other constitutional requirements governing conditions on federal grants to the States."<sup>279</sup> The court also questioned, albeit in dicta, whether *Dole* and the coerciveness inquiry was even necessary.<sup>280</sup> One reason for this was that the court understood section 179 not to withhold federal highway funds from noncompliant states, but merely to "redirect" funds "to programs of the Congress' choosing, including those that 'would improve air quality and would not encourage single occupancy vehicle capacity.'"<sup>281</sup> This is a non sequitur based upon a misunderstanding. That the funding at issue may be spent on some other program, somewhere else, in no way lessens the burden placed upon the noncompliant state. In any event, the court was simply confused about how the CAA actually operates.

To support its claim that section 179 "redirects," rather than withholds, funding for noncompliant states, the opinion cited a portion of the 1989 Senate Report on the Senate version of the 1989 CAA Amendments concerning bill language that was never enacted and is quite different from what is contained in the U.S. Code.<sup>282</sup>

The CAA sanctions are not as the court described. The CAA's broad highway funds sanctions allow the EPA to "impose a prohibition . . . of any projects or the awarding by the Secretary [of the Transportation] of any grants, under Title 23 other than projects or grants for safety."<sup>283</sup> The *Mississippi Commission* court cited a list of possible *exceptions* to the general prohibition on

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279. *Id.* at 176 n.21 (noting petitioners "do not argue that the sanctions provision fails to comply with any other constitutional requirements governing conditions on federal grants to the States" (citing *South Dakota v. Dole*, 403 U.S. 203, 207–08 (1987))).

280. *Mississippi*, 790 F.3d at 179 ("These differences from the Supreme Court's precedents create some uncertainty as to whether the coerciveness inquiry employed in *Dole* and *NFIB* was even triggered by the [CAA] provisions at issue here.").

281. *Id.* (quoting 42 U.S.C. § 7509(b)(1)(B)(viii) (2012)).

282. *See id.* (citing S. REP. NO. 101–228, at 26 (1989)). The opinion repeatedly cites this report as "Senate Committee Report on the 1990 Clean Air Act Amendments." In fact, the report is actually titled as a report on the CAA Amendments of 1989, which underwent substantial revision before being enacted the following year. The court's opinion asserts that this report "explains" the operation of section 179's sanction provisions. Yet the amendments considered by the Senate in 1989 did not contain any sanction provisions in section 179. Rather, the proposed amendments contained combined provisions concerning both conformity *and* sanctions in only section 176. As eventually enacted, the 1990 amendments added separate conformity and sanction provisions in sections 176 and 179 respectively. *See supra* notes 111–116 and accompanying text.

It is also worth noting that earlier in the opinion the court seemed to analyze the question differently, stating: "In the case now before us, the Congress has conditioned some federal highway funding on Texas's adoption of an adequate implementation plan. This condition, like the one at issue in *Dole*, is—at least arguably—not a restriction on how the highway funds are to be used, but rather an incentive to encourage States to take action in a related policy area." *Mississippi*, 790 F.3d at 177 (emphasis added).

283. 42 U.S.C. § 7509(b)(1)(A).

Title 23 highway funds.<sup>284</sup> These exceptions do not “redirect” highway funding as the court suggested. Rather, they allow the Transportation Secretary to continue funding these specific excepted highway programs notwithstanding the EPA’s sanctions under the CAA.<sup>285</sup> Thus, the court’s first attempt to distinguish the CAA highway sanctions from *Dole* relied on a misreading of the sanctions.

