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Issue Brief

Environmental Law After *Sebelius*: Will the Court's New Spending Power Limits Affect Environmental State-Federal Partnerships?

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I. Introduction

Last summer, after the Supreme Court ruled in the highly charged Affordable Care Act case, *National Federation of Independent Business vs. Sebelius*,[1] the political arena erupted in debate over the implications for the President's health reform initiative and the reach of federal law more generally. The Affordable Care Act (ACA) was designed to reduce costs and facilitate access to health insurance by requiring all individuals to participate in the insurance pool and expanding the Medicaid state-federal insurance partnership. Writing for a fractured plurality, Chief Justice Roberts upheld the Act's "individual mandate"—the famously controversial provision requiring individuals to buy health insurance or pay a fine—not under Congress's well-worn authority to regulate interstate commerce, but under its sleepier constitutional power to levy taxes.[2]

Analysts fixated on the decision's dueling Commerce Clause theories, but the arguably most important element involved neither the commerce power nor the tax power directly, but its flip side: Congress's authority to spend tax revenue to advance the general welfare. For even as one plurality allowed that the Act's expanded Medicaid program was itself constitutional, a different plurality held that plans to condition a state's continued receipt of Medicaid funds on assent to the new expansion would exceed federal authority under the Spending Clause.[3] Chief Justice Roberts concluded that Congress could not require participation in the Medicaid expansion by states that preferred the existing partnership, if rejecting the expansion would cause those states to lose critical federal funds they had come to rely on. That approach would amount to unconstitutional coercion, he reasoned, violating the principles of federalism and exceeding Congress's authority to negotiate with freely consenting states.

With that holding, *Sebelius* became the first Supreme Court decision ever to limit an act of Congress on spending power grounds, rounding out the "New Federalism" constraints on federal power under the Commerce Clause, Section Five of the Fourteenth Amendment, and the Tenth and Eleventh Amendments first initiated by the Rehnquist Court in the 1990s.[4] *Sebelius* limits Congress's ability to bargain with the states, effectively holding that it may not condition a state's receipt of federal funds within an entrenched spending power partnership on that state's assent to an independent program—at least when the funds at stake are so substantial that the threat of losing them coercively undermines state consent, and when there is no independent source of federal authority for requiring state performance.[5] However, the decision gives little

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[1] 132 S. Ct. 2566 (2012) (hereinafter, *Sebelius*).

[2] *Id.* at 2598-2600.

[3] *Id.* at 2606-07.

[4] *See* ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 1 & n.2 (2012) (discussing the Rehnquist Court's "New Federalism" revival and listing the standard canon of New Federalism cases).

[5] *Sebelius*, 132 S. Ct. at 2601-07.

direction for evaluating when the amount of funding reaches the threshold of coercion, or even when changes to an existing program (like Medicaid) amount to a new and independent program (as Chief Justice Roberts characterized the Medicaid expansion).[6]

The decision thus leaves open important unanswered questions about the new spending power limits, which are likely to prompt litigation exploring them in challenges to other spending-power based programs of cooperative federalism.[7] Potential targets include partnerships built into the nation's major environmental laws, which often partner state and federal regulators to manage boundary-crossing resources—like air, water, and biodiversity—that can only be protected through coordinated multilevel governance.[8] As regulated entities renew their opposition to longstanding environmental laws and marshal opposition to new regulations, some may seek opportunities to challenge environmental state-federal partnerships under the new *Sebelius* doctrine. Indeed, attorneys for the state of Texas have already indicated intent to do so in ongoing litigation over new Clean Air Act requirements.[9]

This analysis reviews the potential impact of *Sebelius* on environmental programs of cooperative federalism, concluding that few, if any, are vulnerable to successful legal challenge. Part II reviews the role of the spending power in interjurisdictional governance, Part III explores the new *Sebelius* limit, and Part IV analyzes how the doctrine intersects with environmental law. With the possible exception of the Clean Air Act, which links states' preparation of implementation plans with receipt of certain federal highway funds, none of the major environmental laws premised on spending power bargains appear vulnerable. Part V concludes that although an environmental *Sebelius* challenge is unlikely to prevail, the new doctrine nevertheless shifts intergovernmental bargaining leverage toward the states, potentially altering the substance of cooperative federalism programs in important ways.

II. Cooperative Federalism and the Spending Power

In the immediate wake of the *Sebelius* decision, legal analysts were most interested in the fact that the Chief Justice and the four conservative dissenters had rejected the government's view that the ACA was constitutionally authorized under Congress's commerce power.[10] Policy analysts were most concerned about the practical implications of the new commerce power jurisprudence for other programs of cooperative federalism. But even setting aside questions about its precedential value (given that the Chief's only supporters wrote in dissent[11]), the practical implications for existing governance are likely to be small, at least in the foreseeable future. After all, much of the debate over the individual mandate focused on how unprecedented

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[6] *See id.* at 2605-06 (differentiating the expansion as "a shift in kind, not merely degree").
[7] In programs of cooperative federalism, the federal and state governments take responsibility for interlocking elements of an overarching regulatory partnership. *See, e.g.,* RYAN, supra note 4, at 92.
[8] RYAN, supra note 4, at 145-80 (demonstrating intergovernmental interdependence in environmental law).
[9] *See* Lawrence Hurley, *Texas Wastes No Time in Citing Supreme Court Health Care Ruling in Clean Air Act Litigation*, E&E PUBLISHING, LLC (Aug. 1, 2012) http://eenews.net/public/Greenwire/2012/08/01/1 (reporting on the *Utility Air Regulatory Group v. EPA* case discussed *infra* at page 16).
[10] *Sebelius*, 132 S. Ct. at 2591.
[11] Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and 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….'").

it was: despite months of effort, nobody produced a satisfying example of a similar legislative tool used in previous health, environmental, or any other kind of federal law.

By contrast, the most immediately consequential portion of the ruling—and one with far more significance for most regulatory governance—is the part of the decision that focuses on the Spending Clause, limiting the federal spending power that authorizes Medicaid and so many other state-federal partnerships.[12] Congress regularly offers funding and other federal resources to persuade the states to engage in regulatory partnerships addressing matters of mixed state and federal interest. Interjurisdictional governance frequently takes place within spending power-based programs of cooperative federalism, ranging from social welfare programs and public education to national security and the interstate highway system.[13]

Sebelius, however, marks the first time the Court has ever invalidated a congressional act for exceeding its power under the Spending Clause, and it has important implications for the way state-federal regulatory partnerships work. Spending power partnerships reflect the complex way that the Constitution structures federal power, through both specific and open-ended delegations of authority. Specifically "enumerated" congressional powers include the authority to coin money, establish post offices, and declare war.[14] More open-ended grants of federal authority are conferred by the Commerce, Necessary and Proper, and Spending Clauses,[15] jointly accounting for vast areas of congressional lawmaking. Policymaking realms that are not expressly or implicitly covered by federal delegations are committed to state jurisdiction.[16]

The Spending Clause bridges realms of federal and state authority, authorizing Congress to spend money in pursuit of the public welfare in general. Congress can fund federal programs advancing specific federal responsibilities, such as post offices or naval training, and it can also fund state programs operating beyond Congress's specifically delegated powers, such as those addressing public education or domestic violence. Congress can fund state programs that it approves of directly, but it can also offer money conditionally—for example, to any state willing to adopt a rule or program that Congress would like to see implemented. In these examples, Congress is effectively offering the states a deal: "here is some money, but for use only within this program that we think you should operate" (for example, health-insuring poor children[17]).

