2014

The Spending Power and Environmental Law After Sebelius

Erin Ryan

THE SPENDING POWER AND ENVIRONMENTAL LAW AFTER *SEBELIUS*

ERIN RYAN*

In National Federation of Independent Business v. Sebelius*, a plurality of the Supreme Court held that portions of the Affordable Care Act exceeded federal authority under the Spending Clause. With that holding,* Sebelius *became the first Supreme Court decision since the New Deal to limit an act of Congress on spending-power grounds, rounding out the "New Federalism" limits on federal power first initiated by the Rehnquist Court in the 1990s. The new* Sebelius *doctrine constrains the federal spending power in contexts involving changes to ongoing intergovernmental partnerships with very large federal grants. However, the decision gives little direction for evaluating when the amount of change or funding reaches the threshold of spending-power coercion.* Sebelius *thus leaves open important unanswered questions about the contours of the new limit and how it will impact intergovernmental bargaining.*

This Article assesses the Sebelius *doctrine by testing its application in a legal realm in which spending-power bargaining features prominently: federal environmental law. Methodically applying the new limit to the major environmental programs of cooperative federalism, the analysis concludes that*

* Associate Professor, Lewis & Clark Law School; J.D., Harvard Law School, M.A., Wesleyan University, B.A., Harvard University. This Article is based on an issue brief originally published on October 1, 2013, by the American Constitution Society, *Environmental Law After Sebelius: Will the Court's New Spending Power Limits Affect Environmental State-Federal Partnerships?*, *available at* http://www.acslaw.org/publications/issue-briefs/environmental-law-after-sebelius-will-the-court%E2%80%99s-new-spending-power. I am especially grateful to Aubrey Baldwin, Jeff Powell, Richard Lazarus, Robert Glicksman, Craig Johnston, and Dipal Shah for their substantive assistance, and to Laura Shoaps, Kimberly White LaDuca, and Sara Blankenship for their research assistance. I am also thankful for the thought-provoking comments from participants in Professors Gillian Metzger and Jessica Bulman-Pozen's Federalism Workshop at Columbia Law School, Professor Heather Gerken's Federalism Workshop at Yale Law School, and Professor Justin Pidot's Environmental Law Workshop at the University of Denver, all of whom generously immersed themselves in draft versions of the project.

all should withstand legal challenge—even a potentially vulnerable provision of the Clean Air Act. The review sheds light not only on environmental law after Sebelius*, but also the many other realms of American governance that engage spending-power bargaining, such as public education, civil rights law, social service programs, and civic infrastructure. The Article concludes that the impacts of the doctrine will be most palpable in the dynamics of intergovernmental bargaining. States will have more leverage when negotiating design and enforcement terms within spending-power partnerships. However, the federal government may adapt by relying on spending-power bargaining less often and with less at stake, even in contexts where states may prefer spending partnerships to the alternative.*

INTRODUCTION

After the Supreme Court ruled in the highly charged Affordable Care Act case of 2012, *National Federation of Independent Business v. Sebelius*,[1] the political arena erupted in debate over the implications for health reform and, more generally, the reach of federal law. 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 by 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 an arguably more 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 concluded 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.[4] That approach would amount to unconstitutional coercion, he reasoned, violating the principles of federalism and exceeding Congress's authority to

1. 132 S. Ct. 2566 (2012).
2. *Id.* at 2598–2600.
3. *Id.* at 2606–07.
4. *Id.*

negotiate with freely consenting states.[5]

With that holding, *Sebelius* became the first Supreme Court decision since the New Deal to limit an act of Congress on spending-power grounds,[6] rounding out the "New Federalism" limits on federal power first initiated by the Rehnquist Court in the 1990s.[7] Complementing earlier decisions limiting federal authority under the Commerce Clause, Section Five of the Fourteenth Amendment, and the Tenth and Eleventh Amendments,[8] *Sebelius* completes the New Federalism circle by limiting Congress's ability to bargain with the states in policymaking.[9]

The Court's attention to the Spending Clause will please critics who have long argued that the other New Federalism constraints lack force unless the spending power is also reined in, because Congress can sidestep the others by securing state action through a spending-power deal.[10] However, the same critics may be disappointed by the modest impact the doctrine is likely to have on overall federal lawmaking. This analysis concludes that while the new rule has the potential to alter state-federal relations within programs of cooperative federalism, few existing laws are likely to change (rendering the *Sebelius* doctrine perhaps ironically consistent with the rest of the New Federalism).