The *Mississippi Commission* court’s second attempt to distinguish *Dole* and excuse any need for a coerciveness inquiry focused on its assertion that, unlike the conditions under the CAA, the “new” spending conditions imposed in *Dole* and *NFIB* surprised the “participating States with post-acceptance or retroactive conditions.”<sup>286</sup> The court distinguished *Dole* and *NFIB* by noting that “[n]either the [CAA]’s requirement to submit an implementation plan, nor its highway funds sanction, is a condition that has been newly imposed on the States.”<sup>287</sup> Both have been on the books for decades.<sup>288</sup> Because the highway funds sanction came as no surprise to Texas, the court reasoned, it was not clear that “the coerciveness inquiry employed in *Dole* and *NFIB* was even triggered by the [CAA] provisions at issue here.”<sup>289</sup> This reasoning misconstrues *Dole* and *NFIB*.

A threshold question in *Dole* and *NFIB* is whether Congress has exceeded its spending power by imposing conditions that “threat[en] to terminate other significant independent grants.”<sup>290</sup> Thus, as we have discussed, one of the open issues in *NFIB* was whether the PPACA’s “new” Medicaid program was actually new and sufficiently distinct from “old” Medicaid so as to trigger a coerciveness inquiry. But whether the states in *Dole*, *NFIB*, or *Mississippi* were “surprised” or caught off guard by a grant condition does not by itself determine whether Congress has exceeded its constitutional conditional spending authority. In cases in which the conditions “threat[en] to terminate other significant independent grants,” the *Dole* test is to be applied and a coerciveness inquiry conducted when the spending conditions violate even one of the four elements of that test.<sup>291</sup>

In *Mississippi*, the D.C. Circuit had presumed that that the CAA conditions were “an incentive to encourage States to take action in a related policy area”—a conclusion that should have triggered a *Dole* analysis.<sup>292</sup> That is, having determined that the threat to withhold federal highway funds was designed to encourage states to comply with an environmental program, the court then should have applied the four *Dole* factors. Instead, the *Mississippi* court’s dicta suggested that because Texas had been a longtime recipient of the federal

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284. See *Mississippi*, 790 F.3d at 178 (citing § 7509(b)(1)(A), (B)(i)–(viii)).

285. See § 7509(b)(1)(A), (B)(i)–(viii).

286. *Mississippi*, 790 F.3d at 179 (quoting *NFIB v. Sebelius*, 132 S. Ct. 2566, 2606 (2012)).

287. *Id.*

288. *Id.* (“Although both were new in 1977, see Clean Air Act Amendments of 1977, Pub.L. No. 95–95, §§ 103, 176, 91 Stat. 685, 687–88, 749–50 (1977), since then Texas has submitted implementation plans and accepted billions of dollars in highway funding.”).

289. *Id.*

290. *NFIB*, 132 S. Ct. at 2604.

291. *Id.*

292. *Mississippi*, 790 F.3d at 177.

highway funds, and because those funds had long been subject to the CAA sanctions, those sanctions were not “new” or “surprising” to Texas and were therefore unlikely to require a coerciveness inquiry.<sup>293</sup>

After *NFIB*, many predicted that legal challenges to a variety of federal environmental statutes would ensue. The *Mississippi* decision is not likely to be the final word on the constitutionality of the CAA sanctions or even much of a blueprint for how lower courts will apply *NFIB* or employ the “anti-leveraging principle.” Indeed, federal courts should avoid *Mississippi*’s cursory analysis and misreading of the CAA, and consider more carefully whether the CAA sanctions “threat[en] to terminate other significant independent grants.”<sup>294</sup>

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

#### V. COERCION BEYOND CONDITIONAL SPENDING

*NFIB* reinforced, and arguably expanded, the limitations on Congress’s use of conditional spending to induce state participation in federal programs. As discussed above, even a rather narrow reading of the *NFIB* holding raises serious questions about the constitutionality of at least one extant federal environmental program: the imposition of highway fund sanctions under section 179 of the CAA. If one adopted a broader reading of *NFIB*, the consequences would be broader as well.<sup>295</sup>

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293. *Id.* at 179.

294. *NFIB*, 132 S. Ct. at 2604.