In this way, the spending power enables Congress to bargain with the states for access to policymaking arenas that are otherwise beyond its reach. Congress can't just compel the states to enact its preferred policies in realms that exceed its specifically enumerated powers.[18] Yet

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[12] U.S. CONST. art I, § 8.
[13] E.g., RYAN, *supra* note 4, at 265-72, 288-90.
[14] U.S. CONST. art I, § 8.
[15] *Id.*
[16] U.S. CONST. amend. X. There is considerable overlap between state and federal jurisdiction, jointly governed by federal restraint and federal supremacy (U.S. CONST. art. VI), but that's another story—and a previous ACS essay. Erin Ryan, *Health Care Reform and Federalism's Tug of War Within*, ACS BLOG, June 21, 2012, available at http://www.acslaw.org/acsblog/health-care-reform-and-federalism%E2%80%99s-tug-of-war-within (cross-posted with U. Penn's REGBLOG at https://www.law.upenn.edu/blogs/regblog/2012/06/21-ryan-federalism.html). See also RYAN, *supra* note 4.
[17] State Children's Health Insurance Program (SCHIP), 42 U.S.C. 1397 et. seq. (2010).
[18] New York v. United States, 505 U.S. 144, 161 (1992) (holding that the Tenth Amendment forbids Congress from "commandeering" state participation as part of a federal regulatory program).

spending power partnerships are premised on negotiation rather than compulsion, because states remain free to accept or reject the federally proffered deal. In other words, if a state doesn't like the attached strings, it doesn't have to take the money. The *Sebelius* decision likens the spending power deal to a contract, valid when "the State voluntarily and knowingly accepts the terms."[19]

Members of the Court have sporadically worried about circumstances that might undermine the voluntariness of state consent, but usually in dicta and without much elaboration.[20] In 1987, in *South Dakota v. Dole*, the Court famously upheld the spending bargaining enterprise in a case challenging a federal law conditioning 5% of a state's federal highway funds if it did not adopt the national drinking age of 21 years of age.[21] In *Dole*, the Court held that spending power deals are constitutional so long as the conditions are unambiguous, reasonably related to the federal interest, promote the general welfare, and do not induce independent constitutional violations.[22] No law has ever run afoul of these broad limits, which have not since been revisited—until now.

III. The New *Sebelius* Spending Power Limit

A. The *Sebelius* Spending Power Holding

In challenging the ACA, twenty-six states argued that Congress had overstepped its bounds by effectively forcing them to accept a significant expansion of Medicaid, the state-administered but mostly federally-funded public health insurance program.[23] Before the ACA, Medicaid required that states offer health insurance to discrete categories of vulnerable people, including pregnant women, children, needy families, the blind, the elderly, and the disabled.[24] The ACA amendments required states to extend insurance to the general population of people under age 65 with incomes below 133% of the federal poverty line.[25] All states currently participate in the Medicaid partnership, but a longstanding provision specifies that the Secretary of Health and Human Services may withhold all Medicaid funds to any state failing to comply with any Medicaid requirement.[26] The plaintiff states feared losing that substantial source of funding—on average, about 10% of their annual budgets—if they rejected the ACA expansion.

The federal government maintained that Medicaid funds are a conditional gift that states are always free to take or refuse as best serves their interests. Congress had included a provision in the original authorizing legislation expressly stating that it could modify the program from one year to the next, and it has done so nearly fifty times since then.[27] But the plaintiffs argued that the ACA expansion was different, because the changes were more serious, and because they

[19] *Sebelius*, 132 S. Ct. at 2602.
[20] *E.g.,* Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937) (worrying about "the point at which pressure turns into compulsion").
[21] 483 U.S. 203 (1987) (upholding the National Minimum Drinking Age Act).
[22] *Id.*
[23] *Sebelius*, 132 S. Ct. at 2601.
[24] *Id.*
[25] *Id.*
[26] *Id*. at 2607.
[27] The Social Security Act, which includes Medicaid, includes a clause expressly reserving "[t]he right to alter, amend, or repeal any provision" of that statute. 42 U.S.C. § 1304; *Sebelius*, 132 S. Ct. at 2605 (discussing the provision), 2631 (Ginsburg, J., dissenting) (describing the 50 amendments made to Medicaid since 1965).

could not now disentangle from a critical social service program on which their citizens had come to rely. They argued that conditioning their continued access to these needed Medicaid funds on their assent to the new expansion would be unconstitutionally coercive, because they could not realistically refuse if it meant losing 10% of their annual budget. Any such consent would be effectively involuntary. With no ability to foresee this substantial change in the direction of Medicaid, they had become unfairly trapped in dependence on the existing program.

Holding for the plaintiffs on this point, a strained plurality of the Court stated a new rule limiting the scope of Congress's spending power in the context of an ongoing partnership of substantial means. Joined only by Justices Breyer and Kagan, Chief Justice Roberts began by upholding the presumption underlying spending power bargaining—that is, that it doesn't coerce the states, because they can always walk away from the table if they don't like the terms of the deal. As he explained, concerns about federal coercion are usually dispelled by relying on the states to "just say no" when they don't like the proposed federal terms, wryly observing that "[t]he States are separate and independent sovereigns. Sometimes they have to act like it."[28] The Medicaid expansion would therefore be constitutional in isolation, because states that did not want to participate in it could simply choose not to. No coercion, no constitutional problem.

But then the decision takes a key turn. There *would* be unconstitutional coercion, the Chief Justice explained, if Congress could penalize states opting out of the Medicaid expansion by cancelling their existing programs.[29] The Medicaid partnership has become so entrenched, he wrote, that punishing a state's decision to reject an unforeseeable change by denying funds for its existing program would leave that state no genuine opportunity to decline the new deal.

The spending deal upheld in *Dole* had also conditioned ongoing funds for one purpose (highway maintenance) on participation in an indirectly related program (the national drinking age), but Chief Justice Roberts distinguished them on grounds that Medicaid grants were so much larger in size. Plaintiffs may have willingly chosen to participate in the original Medicaid program, but they were now being "economically dragoon[ed]" into the expansion by the threatened loss of so large a percentage of their annual budgets.[30] In contrast to valid spending power programs that attract meaningful state consent by offering directly related federal funds, he concluded that the ACA—coupling an invitation to the new partnership with the threatened loss of funding for the old partnership—procured state consent by "a gun to the head."[31]

Critically, to make this analysis work, the Chief Justice had to construe Congress's new vision of Medicaid as really being *two separate programs*: (1) the pre-existing program, requiring health insurance for discrete categories of vulnerable people, and (2) the "independent" expansion, requiring insurance for the general low-income population.[32] While a joint dissent by

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[28] *Sebelius*, 132 S. Ct. at 2603 (citations omitted).
[29] *Id.* at 2601-07. The Chief Justice's opinion was joined by Justices Breyer and Kagan. Dissenting Justices Scalia, Kennedy, Thomas, and Alito completed the plurality by agreeing that the Medicaid expansion should be invalidated for exceeding the spending power, but under a different rationale (tying coercion primarily to the size of the grant). *Id.* at 2666 (Scalia, J., et al., dissenting). Because the Chief Justice's rationale is narrower than that of the dissenting justices, his controls.
[30] *Id.* at 2604-05.
[31] *Id.* at 2604.
[32] *Id.* at 2601 ("The current Medicaid program requires States to cover only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled.").

conservative Justices Scalia, Kennedy, Thomas, and Alito, tied coercive abuse of the spending power to the size of the federal grant alone, the Chief Justice located coercion in the combined force of the size of the grant and the conditioning of that grant on assent to terms of an unrelated program.[33] His opinion thus differentiates between Congress (a) permissibly encouraging state policy choices by restricting even a large federal grant to a specified use and (b) impermissibly coercing the same policy choice by restricting receipt of a large grant for an *independent* use:

> We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the "general Welfare." Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.[34]

As for the ACA, coercion was evident because receipt of the large, existing Medicaid grant was made conditional on a state's assent to the independent expansion. The Medicaid expansion was an independent program, he reasoned, because no state could have foreseen that the original program it accepted would evolve from one to insure "the neediest among us" to "an element of a comprehensive national plan to provide universal health insurance coverage."[35]

The *Sebelius* analysis thus hinges on three moving parts. First, there must be an ongoing spending power partnership in which states have formed reasonable reliance interests—such that later congressional changes could constitute an unfair surprise to a state that voluntarily became entrenched under an acceptable set of rules but must now contend with an unacceptable set.[36] The plaintiff states argued that this had been their fate under Medicaid, which had seemed like a reasonable partnership in the beginning but became unreasonable after the ACA amendments. Second, the change must condition continued funds within the entrenched program on assent to terms that do not directly relate to how those original funds are to be used—for example, conditioning funds for existing Medicaid populations on coverage for new populations.[37] And finally, the funding at issue must be so large and the impact of losing it so dire for a state that its capitulation to the new terms reflects coercion rather than voluntary agreement.[38]

Accordingly, and consistent with both new and old spending power jurisprudence, Congress could have lawfully conditioned funds to directly support the new Medicaid expansion on a state's agreement to implement those (and only those) programs. Even though the expansion is intended to become an ongoing partnership over time, at the moment of its creation, it would be a new program in which the states could not yet have formed reliance interests. And

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[33] *See* Samuel Bagenstos, *The Anti-Leveraging Principle and the Spending Clause after* NFIB, 101 Geo. L.J. 861 (2013).
[34] *Sebelius* 132 S. Ct. at 2603-04.
[35] *Id*. at 2606.
[36] *Id.* at 2575.
[37] *Id.* at 2603-04.
[38] *Id.; see also* Bagenstos, *supra* note 33.

even though the funds at issue might be enormous, the conditions attached to those funds would govern the use of them directly and straightforwardly, without impacting the pre-existing Medicaid program. *Sebelius* affirms that Congress remains free to condition *directly* the disbursement of large federal grants as it wishes, subject only to the forgiving *Dole* limitations. The ACA was coercive, however, because it conditioned pre-existing funds on *independent* obligations. The Chief Justice held that Congress may not procure state acceptance of the Medicaid expansion by threatening to defund pre-existing operations of the original program.[39]

To remedy the defect, Chief Justice Roberts held that the provision entitling the Secretary to withhold all Medicaid funding for a failure to comply with any Medicaid requirement could not apply to states rejecting the ACA expansion.[40] The four conservative justices agreed with the result, if not the rationale, effectively requiring the federal government to allow dissenting states to opt out of the Medicaid expansion while remaining in the pre-existing Medicaid program.

Justice Ginsburg excoriated this logic in a dissent joined by Justice Sotomayor, arguing that there was only one program before the Court: Medicaid. For her, the expansion simply adds beneficiaries to what is otherwise the same partnership, same purpose, same means, and same administration: "a single program with a constant aim—to enable poor persons to receive basic health care when they need it."[41] She argued that neither the facts nor precedent supported the Chief's distinction between the pre-existing Medicaid program and the ACA expansion on the basis of whether the expansion was foreseeable at the outset of the state-federal partnership.[42] She criticized the Chief Justice for enforcing a new limitation on coercion without clarifying the point at which permissible persuasion gives way to undue coercion, and she pointed out the myriad ways this inquiry requires "political judgments that defy judicial calculation."[43]

B. Interpreting the *Sebelius* Doctrine

The *Sebelius* decision leaves much uncertainty in its wake. It is indeed striking that such a landmark decision, establishing a wholly new constitutional limit, provides so little guidance about when that limit is exceeded. The Chief Justice would find coercion when both the size of a grant and its intersecting conditions make it "realistically impossible" for a state to refuse—but his opinion offered neither a threshold nor a limiting principle for evaluating coerciveness on either account. Punting on the most critical points of the analysis, he merely observed that previous justices had not attempted to "fix a line" between persuasion and coercion, and so neither would he.[44] Yet prior decisions upheld legislation under the spending power,[45] while *Sebelius* articulates a new constitutional limit, arguably creating responsibility to do more.

The *Sebelius* doctrine's first indicator for potential coercion is the large size of an ongoing federal grant, but the decision provides remarkably weak tools for identifying when this

[39] *Id.* at 2606-07.
[40] *Id*. at 2607-08.
[41] *Id.* at 2630 (Ginsburg, J., dissenting).
[42] *Id.* at 2637-38.
[43] *Id.* at 2641.
[44] *Id.* at 2606 ("The Court found it '[e]nough for present purposes that wherever the line may be, this statute is within it.' We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it.").
[45] Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

threshold is exceeded. The only guideposts for analysis are the decision's affirmation that the $614 million in highway funds at issue in *Dole* (less than half of 1% of the state's overall budget) were too small for the threat of loss to be coercive, coupled with its holding that threatened loss of $233 billion in Medicaid grants (on average, 10% of the state's budget) sufficed.[46] But Medicaid includes the largest of all federal grants to states, followed by those for public education and highways. The doctrine thus leaves the many federal grants in the zone between 0.05-10% of a state's budget on uncertain ground for the purposes of *Sebelius* scrutiny. The difficulty of establishing more precisely where persuasion gives way to coercion is surely one reason the Court has declined to do so previously, wisely reluctant to create an empty doctrinal vessel that can only exacerbate federalism-related uncertainty in lawmaking and litigation.

The *Sebelius* doctrine also requires that we distinguish conditional funds that directly sponsor the program in question from federal funds sponsoring one program that are conditioned on state participation in another program. While the former are presumptively permissible, the latter are potentially coercive under the new limit. Yet the decision provides no means at all for evaluating when programmatic amendments are within the permissible threshold of statutory evolution and when they amount to an independent program that warrants *Sebelius* scrutiny. The plurality acknowledged this problem in conceding that the ACA was enacted as an amendment to the same Medicaid statute that Congress and the states have jointly implemented for decades, but concluded that it need not defer to Congress's judgment about the boundaries between legislative programs.[47] Beyond noting that Congress can't just "surprise" states with "retroactive conditions,"[48] the decision provides no tools for distinguishing permissible modifications to an existing program from changes that create an independent program vulnerable to the new limit.

In the end, "I-know-it-when-I-see-it" reasoning won't do when assessing the labyrinthine political dimensions of intergovernmental bargaining under the spending power—but neither the Chief Justice nor the conservative dissenters provide more than that in their various assertions that such a limit must exist. The decision effectively leaves any major, ongoing spending power partnership improved by experience vulnerable to legal challenge under *Sebelius*, and purely at the discretion of the reviewing court. Yet as Justice Ginsburg warns, it is highly dubious for the Court to assume institutional responsibility for determining the overall structure of complex regulatory programs—substituting its judgment for that of Congress in an enterprise in which legislative capacity supposedly apexes while judicial capacity hits its nadir.