The new doctrine constrains the federal spending power in

5. *Id.*

6. For discussion of the pre-New Deal case that comes closest, see *infra* note 27 (considering *United States v. Butler*, 297 U.S. 1, 74 (1936)).

7. During the "New Federalism" revival, the Rehnquist Court issued a series of federalism decisions that established judicially enforceable limits on powers constitutionally delegated to the federal government. *See* ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 1 & n.2 (2012) (discussing the Rehnquist Court's federalism jurisprudence and listing the standard canon of New Federalism cases); *see also* Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Business v. Sebelius, 93 B.U. L. REV. 1, 4–5 (2013) (noting that *Sebelius* "presented a prime opportunity for the Roberts Court to revive the Rehnquist Court's 'Federalism Revolution'"); Pamela S. Karlan, Comment, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 13 (2012) (discussing the Roberts and Warren Courts' contrasting approaches to managing federal power).

8. *See* RYAN, *supra* note 7, at 1 & n.2.

9. *Sebelius*, 132 S. Ct. at 2601–07.

10. *E.g.*, 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, 499–500 (2003); Mitchell N. Berman, Guillen *and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1523–26, 1531–32 (2004).

contexts involving ongoing intergovernmental partnerships with very large federal grants. *Sebelius* effectively holds that Congress may not condition a state's receipt of certain 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.[11] The decision, however, gives little direction for evaluating when the amount of funding exceeds 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).[12]

Sebelius thus leaves important questions unanswered regarding the contours of the new spending-power limit and how it will impact intergovernmental bargaining in areas of jurisdictional overlap.[13] These points of uncertainty will doubtlessly prompt litigation exploring them in challenges to other spending power-based programs of cooperative federalism.[14] At the same time, federal lawmakers will likely adapt to the new constraint by changing the way they structure state-federal partnerships in areas of federalism-sensitive governance. They may choose to rely on spending-power partnerships less often and with less at stake—even in contexts where the states may prefer spending partnerships to the alternative.

11. *Sebelius*, 132 S. Ct. at 2601–07. The result differs if an independent source of federal authority exists for requiring state performance. *See infra* notes 135–36 and accompanying text (discussing the impact of *Sebelius* on conditional spending programs that also implicate Congress's regulatory authority under Section V of the Fourteenth Amendment); *see also infra* Part II.C and notes 108–10 (discussing how future courts will interpret the precedent resulting from *Sebelius*).

12. *Id.* at 2605–06 (differentiating the expansion as "a shift in kind, not merely degree").

13. *See* RYAN, *supra* note 7, at 105–80 (discussing jurisdictional overlap) and 271–314 (discussing federalism bargaining). *See generally* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011) (discussing both).

14. 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 7, at 92; *see also*, Gillian E. Metzger, Comment, *To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 106 (2012) (detailing the decades long trend in regulatory governance away from "command and control" regimes to incentive-based programs that provide states more flexibility, while acknowledging the desirability of direct federal regulation in some circumstances).

This Article assesses the *Sebelius* doctrine by testing its application in a legal realm in which spending-power bargaining features prominently: environmental governance. Spending partnerships are common among the nation's major environmental laws, which often join state and federal regulators in the management of boundary-crossing resources—like air, water, and biodiversity—that can only be protected through coordinated multilevel governance.[15] As regulated entities renew their opposition to longstanding environmental laws and marshal opposition to new ones, some may seek opportunities to challenge them under *Sebelius*. Indeed, attorneys for the State of Texas have already explored this possibility in ongoing litigation over new Clean Air Act requirements.[16]

The following analysis thus reviews the potential impact of *Sebelius* on environmental programs of cooperative federalism. The inquiry sheds light not only on environmental law after *Sebelius*, but also on the many other realms of American governance that engage spending-power bargaining, such as public education partnerships, civil rights law, social service programs, and civic infrastructure.[17] Exploring how the elements of the doctrine intersect with the different varieties of environmental partnerships provides a useful model for forecasting how the doctrine will interact with similarly structured statutes in these other areas of law. In this regard, the Article seeks not only to better understand what happens to environmental law after *Sebelius*, but what happens to intergovernmental bargaining more generally.[18]

15. RYAN, *supra* note 7, at 145–80 (demonstrating intergovernmental interdependence in environmental law); *see also* Huberfeld, *supra* note 7, at 70 (noting the potential impacts of *Sebelius* on established cooperative-federalism programs for education, welfare, environmental protection, highway infrastructure, and others); Bradley W. Joondeph, *The Health Care Cases and the New Meaning of Commandeering*, 91 N.C. L. REV. 811, 815–16 (2013) (asserting that both the spending and coercion reasoning in *Sebelius* could jeopardize a range of spending-power partnerships and affect federal statutes that conditionally preempt state law).