295. For examples of broader readings of *NFIB*’s conditional spending holding, see Elhauge, *supra* note 174, at 545–53. For an argument that *NFIB* should have adopted a broader anti-coercion principle, see Berman, *supra* note 17 at 1286–87. Narrower readings, such as those applied above, have been characterized as “lawyerly . . . gutting” of *NFIB*. See Roderick Hills, *Fair-Weather Friends of Federalism (and Nationalism) in King v. Burwell? The Dilemma of Supporting Principles That Hurt One’s Cause*, PRAWFSBLAWG (Mar. 7, 2015), <http://prawfsblawg.blogs.com/prawfsblawg/2015/03/fair-weather-friends-of-federalism-and-nationalism-in-king-v-burwell.html>.

*NFIB* itself concerned the use of conditional spending to induce state cooperation. An obvious question, however, is whether the holding should be so limited. If the underlying principle embodied in *NFIB*'s Medicaid holding is that the federal government may not coerce states under the guise of offering mere inducements, it is not clear why this principle should be limited to fiscal inducements. Other levers of influence, such as conditional preemption, should create no less risk of coercion, particularly if, as is the case with at least one CAA provision, a state's failure to cooperate results in the imposition of more stringent regulatory requirements.<sup>296</sup> On the other hand, the Court seemed to consider and reject such arguments in *New York*, in the process of upholding conditional regulations that threatened to impose highly disruptive conditions on private industry in noncooperating states.<sup>297</sup>

Since *NFIB*, litigants have already challenged other aspects of the CAA, alleging that the choices presented to state governments are no less coercive than the threat of withholding desired and relied-upon federal funds. In one recent case, for instance, Texas argued (unsuccessfully) that the threat of a FIP was coercive.<sup>298</sup> As of this writing, over two dozen states argue that the Obama Administration's ambitious Clean Power Plan (CPP) is unconstitutionally coercive in that it leaves states no ability to opt out of participation in the control of greenhouse gases from the utility sector. In this Part, we consider the CAA's offset sanction and the coercion challenges to the CPP.

#### A. Offsets

The failure to submit or maintain an adequate SIP to achieve the NAAQS not only threatens the loss of highway funds, but can also trigger more stringent regulatory requirements for stationary sources in the relevant jurisdiction. Under the CAA, firms in nonattainment areas are required to make investments that reduce emissions of the relevant air pollutants to "offset" any emission increases resulting from the construction or modification of covered stationary sources.<sup>299</sup> Where states fail to cooperate with the EPA by developing and implementing a SIP of their own, the offset requirements increase.<sup>300</sup> Specifically, section 179 provides that in applying the sanction emission offset requirements to stationary sources, "the ratio of emission reductions to increased emissions shall be at least 2 to 1,"<sup>301</sup> instead of the default 1.15 to 1 ratio otherwise provided for in the

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296. 42 U.S.C. § 7509(b)(2) (2012).

297. See *New York v. United States*, 505 U.S. 144, 174 (1992) ("The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on [private citizens], rather than on the State as a sovereign.").

298. *Texas v. EPA*, 726 F.3d 180, 197 (D.C. Cir. 2013).

299. § 7509(b)(2).

300. *Id.*

301. *Id.*

CAA. Under existing EPA regulations, this offset requirement typically will be imposed before a state risks losing its highway funds.<sup>302</sup>

Offset provisions are generally used to ensure that additional economic development does not come at the expense of emissions control.<sup>303</sup> By requiring firms to offset capital investments that may increase emissions with equivalent (or greater) emission reductions, such provisions allow firms to upgrade and expand their facilities, so long as they do so in a way that does not increase pollution. Offset provisions often require emission reductions greater than the anticipated emission increases so as to account for potential leakage and reinforce other emission controls that seek to reduce—rather than simply maintain—existing emission levels.<sup>304</sup>