Moreover, the rule threatens to be unworkable in implementation under legislative norms. No present Congress can bind future congressional choices, so every ongoing spending power deal is necessarily limited to its budgetary year as a matter of law. Programs are renewed on an annual basis, with amendments as needed to adjust for changing social circumstances. But after *Sebelius*, Congress can never modify a vulnerable partnership like Medicaid without potentially creating two tracks—one for states that like the change, and another for those that prefer the

[46] *Sebelius*, 132 S. Ct. at 2664 (Scalia, J., et al., dissenting) (identifying the federal funds at issue in *Dole* and *Sebelius*).
[47] *Id.* at 2605 ("We cannot agree that existing Medicaid and the expansion dictated by the Affordable Care Act are all one program simply because 'Congress styled' them as such. If the expansion is not properly viewed as a modification of the existing Medicaid program, Congress's decision to so title it is irrelevant.").
[48] *Id.* at 2606 (noting that the spending power does not enable Congress to "surpris[e] participating States with post acceptance or 'retroactive' conditions").

original (and with further modifications, three tracks, *ad infinitum*). The next time Congress decides to modify Medicaid—perhaps with insight gleaned from its experience with the ACA expansion—will it be required to manage three separate systems, to protect the choices of states that preferred the original Medicaid system, the ACA expansion, and now the new modification?

Perhaps the saving grace of the unworkable opinion is that its own vagueness could ultimately confine it to its facts—affecting future changes *only* to Medicaid, unique among cooperative federalism programs for both its enormous size and its uncertain footing in sources of federal authority beyond the spending power. After all, federal grants for state primary and secondary education are the next largest after Medicaid, and even in states with smaller than average Medicaid grants, Medicaid grants are at least twice the size of federal educational funding as a percentage of total state expenditures.[49]

Vulnerable provisions that condition federal educational funds on potentially "independent" conditions may also be upheld under independent sources of federal authority even if they prove infirm under the spending power limit. For example, civil rights laws like Title VI and IX, which prevent race and sex discrimination by recipients of federal funds, may find justification in direct congressional authority under Section V of the Fourteenth Amendment even if they were somehow held infirm under the spending power.[50]

Many of the nation's environmental spending power partnerships are also understood to be simultaneously grounded in another source of federal authority, usually the Commerce Clause. However, several Supreme Court cases following the New Federalism revival have challenged the commerce basis of some of those laws, threatening the reach of federal environmental law.[51] Indeed, the Chief Justice's commerce analysis of the ACA's individual mandate, if extended in future jurisprudence, could further undermine the commerce foundations of some environmental laws. For this reason, it is worth analyzing their spending power foundations in light of the new *Sebelius* doctrine, and how they would fare if challenged.

IV. Environmental Law After *Sebelius*

This part considers the post-*Sebelius* vulnerability of the nation's major environmental laws that involve programs of cooperative federalism, including the Clean Air and Water Acts, the Coastal Zone Management Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Emergency Planning & Community Right-to-Know Act, the Endangered Species Act, the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Surface Mining Control and Reclamation Act. The list is representative rather than exhaustive, but the conclusion is clear: with the possible exception of the Clean Air Act's cross-over conditioning of federal highway funds, none of the environmental spending partnerships trigger all three elements of the *Sebelius* limit. Yet as foreshadowed above, the most difficult part of the analysis is figuring out exactly how to test that limit.

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[49] *Id.* at 2664-65 (joint dissent).
[50] *See* Emily Martin, *Title IX and the New Spending Clause*, AM. CONSTITUTION SOC'Y Issue Brief, (Dec. 4, 2012), available at http://www.acslaw.org/sites/default/files/Martin_-_Title_IX_and_the_New_Spending_Clause_1.pdf.
[51] *See* Rapanos v. United States, 126 S. Ct. 2208, 2252 (2006) and Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 173-74 (2001) (environmental federalism cases challenging the reach of the Clean Water Act over intrastate wetlands on both statutory and Commerce Clause grounds).

Since the decision came down last summer, commentators have struggled to ascertain the impacts of *Sebelius* on existing spending power partnerships. A common theme in their evaluation is the lack of a coherent test for analyzing these programs. We have known since *Dole* that spending deals tying federal funds to wholly unrelated policy goals are constitutionally infirm, but after *Sebelius*, indirectly related conditions may also be vulnerable when the funds at issue are large enough to undermine genuine state consent. Future courts will have to divine when the size of federal grants between *Dole*'s permissible and *Sebelius*'s impermissible baselines trigger scrutiny.[52] But as a threshold matter, when is an indirectly related condition sufficiently remote to constitute an "independent" program?

Writing previously for the American Constitution Society, Emily Martin concludes that the Court articulated no clear test in *Sebelius*, and she accordingly analyzes the vulnerability of the Title IX federal education program by distinguishing it point by point from the vulnerable Medicaid program.[53] Writing for the Congressional Research Service, Kenneth Thomas observes that the test is unclear, but that the limit appears to hinge on whether the states had adequate notice of a change in conditional funding, the relatedness of the change to the conditioned funds, and the size of the funds.[54] Professor Sam Bagenstos identifies similar elements and makes sense of the *Sebelius* limit as an "anti-leveraging principle," best understood as prohibiting the use of the spending power to leverage a state's substantial reliance on one spending power program to coerce agreement to another.[55] He defends the anti-leveraging principle as justifiable in theory, but acknowledges that the decision fails to identify a workable threshold for the "independent program" element.[56]

However, all analyses converge on the three main elements in the *Sebelius* doctrine identified in Part III of this Issue Brief, and Professor Bagenstos convincingly shows that all of them must be met before the coercion limit is triggered: (1) the new offer must unfairly surprise the state by changing the terms of participation in an entrenched spending power partnership in which that state has established reasonable reliance interests; (2) the new offer must condition funds for the existing program on compliance with independent obligations that are not directly related to the disbursement of the funds within the original program (a "crossover condition"); and (3) the size of the grant at issue must be so large and forgoing it is so economically infeasible to the state that their consent to the new offer is effectively involuntary. [57]

Applying these criteria to the state-federal partnerships in the nation's environmental laws should provide comfort to advocates for federal environmental regulation and disappointment to opponents. Many federal environmental laws include ongoing spending power partnerships, but few appear vulnerable on any of the three criteria. Several authorize modest grants in one-time spending deals, but not in the kind of ongoing, multiple-iteration way that could create

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[52] Grants larger than the $233 billion at stake under pre-ACA Medicaid are likely to be scrutinized, while those smaller than the $614.7 million in highway funds at issue in *Dole* are not. *See supra* note 46 and accompanying text.
[53] Martin, *supra* note 50.
[54] KENNETH R. THOMAS, CONG. RESEARCH SERV., 7-5700, THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER NATIONAL FEDERATION OF INDEPENDENT BUSINESSES V. SEBELIUS (JULY, 17, 2012).
[55] Bagenstos, *supra* note 33, at 866.
[56] *Id*. at 898-99, 905-06.
[57] *Id*. at 870-71.

reasonable reliance interests on the part of a state. A few include annual renewals that could create unfair surprise if the terms were suddenly altered, but none involve grants on the scale of Medicaid, and only one—the Clean Air Act—includes a potentially vulnerable cross-over provision conditioning funds for one purpose on state assent to indirectly related terms.

Subjecting the major environmental cooperative federalism programs to a *Sebelius* analysis enables quick disposal of the majority of potential challenges. For example, the Emergency Planning & Community Right-to-Know Act (EPCRA) engages state and local partners in an ongoing regulatory partnership, but without use of the spending power and thus does not implicate *Sebelius*.[58] The Resource Conservation and Recovery Act (RCRA),[59] the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[60] the Endangered Species Act (ESA),[61] and the Surface Mining Control and Reclamation Act (SMCRA),[62] all involve spending partnerships, but the relevant federal funds are offered as one-time grants responding to specific tasks that cannot create state expectations triggering *Sebelius*'s first element. The Coastal Zone Management Act (CZMA) does include a program of recurring grants to states that implement coastal management plans, but not only are the grants small and directly conditioned, state participation is fully voluntary—with neither sanctions nor a federal alternative if a state opts out.[63]

[58] EPCRA requires state and local planning for chemical emergencies (including State Emergency Response Commissions), notification of emergency releases of chemicals, and that communities can access local data about toxic and hazardous chemicals. Pub. L. No. 99–499,100 Stat. 1728 (1986) (codified as amended at 42 U.S.C. § 11004-11049, 11045).