16. *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* in text accompanying note 222).

17. *See infra* notes 119–24 and accompanying text.

18. For a fuller discussion of state-federal bargaining in contexts of jurisdictional overlap, see generally Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011); RYAN, *supra* note 7, at 265–314.

Part I reviews the role of the spending power in interjurisdictional governance and the permissible scope of the state-federal bargaining it enables. Part II explores the new *Sebelius* limit, focusing on the operation of its three distinct elements and the points of uncertainty that remain. Part III analyzes how the doctrine intersects with federal environmental law, concluding that most (if not all) statutes should pass muster. With the possible exception of the Clean Air Act, which links states' receipt of federal highway funds with air-quality management obligations, none of the major environmental laws appear vulnerable to challenge—and even the relevant provisions of the Clean Air Act are likely to survive *Sebelius* scrutiny.[19] Part IV suggests that although an environmental *Sebelius* challenge is unlikely to prevail, the new doctrine nevertheless has the potential to alter the substance of cooperative-federalism programs in important ways.

Indeed, the true impact of the doctrine will not be measured in litigation outcomes, but in the way it shifts leverage within intergovernmental bargaining. The doctrine is designed to empower the states, strengthening their position against the combined force of federal supremacy and the formidable power of the federal purse. However, that leverage is only effective if the federal government remains at the bargaining table, and if it is able to negotiate with the states for what they actually want. The doctrine may reduce federal flexibility within spending-power bargaining and overall federal reliance on spending partnerships, prompting other means of federal lawmaking that engage the states less effectively.[20] As states often prefer spending deals to the alternatives in realms of jurisdictional overlap, it remains unclear whether the states—and American federalism more generally—will ultimately benefit.

I. COOPERATIVE FEDERALISM AND THE SPENDING POWER

This Part sets the stage for analysis of the *Sebelius* doctrine by reviewing the role of spending-power bargaining in

19. *See infra* Part III.
20. *See infra* notes 249–58 and accompanying text.

American federalism and interjurisdictional governance.[21] After introducing the special place of the Spending Clause in the context of the federally enumerated powers, it reviews the permissible scope of spending-power bargaining before the new *Sebelius* limit.

A. Sebelius *and the Spending Clause*

In the immediate wake of the *Sebelius* decision, legal analysts were most interested in the fact that a majority of the Court had rejected the government's view that the ACA was constitutionally authorized under Congress's commerce power.[22] 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 the precedential value of the Commerce Clause analysis (given that the Chief Justice's only supporters wrote in dissent),[23] 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 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 that focuses on the Spending Clause,[24] in which a plurality of the Court limited the federal spending power that authorizes Medicaid and so many other state-federal partnerships.[25] Congress regularly offers funding and other federal resources to persuade the states to

21. For a fuller discussion of interjurisdictional governance, see RYAN, *supra* note 7, at 105–07 (describing it as regulating matters that legitimately implicate both local and national interests or obligations).

22. This was the view taken by the Chief Justice and the four conservative dissenters in Part III(a). Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591 (2012).

23. *See* 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.'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).

24. U.S. CONST. art. I, § 8, cl. 1 & amend. XVI.

25. *Sebelius*, 132 S. Ct. at 2603–06 (Part IV(a)).

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.[26]

Sebelius, however, marks the first time the Court has specifically invalidated a congressional act for exceeding its power under the Spending Clause,[27] 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.[28] More open-ended grants of federal authority are conferred by the Commerce, Necessary and Proper, and Spending Clauses,[29] jointly accounting for vast areas of congressional lawmaking. Policymaking realms that are not expressly or implicitly covered by delegations to the federal government are committed to state jurisdiction.[30]

The Spending Clause bridges realms of federal and state authority, authorizing Congress to spend money in pursuit of

26. *E.g.,* RYAN, *supra* note 7, at 265–72, 288–90.