There is nothing particularly unusual or punitive about requiring firms to offset expected emission increases with equal or greater emission reductions, particularly where (as with nonattainment areas) the policy aim is to reduce existing pollution levels. Without such provisions, permitting firms to construct new facilities poses a risk of increasing pollution levels, particularly over time.<sup>305</sup> It may also make sense to increase the severity of offset requirements in areas with worse air pollution, as is done in some CAA provisions,<sup>306</sup> as greater offset requirements would align with greater emission reduction requirements. Yet there does not appear to be any such rationale for increasing offset requirements in states that fail to cooperate with federal regulatory initiatives particularly where, as with the CAA, the federal government is prepared to step in and impose the necessary regulatory controls itself. The existence of a FIP alternative obviates the need for such requirements. Thus the CAA's offset sanction appears to be nothing more than a punishment imposed on recalcitrant states as a means of pressure to cooperate. For this reason, the offset provisions seem to raise the possibility of unconstitutional coercion.

*NFIB* did not address the problem of threatening more severe regulatory burdens in states that refuse to cooperate with the implementation and execution of a federal regulatory program. Such a problem was arguably raised in another PPACA case, however. At oral argument in *King v. Burwell*, Justice Kennedy suggested it would be unconstitutional to impose greater regulatory burdens in states that refuse to implement a federal program.<sup>307</sup> Specifically, Justice Kennedy suggested that the Court “wouldn't allow” a law that, instead of

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302. See 40 C.F.R. § 52.31(d) (2016).

303. For a discussion of offsets and their use under the CAA, see Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1627–30 (1991).

304. See *id.* at 1630 n.454.

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

306. See 42 U.S.C. §§ 7511a(b)(5), 7511a(c)(10), 7511a(d)(2) (2012).

307. Transcript of Oral Argument at 19, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114), 2015 WL 2399405.

withholding a portion of highway funding, threatened noncooperating states with lower speed limits.<sup>308</sup> This scenario is quite analogous to the CAA offset sanction (if a bit more severe).<sup>309</sup> It did not become part of the holding in *King*, however, as the Court eschewed any reliance upon federalism-related arguments in reaching its conclusion that the PPACA did not withhold tax credits for the purchase of health insurance in states that refused to establish their own health insurance exchanges.<sup>310</sup>

The Court may have avoided the federalism coercion argument in *King* because of its potential to disrupt other federal regulatory programs.<sup>311</sup> Indeed, the argument that imposing a differential regulatory burden in noncooperating states runs headlong into *New York*, in which the Court concluded there was no problem with Congress using its regulatory authority to encourage state cooperation.<sup>312</sup> Specifically, in *New York*, the Court held that Congress could offer states the following deal: either implement federal policy (so as to ensure local disposal capacity for low-level radioactive waste), or producers of such waste (which include hospitals and medical research centers) will face more costly disposal options and eventually be deprived of any ability to dispose of their wastes.<sup>313</sup> Given the volume of such wastes produced in many industries, this was a particularly draconian condition, but one that the Court said was not constitutionally problematic because the consequences of state inaction would fall upon private actors rather than the state itself. As Justice O'Connor explained in her opinion for the Court:

The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign. A State whose citizens do not wish it to attain the Act's milestones

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308. *Id.* (“In *South [Dakota] v. Dole* where . . . the matter of funding for the highway, suppose Congress said, and if you don't build the highways, you have to go 35 miles an hour all over the State. We wouldn't allow that.”). This hypothetical appears to have been inspired by an amicus brief focusing on federalism arguments in support of the federal government's position in *King*. Brief of Jewish All. for Law & Soc. Action (JALSA) et al. as Amici Curiae Supporting Respondents, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114), 2015 WL 350366, at \*27.

309. The federal government has proposed lowering speed limits to achieve environmental regulatory goals. See 151 Cong. Rec. H8537-02, 2005 WL 2397286; Dick Feagler, *Cloning the Key to Calm in Flitting Flower Fly Furor*, CLEV. PLAIN DEALER (March 3, 1997), 1997 WLNR 6322757; Andy McCue, *The Press-Enterprise, Riverside, Calif., Andy McCue Column*, THE PRESS-ENTERPRISE, Riverside, Calif., (July 27, 2001), 2001 WLNR 7665403 (“Developers still talk of the government bureaucrat who proposed that the state limit traffic on I-10 to 20 miles an hour during the mating season, when the fly would want to migrate across the already existing freeway.”).