[59] RCRA regulates hazardous substances through "cradle to grave" oversight, enabling states to choose whether to become authorized to implement the program within their boundaries or submit to federal regulation. Pub.L. No. 94–580, 90 Stat. 2795 (codified as part of the Solid Waste Disposal Act, 42 U.S.C. §§ 6901–6992). RCRA provided federal funds to assist the development of new state programs, but no grants involve recurring or ongoing grants.

[60] CERCLA imposes liability for the use, harboring, or transportation of hazardous substances that substantially endanger human health or the environment. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. 9601-9675(1994)), as amended by Superfund Amendments and Reauthorization Act of 1986 (SARA). CERCLA authorizes discretionary § 104(k) "Superfund" grants to encourage state participation in cleanup efforts, and states and tribes are also eligible for § 128(a) Brownfield Grants to cope with less contaminated sites, but state grants are not recurring.

[61] The ESA provides for the conservation of endangered species of wildlife. Pub. L. no. 93–205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §1531). Section 6 authorizes small, non-recurring state grants through the Cooperative Endangered Species Conservation Fund, Habitat Conservation Planning Assistance Grants, and Habitat Conservation Plan Land Acquisition grants. U.S. Fish & Wildlife Service, Section 6 of the Endangered Species Act, http://www.fws.gov/midwest/endangered/grants/S6_grants.html#S6.

[62] SMCRA prevents water pollution, soil erosion, ecological destruction, and social and economic disruption as a result of surface mining, enabling states to implement their own programs or submit to federal regulation. Pub. L. No. 95–87, 91 Stat. 445 (1977). The law provides for discretionary grants to assist states in developing state programs, but grants cease when a state becomes fully certified to regulate, §1295, and thus cannot create state expectations that would implicate *Sebelius*. Federal Assistance Manual, Regulatory Programs Overview, http://www.osmre.gov/guidance/fam/5-100.pdf; http://www.wpcamr.org/projects/smcra_reauth/TitleIV%20Basics.pdf.

[63] The CZMA is a voluntary program of cooperative federalism designed to protect coastal resources from interregional development pressure. 16 U.S.C. § 1451 et seq. The CZMA offers four different kinds of federal funding to encourage states to create voluntary coastal management plans: §306 administrative grants, §309 enhancement grants, §6217 nonpoint pollution control grants, and § 315 estuarine research reserve grants. Administrative grants are the only recurrent kind, 16 U.S.C. 1455, but they are small and directly conditioned.

Of all federal environmental laws, only three include recurring grant programs that meaningfully trigger the first element of *Sebelius* concern, and only one potentially triggers all three. The Clean Water Act involves an ongoing spending partnership with more force than the CZMA, but for grants that fall far shy of the benchmarks for coercive size. The Safe Drinking Water Act involves grants potentially large enough to warrant scrutiny for size, but the relevant grants are directly conditioned. Only the Clean Air Act potentially includes all three indicators, in an ongoing spending partnership of substantial means with cross-over terms linking a state's satisfaction of air quality requirements to its receipt of federal highway funds. The following analysis walks through application of the *Sebelius* doctrine to all three laws, demonstrating the independent operation of each element and concluding that all three laws should pass muster.

Clean Water Act. The Clean Water Act (CWA),[64] which regulates point source pollutants to the nation's waters,[65] authorizes recurring grants to states under the State Revolving Fund (SRF) to enable state distribution of low-interest loans for municipal water quality projects. Established in the Water Quality Act of 1987, the CWA SRF provides states with annual capitalization grants to fund municipal projects for wastewater treatment (§212), nonpoint source pollution control (§319), and watershed and estuary management (§320). Grants are awarded to states to develop conservation plans, implement management programs, and issue loans to local communities to construct treatment works.[66] Since 1987, cumulative assistance under the SRF has surpassed $65 billion. In the last decade, annual federal spending in the program has ranged from a high of $238.5 million in 2003 to a low of $164.5 million in 2012.[67]

States rely on this attractive source of funding, and the fact that grants are made on a recurring basis could trigger the reliance element of *Sebelius.* However, the SFR grants would easily survive scrutiny under the remaining elements. Even though administrative grants are ongoing, the funds at issue are still much smaller than the *Dole* $614 million standard of safety. More importantly, the federal conditions that attach to these funds are directly related to the use of the funds: states are entitled to these funds only for use in qualifying water quality projects. Because there is no condition tying availability of these funds to a state's agreement to indirectly related conditions, the critical third element of a crossover condition is also missing.

Safe Drinking Water Act (SDWA). The SDWA ensures the quality of drinking water by authorizing the promulgation of federal standards and federal oversight of the state agencies, local governments, and water suppliers that implement these standards.[68] The SDWA authorizes the Drinking Water State Revolving Loan Fund (DWSRLF), an ongoing grant program similar to the CWA SRF that helps public water agencies finance the infrastructure projects needed to comply with federal drinking water regulations.[69] As under the CWA SRF, annual capitalization

[64] Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. 1251 et seq.).
[65] A "point source" discharge, which enters a regulated watercourse through the end of a pipe, must be permitted under the National Pollutant Discharge Elimination System. 33 U.S.C. § 1342.
[66] Twenty-seven states leverage these funds by issuing bonds secured by SRF assets, increasing the value of the federal grants to finance more projects over time. *Id.*
[67] For a table listing total grants for each year since 1990, *see* Env't Prot. Agency, *Clean Water Act 319(h) Grant Funds History*, http://water.epa.gov/polwaste/nps/319hhistory.cfm, (last updated Oct. 9, 2012).
[68] Pub. L. No. 93-523, 42 U.S.C. § 300f.
[69] Pub. L. No. 104–182, 110 Stat. 1613 (1996).

grants enable participating states to capitalize their own state loan funds, providing a long-term source of financing for the costs of maintaining drinking water infrastructure and quality.[70]

The DWSRLF provides long-term federal financing of state infrastructure through annual grants, and like the CWA SRF, likely triggers the *Sebelius* reliance element. But in contrast to CWA funds, federal DWSRLF funding has regularly exceeded the clear safety zone for coercive size established in *Dole*.[71] For example, total funds made available to the states in 2010 approached $1.4 billion[72]—still far short of Medicaid's coercive $233 billion, but in the gray zone between there and the $614 million held acceptable in *Dole*. The SDWA thus potentially triggers two of the three *Sebelius* indicators: the coercive size criteria, if a court were to interpret that limit conservatively, and the entrenched grant program creating reliance interests by a state. Yet absent more, the program would still survive scrutiny because it lacks the third indicator, a crossover condition. All funds are conditioned directly on their use within the program.

Clean Air Act (CAA). Among all environmental laws, only the Clean Air Act approaches the potentially combustible mix of all three *Sebelius* indicators. The Clean Air Act is designed to protect and improve air quality and the stratospheric ozone layer.[73] Under the CAA, states must prepare and maintain an adequate State Implementation Plan (SIP) for attaining federally designated air quality standards, and they must remain in attainment or risk the sanction of losing certain federal highway funds.[74] Federal highway funds are among the largest federal grants to states, and they represent an ongoing spending power partnership on which states had long relied before they were linked to the CAA. 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.