27. Earlier last century, the Supreme Court did something similar in *United States v. Butler*, 297 U.S. 1 (1936), which invalidated the 1933 Agricultural Adjustment Act for exceeding Congress's authority by impermissibly conditioning federal farm subsidies on farmers' agreement to reduce production of specified crops. Parts of that holding have been obviated by the Court's evolving view of the Commerce Clause. For further discussion of the case, *see infra* note 41 and accompanying text.

28. U.S. CONST. art. I, § 8, cl. 5, 7, & 11.

29. *See id.* § 8, cl. 1, cl. 3, cl. 18. To be sure, the Commerce Clause is more "specific" in nature than the others (given that it confers federal authority only in relation to matters of interstate commerce), but the breadth of authority it creates is open-ended in comparison to the narrower zones of federal authority created by even more specific grants (e.g., for coining money and establishing post offices).

30. *See generally* U.S. CONST. amend. X. There is considerable overlap between state and federal jurisdiction, jointly governed by federal restraint and federal supremacy, but that's another story—and a previous American Constitution Society essay. *See generally* U.S. CONST. art. VI, cl. 2. *See* Erin Ryan, *Health Care Reform and Federalism's Tug of War Within*, AM. CONST. SOC'Y BLOG (June 21, 2012), http://www.acslaw.org/acsblog/health-care-reform-and-federalism%E2%80%99s-tug-of-war-within; *see also* RYAN, *supra* note 7.

the public welfare.[31] 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 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.[32] In these examples, Congress is effectively offering the states a deal: "[H]ere is some money, but for use only within this program that we think you should operate" (for example, providing health insurance for poor children).[33]

B. The Permissible Scope of Spending-Power Bargaining

In this way, the spending power enables Congress to bargain with states for access to policymaking arenas that are beyond the reach of its other enumerated powers.[34] Congress cannot just compel the states to enact its preferred policies in realms that exceed its specifically enumerated powers.[35] Yet spending-power partnerships are premised on negotiation rather than compulsion, because states remain free to accept or reject the federally proffered deal.[36] 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

31. U.S. CONST. art. I, § 8, cl. 1.

32. South Dakota v. Dole, 483 U.S. 203, 206–07 (1987) ("Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'").

33. *See, e.g.*, Social Security Act, 42 U.S.C. § 1397aa–mm (1997).

34. *Dole*, 483 U.S. at 206–07 ("[T]he 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."); United States v. Butler, 297 U.S. 1, 66 (1936) ("[O]bjectives not thought to be within Article I's 'enumerated legislative fields,' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.").

35. *See* 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).

36. Steward Mach. Co. v. Davis, 301 U.S. 548, 589–91 (1937) (rejecting the argument that economic incentives are coercive because would-be recipients retain "the freedom of the will" to decline).

accepts the terms."[37]

Members of the Court have sporadically worried about circumstances that might undermine the voluntariness of state consent in spending-power bargaining, but usually in dicta and without much elaboration.[38] For example, in *Steward Machine Company v. Davis*, the Court considered whether the Social Security Act of 1935 encroached on constitutionally reserved state authority by creating a coercive structure of federal taxation.[39] The Court briefly considered the argument that federal economic pressure could compel the states, but it firmly rejected the idea, concluding that "to hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties."[40]

Steward Machine appeared to resolve questions about the permissible scope of spending-power bargaining that the Court had left open one year earlier in *United States v. Butler*, in which it invalidated the 1933 Agricultural Adjustment Act on grounds reminiscent of the concerns raised in *Sebelius*.[41] In a holding discredited by subsequent developments in constitutional law, the Court invalidated conditional farm subsidies and processing taxes for exceeding federal authority by coercing individual farmers into reduced agricultural production.[42] The Court affirmed that the taxing and spending powers are not limited by the scope of Congress's other enumerated powers,[43] but concluded that Congress had nevertheless wielded them here for the unconstitutional ends of

37. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012).

38. *See, e.g., Steward Mach. Co.*, 301 U.S. at 590 (worrying about "the point at which pressure turns into compulsion"); *Dole*, 483 U.S. at 211 (citing the scant discussion of this point in *Steward Machine*); *cf.* United States v. Butler, 297 U.S. 1, 74 (1936) (discussed *infra,* note 41).

39. *Steward Mach. Co.*, 301 U.S. at 548.

40. *Id.* at 589–91. The Court also distinguished *United States v. Butler*, finding that the specific points of weakness identified in the Agricultural Adjustment Act did not apply to the Social Security Act. *Id.* at 592.

41. 297 U.S. 1, 74 (1936).