310. See Jonathan H. Adler & Michael F. Cannon, *King v. Burwell and the Triumph of Selective Contextualism*, 15 CATO SUP. CT. REV. 35, 51–52 (2015) (noting the Court's failure to address federalism concerns in *King v. Burwell*).

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

312. *New York v. United States*, 505 U.S. 144, 166–67 (1992).

313. *Id.* at 174.

may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile.<sup>314</sup>

This language would seem to allow for the constitutionality of the CAA's offset provisions. Although these provisions may seem punitive—and, as a consequence somewhat coercive, they impose the additional burden on private citizens rather than upon the states themselves.

If Congress's use of incentives poses a risk of coercion, there is no logical reason for subjecting conditions placed upon the receipt of federal spending to greater scrutiny than the potentially punitive use of conditional preemption. At least in theory, either poses the potential of presenting states with an offer they cannot refuse—the proverbial “gun to the head.” If, in the conditional spending context, leveraging state reliance upon federal funds is suspect, then there are reasons to suspect equivalent leveraging in the context of conditional preemption. *New York*, however, clearly rejects such concerns on formalist grounds. So long as the threatened burden is borne by private actors, as opposed to the state itself, the *New York* Court saw no threat to state sovereign interests. Unless the Court were willing to revisit this analysis—perhaps by revisiting the formalist distinction between burdens placed upon states-as-states and burdens placed upon private interests within states—it is hard to see how a coercion-based challenge to the offset sanctions would gain much traction.

### B. *The Clean Power Plan*

*NFIB*-based coercion arguments feature prominently in attacks on the lawfulness of the EPA's CPP.<sup>315</sup> The CPP is a set of regulations implemented under section 111 of the CAA, which authorizes the issuance of standards of performance for new and existing sources.<sup>316</sup> The central piece of the CPP imposes emission reduction obligations on existing power plants—those that are

314. *Id.*

315. See, e.g., David B. Rivkin, Jr. et al., *Does EPA's Clean Power Plan Proposal Violate the States' Sovereign Rights?*, 16 *ENGAGE* 36, 42 (2015). Laurence H. Tribe, *Tribe: Why EPA's Climate Plan Is Unconstitutional*, HARV. L. TODAY (Mar. 20, 2015), <http://today.law.harvard.edu/why-epa-climate-plan-is-unconstitutional/>; HOUSE COMMITTEE ON ENERGY AND COMMERCE: SUBCOMMITTEE ON ENERGY AND POWER, EPA'S PROPOSED 111(D) RULE FOR EXISTING POWER PLANTS: LEGAL AND COST ISSUES: TESTIMONY OF LAURENCE H. TRIBE 26 (March 17, 2015), <http://docs.house.gov/meetings/IF/IF03/20150317/103073/HHRG-114-IF03-Wstate-TribeL-20150317-U1.pdf> (“EPA's proposal puts a gun to every state's head.”); Laurence H. Tribe, *The Clean Power Plan Is Unconstitutional*, WALL ST. J. (Dec. 22, 2014, 7:06 PM), <http://www.wsj.com/articles/laurence-tribe-the-epas-clean-power-plan-is-unconstitutional-1419293203>; Laurence H. Tribe & Peabody Energy Corp., *Comment Letter on 79 Fed. Reg. 34,830*, at 32 (Dec. 1, 2014) [http://www.masseygail.com/pdf/Tribe-Peabody\\_111\(d\)\\_Comments\\_\(filed\).pdf](http://www.masseygail.com/pdf/Tribe-Peabody_111(d)_Comments_(filed).pdf) (“The Proposed Rule invades state regulatory control in an unprecedented manner under the [CAA] and raises grave constitutional questions. It seeks to commandeer state agencies in violation of core structural principles of federalism and the Tenth Amendment.”).