CAA §179 requires that federal highway funds be withheld to a state that has failed to prepare an adequate SIP or failed to implement requirements under an approved plan when that state includes "non-attainment areas."[75] Non-attainment areas are those that have not achieved

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[70] 42 U.S.C. § 300j-12 (1996).

[71] The original statute authorized appropriations through 2003, providing for $599,000,000 in 1994 and $1,000,000,000 for each of the fiscal years between 1995 and 2003. 42 U.S.C. §300j-12(m); *see also* Procedures for Implementing Certain Provisions of EPA's Fiscal Year 2012 Appropriations Affecting the Clean Water and Drinking Water State Revolving Fund Programs, http://www.epa.gov/region8/water/Final_FY12_SRF_guidelines.pdf (last visited July 9, 2013). The statute includes other ongoing grant programs to states and tribes, including State Public Water System Supervision Grants and State Underground Water Source Protection Grants, but their size puts them well below the Dole threshold of concern. *See* Env't Prot. Agency, Grants – UIC, available at http://water.epa.gov/type/groundwater/uic/Grants.cfm (last updated Mar. 6, 2012).

[72] Env't Prot. Agency, Final State Allotment of Drinking Water State Revolving Fund Appropriation for Fiscal Year 2010, available at http://water.epa.gov/grants_funding/dwsrf/allotments/Final-State-Allotment-of-Drinking-Water-State-Revolving-Fund-Appropriation-for-Fiscal-Year-2010.cfm.

[73] Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended in 42 USC 7401 et seq.(1990)).

[74] 42 USC §7509(b)(1).

[75] 42 USC §7509, § 7509(b)(1) ("The Administrator may impose a prohibition, applicable to a nonattainment area, on the approval by the Secretary of Transportation of any projects or the awarding by the Secretary of any grants, under title 23…"). EPA may also apply discretionary sanctions after determining that a CAA requirement has been violated. 42 U.S.C. §7410. *See also* EPA Regulations on Sanctions, 40 C.F.R. §§ 52.30-52.32; Federal Highway Administration (FHA), *Clean Air Act Sanctions*, U.S. Dept. of Transp., available at http://www.fhwa.dot.gov/environment/air_quality/highway_sanctions/#subject (last updated May 5, 2013).

the CAA's National Ambient Air Quality Standards, which define the level of air quality necessary to protect the public health and welfare.[76] The Environmental Protection Agency (EPA) maintains initial discretion about how and when to apply sanctions after notice and a grace period, but the Act mandates withholding of funds if noncompliance continues beyond 18-24 months.[77] EPA is then obligated to prevent disbursement of federal highway funds—but only those pertaining to the area in non-attainment, and even then, the penalty excludes funds used to reduce air pollution emissions, funds that are necessary for traffic safety,[78] and funds for certain specified transportation projects.[79] EPA also retains discretion to apply leniency for states that have made good-faith efforts to comply.[80]

An important detail mitigating SIP requirements and penalties is the availability of a federal alternative. A state may eliminate the responsibility to prepare a SIP by electing a Federal Implementation Plan (FIP) option, shifting planning and implementation responsibilities to EPA. If a SIP-state remains in noncompliance with its obligations beyond two years, then EPA is required to intervene with a FIP. The state is then alleviated of its obligation to prepare a SIP, and the potential for further sanctions under §179 is negated. Nevertheless, most states prefer the autonomy of managing their own plans, and EPA has reportedly used its potential authority to withhold transportation funds as a threat to encourage full CAA compliance.[81]

In contrast to all other environmental laws, applying the three elements of the *Sebelius* doctrine—whether the size of the grant is coercive, whether the condition changes the terms of an entrenched spending partnership, and whether the proffered offer conditions existing funds on compliance with indirectly related conditions—suggests potential controversy over the CAA.

Federal transportation funds constitute a substantial component of overall state spending, smaller only than Medicaid and combined federal spending on primary, secondary, and higher education. In 2010, states received around $62 billion in federal highway funds,[82] still short of Medicaid's monster grants but substantially larger than the funds at issue in *Dole*. However, nearly half that amount was designated for Highway Law Enforcement and Safety and Maintenance and Highway Services, two safety-related programs likely exempt from CAA withholding. The total would be further lowered as other exempted programs were subtracted from withholding, but may yet exceed *Dole*'s clear margin of safety. Notably, however, it is

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[76] 42 U.S.C. §§ 7511(a) (ozone), 7512 (carbon monoxide), 7513 (particulates), and 7514 (nitrogen dioxide).

[77] 42 U.S.C. §7509(a)(4) ("If the Administrator has selected one of such sanctions and the deficiency has not been corrected within 6 months thereafter, sanctions under both paragraph (1) and paragraph (2) of subsection (b) of this section shall apply until the Administrator determines that the State has come into compliance.").

[78] 42 U.S.C. § 7509(b)(1) (exempting "projects or grants for safety where the Secretary determines, based on accident or other appropriate data submitted by the State, that the principal purpose of the project is an improvement in safety to resolve a demonstrated safety problem and likely will result in a significant reduction in, or avoidance of, accidents").

[79] CAA § 179(b)(1)(B), 42 U.S.C. § 7509(b)(1)(B).

[80] 42 U.S.C. § 7509(a).

[81] *See* JAMES E. MCCARTHY, CONG. RESEARCH SERV., RL 30131, HIGHWAY FUND SANCTIONS AND CONFORMITY UNDER THE CLEAN AIR ACT (Oct. 15, 1999), available at http://cnie.org/NLE/CRSreports/transportation/trans-29.cfm.

[82] David Baake, *Federalism in the Air: Is the Clean Air Act's "My Way or No Highway" Provision Constitutional After NFIB v. Sebelius?*, 37 HARV. ENVTL. L. REV. ONLINE 1, 8 (2012) (citing figures from the Federal Highway Administration and the National Association of State Budget Officers).

hard to apply real numbers in this guessing game, because while EPA frequently warns noncompliance areas about the potential of withholding, it has only actually withheld highway funds on one occasion.[83]

In addition to the large grants involved, the CAA condition could be vulnerable because it changes the terms of an entrenched transportation spending partnership in a way that could violate the expectations of states when they first entered into the partnership. The Department of Transportation has been administering federal highway funds to the states for over fifty years, since the Federal Aid-Highway Act was first passed in 1956.[84] It is unlikely that states could have foreseen at the time that the relationship would evolve to include air quality regulation.

Most importantly, and alone among environmental laws, the CAA conditions existing funds dedicated to one purpose (highways) on a state's compliance with a separate, indirectly related program (air quality management). The conditions are sufficiently related to satisfy the requirements of *Dole*, because the use of state highways will contribute substantially to that state's ambient air quality problems through automobile exhaust. However, not all of the pollutants compromising air quality are emitted by mobile sources using state highways; power plants, industrial and agricultural operations, and municipal and domestic uses also contribute. Conditioning highway funds authorized under a transportation statute on a state's compliance with air quality management obligations that go beyond transportation appears to present the very crossover fact pattern that the Chief Justice warned about in *Sebelius*. The condition is only indirectly related to the federal funds at peril, and those funds are authorized by a separate, pre-existing federal grant program under a separate statute in a different part of the U.S. Code.