42. *Butler,* 297 U.S. at 74. The Court concluded that Congress lacked authority to regulate agricultural production, and that it could not skirt the bounds of federal authority by deploying particularized taxes on individual farmers this way. *Id.* ("Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance.").

43. *Id.* at 65–66.

invading the residual authority preserved to the states.[44]

Butler turned on the limits of Congress's ability to influence individuals' choices through conditional taxes, rather than its ability to influence state choices through conditional spending (the primary factor in the *Sebelius* spending-power analysis). However, it confronted the analogous concern that Congress had exceeded constitutional reach by coercing non-cooperators into a federally desired course of action by the use of economic incentives. *Butler* is an especially poignant historical counterpart to *Sebelius* given the available parallels between the farm taxes and subsidies there invalidated, and the individual mandate at issue in the larger ACA controversy.

Today, *Butler* leaves an interesting legacy for *Sebelius* interpreters. The Court's confirmation that the spending power operates independently from the other federally enumerated powers set the stage for the modern breadth of the doctrine. However, other parts of its holding have been obviated by the Court's evolving view of federal authority under both the Commerce[45] and the Spending Clauses.[46] The conservative dissenters in *Sebelius* echo *Butler*'s concern that the spending power not be used to obliterate the constitutional system of enumerated powers.[47] Yet the intervening seventy-five years of precedent starkly rejects *Butler*'s view that spending-power bargaining cannot intrude into areas of reserved state power, such as public education, health, or safety.[48]

The culmination of that line of precedent is the Court's 1987 decision in *South Dakota v. Dole*, in which it broadly upheld the spending bargaining enterprise in a case challenging a federal law that conditioned 5 percent of a state's federal highway funds on its adoption of the national drinking age.[49] Writing for a majority of seven, Chief Justice Rehnquist

44. *Id.* at 74–75; *see also Sebelius*, 132 S. Ct. at 2599 (describing the invalidated tax as a punitive exaction designed to regulate behavior beyond what was then considered legitimate federal reach).

45. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964) (affirming that the Commerce Clause confers federal authority that would have justified the Agricultural Adjustment Act of 1933); Wickard v. Filburn, 317 U.S. 111 (1942) (same).

46. *See, e.g.,* South Dakota v. Dole, 483 U.S. 203, 210–11 (1987) (affirming that the Tenth Amendment is not an independent constitutional bar to spending power bargaining beyond the reach of Congress's other enumerated powers).

47. *Sebelius*, 132 S. Ct. at 2657 (Scalia, J. et al, dissenting).

48. *See, e.g.*, *Dole*, 483 U.S. at 210–11.

49. *Id.* at 206–12 (upholding the National Minimum Drinking Age Act, which

concluded that neither the Tenth nor the Twenty-first Amendments undermined the constitutionality of the National Minimum Drinking Age Act, even though Congress could not regulate underage alcohol consumption directly.[50] In so doing, he formally parted ways with all vestiges of the *Butler* analysis.

Chief Justice Rehnquist also found the deal consistent with all other previously recognized constraints on conditional federal spending,[51] including the requirement recently clarified in *Pennhurst State School & Hospital v. Halderman*[52] that Congress unambiguously informs the states what would be expected of them in exchange for the conditioned funds.[53] And though the clearly stated obligation to adopt the national drinking age was not a direct use of the conditioned highway funds, the connection between a uniform national drinking age and highway safety was sufficiently germane to satisfy the Chief Justice's scrutiny.[54] As he explained, federal highway funds are provided to enhance safe interstate travel, and highway accidents involving underage drinkers posed a major threat to road safety.[55]

In cataloguing the history of supportive spending-power precedent, Chief Justice Rehnquist summarized the scope of congressional authority to bargain with the states pursuant to the Spending Clause:

> The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the

established twenty-one years as the minimum legal age of public alcohol consumption).

50. *Id.* at 206–11.

51. *Id.* at 206–08.

52. 451 U.S. 1, 17 (1980) (holding conditional funds for care for the developmentally disabled unsupported by the Spending Clause because Congress had failed to provide clear notice of the obligations that would be required of recipient states).

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

54. *Id.* at 208–09.

55. *Id.* ("A Presidential commission appointed to study alcohol-related accidents and fatalities on the Nation's highways concluded that the lack of uniformity in the States' drinking ages created 'an incentive to drink and drive' because 'young persons commut[e] to border States where the drinking age is lower.'").