316. 42 U.S.C. § 7411 (2012).

in operation and emitting GHGs. Under section 111(d), the EPA identifies the “Best System of Emission Reduction” that has been “adequately demonstrated” for a given source category—this becomes the standard of performance that existing sources must meet.<sup>317</sup> States are then expected to develop SIPs that will ensure sources within each state will meet the emission targets. The goal of the plan is to reduce power plant emissions by 32 percent (below 2005 levels) by 2030.<sup>318</sup> This goal is significant because power plants are responsible for the lion’s share of GHG emissions (approximately one-third).<sup>319</sup> Under the CPP, states are supposed to begin making reductions in 2022 with an ultimate compliance date of 2030. This date may seem like a long way off, but given the nature of utility investments, it is generally recognized that utilities would have to begin making investments in compliance within the next year or so in order to meet the targets.<sup>320</sup> Industry and the challenging states stressed this in their stay applications with the Court.<sup>321</sup>

The CPP gives states substantial flexibility in how they decide to meet the required emission reductions. Among other things, the EPA hopes that states will rely to some degree on energy efficiency and conservation investments and emission trading to reduce the costs of compliance.<sup>322</sup> Despite the EPA’s promised flexibility, some states have indicated that they do not plan to cooperate (much as many states refused to cooperate with the PPACA and refused to create exchanges). Should states refuse to develop their own SIPs, however, the EPA has the authority to impose a FIP to achieve the same level of emission reductions, just as it has under other provisions of the CAA. A FIP, however, is unlikely to be as flexible as a SIP could be.

The emission reductions targeted by the CPP are based upon a set of “building blocks” identified by the EPA. Specifically, the EPA assumes that states may achieve the required emission reductions through (1) heat rate improvements at individual plants, (2) increased use of natural gas instead of coal for electricity generation, and (3) increased use of renewable energy.<sup>323</sup> The

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317. § 7411(d).

318. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,924 tbls.15 & 16 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

319. See *id.* at 64,689 (fossil fuel-fired power plants generate approximately 38 percent of all domestic, energy-related carbon dioxide emissions).

320. See generally James W. Coleman, *Investing in the Shadow of the Law: How Agencies Are Using Proposed Rules to Transform Industry Long Before Final Rules Are Tested In Court*, 23 GEO. MASON L. REV. (forthcoming 2016).

321. See, e.g., Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review at 43–44, *West Virginia v. EPA* (No. 15A773), [https://www.edf.org/sites/default/files/content/2016.01.26\\_wv\\_et\\_al\\_scotus\\_stay\\_application.pdf](https://www.edf.org/sites/default/files/content/2016.01.26_wv_et_al_scotus_stay_application.pdf). On February 9, 2016, a divided Supreme Court voted 5–4 to grant a stay of the CPP pending resolution of pending legal challenges to the EPA’s rules. See Order Granting Stay, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016).

322. See 80 Fed. Reg. at 64,710 (noting that the CPP does not require that states adopt the specific emission reduction measures identified by the EPA).

323. See *id.* at 64,667.



EPA also hopes that states will also use their SIPs to encourage energy conservation and increased efficiency, although the EPA could not impose such measures directly under a FIP.<sup>324</sup> The ultimate level of emission reductions required under the CPP is greater than can be achieved by merely imposing emission controls on existing fossil-fuel fired power plants, and will require regulated sources to achieve emission reductions by displacing existing fossil fuel electricity production with natural gas, renewable energy, energy conservation, or some combination thereof.<sup>325</sup> These changes, in turn, will inevitably make work for state policy makers as well.