Legal commentators have reached conflicting conclusions about potential *Sebelius* problems with the CAA sanctions. For example, Professor Jonathan Adler suggests that the highway fund penalty should be stricken, noting that highway funds are raised from gasoline taxes and are even "less directly related to air pollution control (particularly from stationary sources) than traditional Medicaid is to the Medicaid expansion."[85] David Baake concludes just as certainly that the sanctions are not unconstitutionally coercive, not only because the funds at issue are smaller than Medicaid's by a factor of seven, but because the penalty is so much more avoidable than the one at issue in the ACA.[86] Professor Bagenstos reserves judgment. He concedes that the provision is vulnerable under the reliance and crossover elements of the doctrine, but agrees that the CAA and ACA may be distinguishable in size and nuance.[87] He defends the connection between highway maintenance and air quality regulation, noting Congress's "desire that highway construction be carried out in a manner that does not contribute to air pollution,"[88] but emphasizes that the problem is not *Dole's* germaneness inquiry but

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[83] In 1996, EPA applied sanctions for violations in East Helena, Montana. FHA, *Status of Sanction Clocks under the Clean Air Act*, http://www.fhwa.dot.gov/environment/air_quality/highway_sanctions/sanctionsclock.cfm (last updated Jan. 7, 2013); *See also* CONG. RESEARCH SERV., CLEAN AIR ACT ISSUES IN THE 106TH CONGRESS II (2000), available at http://chle.org/NLE/CRSreports/air/air-24a.cfm.

[84] Pub. L. No. 84-627 (1956).

[85] Jonathan H. Adler, *Could the Health Care Decision Hobble the Clean Air Act?* PERC Blog (July 23, 2012) available at http://perc.org/blog/could-health-care-decision-hobble-clean-air-act.

[86] Baake, *supra* note 82.

[87] Bagenstos, *supra* note 33, at 917-20.

[88] *Id.* at 918 (quoting Missouri v. United States, 918 F. Supp. 1320, 1333 (E.D. Mo. 1996), vacated for lack of jurisdiction, 109 F.3d 440 (8^{th} Cir. 1997)).

Sebelius's crossover condition.[89] The CAA subjects highway funds to a condition that is not directly related to their use; after all, "preparing a SIP is not about building a highway."

One state has already noticed the potential for using *Sebelius* in litigation against the CAA's SIP requirements. On July 20, 2012, Texas state attorneys filed a notice of supplemental authority suggesting a *Sebelius* claim in *Utility Air Regulatory Group v. EPA*, a pending suit challenging EPA's new requirement that states update their SIPs with greenhouse gas regulations.[90] Under the new rule, states may not issue permits for the construction or improvement of projects that will emit large amounts of regulated pollutants until qualifying SIPs are approved. Frustrated by the consequences of an invalid SIP during this time, Texas argued that EPA should allow a buffer period of three years before invalidating its old SIP.[91] The July 2012 filing implied that Texas would be unconstitutionally coerced otherwise, but the issue was not raised during oral argument on May 7, 2013.[92] Though distinguishable from a pure highway fund challenge, the claim nevertheless demonstrates that states unhappy with CAA requirements are seeking opportunities to make use of the new *Sebelius* doctrine.

Critically, however, *Sebelius* claims targeting SIP and highway fund sanctions must contend with the fact that the CAA provides states with the option to avoid all SIP-related obligations and sanctions by opting out of the SIP program and invoking the federal FIP alternative.[93] After all, the premise of the *Sebelius* limit is that Congress should not be able to coerce the states, and enabling the states to opt out without losing the funds at issue is the antithesis of *Sebelius* coercion.

In this regard, the facts differ meaningfully from those at issue in *Sebelius.* States that opted out of their role in administering the Medicaid expansion stood to lose all of their existing Medicaid funding, facing an all-or-nothing dilemma regarding participation in both federal programs. Their choices were to either accept the new expansion, or lose all federal funding under the existing program. By contrast, the CAA enables states to avoid SIP obligations without sacrificing the highway fund spending partnership by opting for EPA to directly regulate in-state polluters through a FIP. In that case, EPA becomes the author and implementer of plans to regulate pollution in the state, and sanctions against a state for noncompliance disappear.[94] If

[89] *Id.*(noting that lower courts have consistently rejected germaneness claims and affirmed that the CAA furthers Congress's purpose because both mobile and stationary sources contribute to the overall problem of air pollution).
[90] Mark W. DeLaquil, *Petitioner State of Texas's Notice of Supplemental Authority,* Utility Air Regulatory Group v. EPA, No. 11-1037, Environment and Energy Publishing (Jul. 20, 2012), http://www.eenews.net/assets/2012/07/31/document_pm_03.pdf.
[91] Lawrence Hurley, *Texas Wastes No Time in Citing Supreme Court Health Care Ruling in Clean Air Act Litigation*, E&E PUBLISHING, LLC (Aug. 1, 2012) http://eenews.net/public/Greenwire/2012/08/01/1.
[92] D.C. Circuit Calendar, available at http://www.cadc.uscourts.gov/internet/sixtyday.nsf/fullcalendar?OpenView&term=2013&count=1000&date=2013-06-27; email from Professor Richard Lazarus, Harvard Law School, June 27, 2013 (discussing oral arguments).
[93] See, e.g., Richard Lazarus, *Texas Unconvincing in Clean Air Suit*, ENVIRONMENTAL FORUM (SEPT/OCT 2012) http://www.law.harvard.edu/faculty/rlazarus/docs/columns/LAZARUS_FORUM_2012_SEP-OCT.pdf; Damien Schiff, NFIB v. Sebelius, Coercion, and the Unconstitutional Conditions Doctrine, SCOTUS Blog (August 6, 2012), available at http://www.scotusreport.com/2012/08/06/nfib-v-sebelius-coercion-and-the-unconstitutional-conditions-doctrine/; Baake, *supra* note 82, at 6-7.
[94] Section 179 is ambiguous on this point, but EPA has formalized this interpretation in the implementing regulations, 40 C.F.R. 93.120, to which a reviewing court must defer. Chevron v. NRDC, 467 U.S. 837 (1984).

states prefer the regulatory control that a SIP offers over a FIP, that represents a freely bargained-for position that does not implicate the *Sebelius* coercion limit.

Even if the FIP alternative were not available to forestall the highway fund penalty, CAA sanctions are distinguishable from the troubled Medicaid penalty on several other grounds. Most important, federal funding plays a much smaller role in state transportation regulation than it does in state Medicaid implementation.[95] A reviewing court could easily conclude that the amounts at issue are so much less than those at issue in Medicaid that the sanctions are too small to meet the size-related coercion factor. Of course, the vagueness of the size constraint means that a court could also find it violated here, highlighting the wide zone of uncertainty that the Chief Justice left open between *Dole* and *Sebelius*.

But as noted, the CAA provides EPA with a variety of ways to forestall or lighten the penalty in comparison to the all-or-nothing approach of the ACA's Medicaid penalty. The vulnerable federal highway grants are much more narrowly tailored than those at issue in *Sebelius*, exempting essential highway funds devoted to road-safety and other protected projects. EPA also retains much greater discretion on when and how to apply them. Unless an entire state is out of compliance (which would be unprecedented), highway funds may be withheld proportionately, corresponding only to the portion of the state in non-attainment. The administrator also retains discretion not to apply the penalty if the state is making good-faith efforts to comply, an option unavailable to the agency in the ACA Medicaid Expansion.

Finally, to the extent *Sebelius* was decided to protect legitimate state expectations in spending power bargaining, the reliance interests at stake are much different in the CAA context. Participating states have consented to the CAA's crossover terms for decades, in contrast with the open rebellion that took place in the wake of the ACA's passage. If any state reliance interests were upset by unfair surprise when the sanctions first emerged, that upset has most likely been mooted by the subsequent state expectations that have been generated through years of experience under the existing program. Of course, if the program were later amended in some important and meaningful way, this defense could be weakened.