Twenty-six states filed suit challenging the CPP in federal court.<sup>326</sup> Among other things, these states (and their industry allies) argued that the CPP both commandeers state governments and is coercive under *NFIB* because it effectively forces states to participate in the federal government's regulatory regime and offers states no ability to withhold their cooperation.<sup>327</sup> Whether or not a state adopts a SIP to implement the CPP, state public utility commissions and other officials will be required to take steps to ensure that power continues to flow within the state.<sup>328</sup> Failure to cooperate is not an option. Should a state refuse to enact a SIP to implement the CPP, the substitute FIP would still require state cooperation in order for it to be effective without compromising the reliability of the electricity supply.<sup>329</sup> If, for instance, sources in a given state seek to comply with a FIP by reducing reliance upon coal and increasing natural gas capacity, this would require the approval and cooperation of state regulators, and should state regulators refuse to comply, the state would risk severe consequences in the form of an unreliable electricity supply.

As with arguments targeting the offset provisions, the arguments against the CPP also seem precluded by the Court's holding in *New York*—even more so. In the offset context, noncooperating states are explicitly subject to more stringent regulatory burdens—the precise scenario suggested by Justice Kennedy in the *King* oral argument. With the CPP, however, it is not clear that the regulatory burden faced by electricity producers (and, by extension, state citizens) is any more severe in noncooperating states than in those that adopt SIPs of their own.

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324. *See id.* at 64,835–37.

325. *See id.* at 64,666–67.

326. An additional eighteen states support the CPP. *See* Robin Bravender, *44 States Take Sides in Expanding Legal Brawl*, GREENWIRE (Nov. 4, 2015), <http://www.eenews.net/stories/1060027463>.

327. Joint Brief for the Petitioner at 78–85, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Feb. 19, 2016).

328. *Id.* at 82 (“A federal plan’s mandate to retire coal-fired plants or reduce their utilization (including by requiring the purchase of emissions allowances) would force state utility and electricity regulators to respond in the same way as if the State itself had ordered the retirements.”).

329. *Id.* at 20 (“Because no regulated unit can achieve the Rule’s uniform performance rates, States will be required even under federal plans to facilitate the reordering of each State’s mix of electricity generation in order to ‘ensure that electric system reliability will be maintained’ as coal generation is forced to retire and alternative generation must be constructed to take its place.” (quoting 80 Fed. Reg. at 64,981)).

In either case, the CPP imposes an extensive range of costly emission reduction requirements with the aim of restructuring electricity markets.

The stakes involved in the CPP may be higher than in other conditional preemption contexts, but it is not clear why the principle is any different. Further, unlike with the offset provisions, the EPA is not imposing greater regulatory burdens on noncooperating states. Insofar as a FIP is more costly or onerous for in-state industries than a SIP, this is due to the fact that states have a broader range of regulatory (and other) tools at their disposal, not because the CAA imposes sanctions on noncooperation.<sup>330</sup> The ultimate degree of emission reductions required is the same under either a SIP or a FIP. If the EPA's CPP regulations are authorized by the CAA,<sup>331</sup> then the choice presented to states is equivalent to that offered in most conditional preemption contexts: adopt regulations that achieve the federally mandated goals or be subject to duly authorized federal regulations that will achieve this goal.

CPP opponents have argued that the regulations adopted by the EPA are nonetheless coercive because states will be required to facilitate even federal regulation of greenhouse gases from utilities, and the states have no practical choice but to cooperate. This is because implementation of the CPP—whether performed by federal or state officials—will force the closure of coal-fired power plants. As a consequence, state public utility commissions will need to facilitate the siting of alternative power sources in order to ensure an adequate and reliable electricity supply within the state.<sup>332</sup> This facilitation, opponents claim, amounts to unconstitutional commandeering, and the CPP is coercive because the states are left without any choice but to cooperate in this fashion.

There is no doubt that state policy makers will feel tremendous pressure to ensure that electricity supply and reliability are unaffected by the imposition of

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330. There is some ambiguity as to whether the EPA could impose highway fund sanctions under section 179 for a state's failure to adopt a compliant SIP to implement section 111 requirements, but the EPA has made clear that it does not believe such sanctions are available. See Jean Chemnick, *Agency Won't Withhold Highway Funds for Clean Power Plan – McCarthy*, E&E NEWS PM, (Mar. 30, 2015) <http://cache-ashburn-01.eenews.net/eenewspm/2015/03/30/stories/1060016017>.

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

332. See David B. Rivkin, Jr. & Andrew M. Grossman, *'Clean Power' Plays and the Last Stand for Federalism: What Will Be Left of Our Constitutional Order if the EPA's Plan Passes Judicial Muster?*, WALL ST. J. (Sept. 25, 2016, 6:11 PM), <http://www.wsj.com/articles/clean-power-plays-and-the-last-stand-for-federalism-1474841482> (“[T]his is how the plan works: The EPA pushes coal-fired plants off the grid, and then counts on the states to ensure that the resulting reductions in capacity are matched by increases in EPA-preferred forms of power generation. State agencies will have to be involved in decommissioning coal-fired plants, addressing replacement capacity—like wind turbines and solar arrays—addressing transmission and integration issues, and undertaking all manner of related regulatory proceedings. All this to carry out federal policy.”).

stringent emission controls on the power sector. In this regard, however, the CPP is no different in kind than any other CAA regulation of utility emissions, including recently imposed controls on mercury emissions or the interstate emissions of ozone precursors. All such regulation has the potential to result in the closure of older, higher-emitting facilities (coal-fired power plants in particular) and any such closures present state policy makers with a choice of either facilitating the siting and development of alternatives or risking a less reliable electricity supply. More broadly, all manner of environmental (and other) regulation of private economic activities may generate secondary effects that prompt state and local governments to respond. None of this constitutes commandeering, and the existence of such consequences does not “coerce” the states as coercion is understood under *Dole* and *NFIB*. To hold that the CPP is coercive because the federal regulation of utilities may create problems that state regulators must address would effectively proscribe *any* meaningful federal regulation of utilities. Such a rule would not only eviscerate the long-standing practice of cooperative federalism under the CAA, it would threaten the use of conditional preemption throughout the U.S. Code.

The CPP may represent a more expansive assertion of federal regulatory authority than was involved in *New York*, but the differences are of degree, not of kind. In *New York*, the Supreme Court expressly blessed the use of conditional preemption where the imposition of federal regulation has the potential to create problems that state policy makers will feel compelled to address. *New York* opposed the Low-Level Radioactive Waste Policy Amendments Act in no small part because state policy makers feared the federal regulatory measures would induce a low-level radioactive waste disposal crisis within the state. No matter. The use of conditional preemption to prod state cooperation was upheld. Only the effort to “commandeer” state policy makers through the take-title provision was invalidated. By the same token, were the EPA to attempt to require states to regulate utility emissions themselves, there would be a commandeering problem, but there is no such problem under *New York* merely because federal regulatory measures may have local effects to which some states object.

#### CONCLUSION

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

Although *NFIB* itself was confined to the question of conditional spending, the Court’s willingness to find coercion within the PPACA’s choice architecture opens the door to coercion arguments in other contexts. This creates an opening for challenges to other parts of the CAA, including the offset provisions and the

CPP, though such challenges would require a further expansion of the anti-coercion doctrine in order to be successful. To date, the Court has not indicated any willingness to second guess the wide berth given to conditional preemption under *New York*.

The CAA's highway fund sanctions may be constitutionally suspect after *NFIB*, but conditional spending requirements under other federal environmental statutes appear to be far less vulnerable. At present, most other federal environmental statutes simply impose conditions on how funding for state-level environmental programs is to be spent or do no more than threaten conditional preemption.<sup>333</sup> Nonetheless, the Court's willingness to accept a coercion-based argument against the use of conditional spending creates opportunities to alter the entire landscape of this doctrine.

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333. Ryan, *supra* note 20, at 1039–49.