With all this in mind, a successful facial challenge seems very unlikely, because it is difficult to imagine the law proving coercive in every possible application.[96] The worst case scenario is that an individual state could succeed on a more limited, as-applied challenge if the federal alternative is somehow disregarded and none of EPA's ample discretion is deployed in that state's favor.[97] Of course, the threat of a successful as-applied challenge may be enough to prompt EPA to enforce sanctions more mildly, which in turn could weaken the rigor with which states comply. In this way, *Sebelius* could impact the way the CAA functions, even if it doesn't

[95] *See supra* notes 45, 81, and accompanying text.
[96] In a *facial* challenge, the plaintiff argues that the law is unconstitutional "on its face," meaning that the law cannot be applied constitutionally in any circumstance. An *as-applied* challenge argues that the law functions unconstitutionally in a specified circumstance, even if it may be constitutionally applied in other circumstances. The latter is much easier to prove, but its individualized remedy is less satisfying because the overall law remains intact.
[97] *Cf.* Bagenstos, *supra* note 33, at 920 ("[I]f the Administrator were to shut off *all* federal highway funds to a state based on the state's failure to provide a sufficient response to *stationary* sources of pollution, her actions would raise serious questions under the Chief Justice's opinion.").

undo the current terms of the statute. That said, given that the EPA has only enforced the sanctions one time in the history of the statute, even that kind of change would be modest.

If the CAA were challenged this way, it is worth noting how tempting it would be to argue that even if the sanction did somehow violate the new spending power limit, its terms are independently authorized under the Commerce Clause.[98] *Sebelius* doesn't alter Congress's settled commerce authority to regulate air pollution, but it is important to note that challenges to the highway fund sanctions focus on an independent issue. Even if Congress can regulate polluters directly under the Commerce Clause, there is a separate constitutional question about whether Congress can secure state participation in implementing the CAA. In cases like *Sweat v. Hull* (2001)[99] and *Missouri v. United States* (1996),[100] challengers argued that the threat of sanctions unconstitutionally coerced the states to participate in a federal regulatory program, in violation of the Tenth Amendment anti-commandeering doctrine.[101] Notably, these suits failed.

However, the *Sebelius* decision alters some of this precedent. These earlier decisions grounded the overall CAA in commerce authority but relied explicitly on the consent-theory of the spending power to immunize the highway sanctions against coercion claims. Thanks to the crossover characteristics of the sanctions, the spending power basis of these decisions has less force after *Sebelius*. Still, the change will ultimately prove a distinction without a difference. Even without the old spending power precedent, coercion claims should be easily refuted by the lack of coercion in fact, given the distinguishable nature of the CAA sanctions and the fact that states can opt out of the risk of sanctions entirely when EPA regulates directly from a FIP.

V. Conclusion: Changing the Dynamics of State-Federal Bargaining

After *Sebelius*, then, programs of cooperative federalism may exceed the spending power when (1) the new offer changes the terms of an entrenched partnership, (2) the new offer conditions existing funds on compliance with indirectly related terms, and (3) the size of the grant at issue is so large that the state could not forgo it without excessive economic harm. In environmental law, only the CAA potentially triggers all three elements, and it is distinguishable from the Medicaid example because states can avoid the penalty entirely by allowing EPA to regulate in-state polluters directly. The size of the implicated funds are also much smaller than those held coercive in *Sebelius*, and the CAA provides substantial discretion to the agency to avoid the all-or-nothing coerciveness that the Court disparaged in *Sebelius*. The fact that the program has been in operation for so long also mitigates against the frustration of states' reliance interests that drove the plurality's analysis of the ACA Medicaid expansion.

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[98] For example, the Fourth Circuit upheld the CAA against a federalism challenge in *Virginia v. Browner* in 1996, 80 F.3d 869, 877 (4th Cir. 1996), cert. denied, 519 U.S. 1090 (1997) (holding that the Commerce Clause authorizes Congress to regulate "activities causing air or water pollution, or other environmental hazards that may have effects in more than one State."). At least one federal court has gone as far as to hold that air pollution is itself interstate commerce. United States v. Bishop Processing Co., 287 F. Supp. 624 (D.C. Md. 1968).

[99] 200 F. Supp. 2d 1162 (D. Ariz. 2001) (rejecting Tenth Amendment defense of state's unilateral decision to terminate pollution controls provided for in State Implementation Plan under Clean Air Act).

[100] 918 F. Supp. 1320 (E.D. Mo. 1996) (rejecting Tenth Amendment challenge to Clean Air Act requirements for State Implementation Plans).

[101] New York v. United States, 505 U.S. 144, 161 (1992).

The CAA thus has good chances in court, but of course, that is not the end of *Sebelius*'s impact. One thing we have learned from environmental federalism cases in the past is that the threat of litigation—even litigation that is unlikely to be successful—changes the way that the implementing agencies behave, especially when the Court's ruling leaves open considerable uncertainty. For example, after two cases challenging the reach of EPA's authority to regulate wetlands were decided in a way that clouded the scope of EPA's jurisdiction, the agency substantially pulled back from enforcement efforts in realms of regulatory uncertainty.[102] A major investigation in 2010 reported that nearly 1,500 major water pollution investigations had been dropped due to the difficulty of establishing jurisdiction after these decisions.[103]

As a result of *Sebelius*, the states will have more leverage when negotiating the future terms of spending power bargains and enforcement. This is "Negotiation 101": the better a state's chances in court, or the costlier it will be for the agency to determine the legal limit, the stronger the state's bargaining position becomes at the table. Congress will be more cautious in drafting laws that create spending power partnerships and agencies more hesitant in implementing them. States may continue the trend of negotiating for individualized waivers from more generally applicable laws, and EPA may be more receptive. Indeed, EPA may capitulate more easily in negotiating compliance under the CAA, and it will certainly be less likely to press for the kinds of penalties that could prompt a *Sebelius* challenge. Of course, EPA could also seek closure by isolating a test case and using it to establish clearer limits—but it is unlikely to do so before the current Court, which came so close in *Sebelius* to limiting the commerce authority on which so many environmental laws are premised.

At the same time, *Sebelius* could also harm the interests of states by prompting Congress to reduce or avoid state-federal partnerships in regulatory arenas where states might prefer them. Congress may lean toward smaller federal grants in cooperative programs of more limited duration, or toward programs that bypass the states entirely to avoid *Sebelius* impacts.[104] After all, the reason that all but a handful of states elect to design air quality implementation standards under the Clean Air Act and approve discharge permits under the Clean Water Act is that they prefer the resulting autonomy and engagement to direct federal regulation by EPA. While *Sebelius* thus legitimately focuses our attention on matters of fairness in state-federal bargaining, it's not yet clear who will benefit most from the change.

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[102] Rapanos v. United States, 126 S. Ct. 2208, 2252 (2006); Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Engineers, 531 U.S. 159, 173-74 (2001).
[103] Charles Duhigg & Janet Roberts, *Rulings Restrict Clean Water Act, Foiling EPA*, N.Y. TIMES, Feb. 28, 2010, at A1, http://www.nytimes.com/2010/03/01/us/01water.html?emc=eta.&_r=0.
[104] In an analysis of *Sebelius* effects on federal education grants, Professor Eloise Pasachoff similarly concludes that the decision is unlikely to impact them no matter how large they are, but that it is still likely to affect the future of federal education law by changing the architecture of state-federal partnerships. Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 Am. U. L. Rev. 577, 651-61 (2013).