> spending power must be in pursuit of "the general welfare." In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second, we have required that, if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs."[56]

After finding the grant consistent with each of these requirements, Chief Justice Rehnquist dispensed with South Dakota's final argument that the grant nevertheless coerced the states through the attractive force of much-needed federal funds.[57] Quoting language made famous in *Steward Machine*, he concluded that the economic incentives created by conditional grants do not unconstitutionally coerce the states because they continue to exercise free will in making the best choices for themselves:

> Every [economic incentive] conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.[58]

Characterizing the federal grant at issue as "relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose," he pointed out that "the enactment of such laws remains the prerogative of the States not merely in theory but in fact."[59]

56. *Id.* at 207 (internal citations omitted).
57. *Id.* at 208–09.
58. *Id.* at 211–12 (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 589–91 (1937)).
59. *Id.* at 211–12.

Dole thus affirmed that spending-power deals are constitutional so long as the conditions (1) promote the general welfare, (2) are unambiguous, (3) are reasonably related ("germane") to the federal interest, and (4) do not induce independent constitutional violations.[60] No law has ever run afoul of *Dole*'s broad limits,[61] which have not since been revisited—until now.

II. THE NEW *SEBELIUS* SPENDING-POWER LIMIT

This Part explores the *Sebelius* doctrine and how it alters the permissible scope of state-federal bargaining under the Spending Clause. After reviewing the Court's disposition of the spending-power claim in the case, it isolates the primary elements of the new doctrine and the multiple points of uncertainty it leaves for future interpreters, closing with a critique.

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.[62] Before the ACA, Medicaid required that participating states offer health insurance to discrete categories of vulnerable people, including pregnant women, children, needy families, the blind, the elderly, and the disabled.[63] The ACA amendments required states to extend insurance to the general population of people under age sixty-five with incomes below 133 percent of the federal poverty line.[64]

All states currently participate in the Medicaid partnership, but those that did not extend insurance to the larger population anticipated by the ACA would be out of

60. *Id.* at 206.

61. *See, e.g.*, Pierce Cnty., Wash. v. Guillen, 537 U.S. 129, 146 (2003) (rejecting a challenge prompting the Court to revisit the *Dole* spending power limits in a case about highway funding that was ultimately upheld under Congress's commerce power).

62. *See Sebelius*, 132 S. Ct. at 2580, 2601.

63. *Id.* at 2601.

64. *Id.*

compliance with the new terms of the program. 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.[65] The plaintiff states feared losing that substantial source of funding—on average, about 10 percent of their annual budgets—if they rejected the ACA expansion.[66]

Reflecting the Court's previous emphasis on the states' free will in spending-power bargaining,[67] the federal government defended the conditioned Medicaid funds as a conditional gift that states remain free to take or refuse as best serves their interests.[68] Congress even had included a provision in the original Medicaid legislation expressly stating that it could modify the program from one year to the next, so the defendant agency argued that the states had always been on notice that the terms of the ongoing spending-power deal would change from time to time.[69] In fact, Congress had previously modified Medicaid nearly fifty times since its inception,[70] suggesting that the additional changes here were unremarkable in the context of the full Medicaid partnership.

The plaintiff states maintained that the ACA expansion was different, however, because the changes were much more serious, and because they could not now disentangle from this critical social service program on which their citizens had come to rely.[71] They argued that conditioning their continued access to 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 percent of their annual budget.[72] This was not the "relatively mild" economic incentive upheld in *Dole*, they argued, and though they may have been free to reject the Medicaid expansion in theory, they were not

65. *Id.* at 2607.
66. *See id.* at 2582, 2605.
67. South Dakota v. Dole, 483 U.S. 203, 211–12 (1987).
68. *Sebelius*, 132 S. Ct. at 2605–06.
69. *Id.* at 2605, 2631. 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. *Id.* at 2605 (quoting Social Security Act, 42 U.S.C. § 1304 (1935)).
70. *Id.* at 2630–31 (Ginsburg, J., dissenting) (describing this provision and the fifty amendments that have been made to Medicaid since 1965).
71. *See id.* at 2603–05.
72. *See id.* at 2603, 2605.

free to do so in fact.[73] They alleged that their consent to the expansion would be effectively involuntary.[74] 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.[75] Joined only by Justices Breyer and Kagan, Chief Justice Roberts began by upholding the presumption underlying spending-power bargaining—that is, that it does not coerce the states because they can always walk away from the bargaining table if they do not like the terms of the deal.[76] 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."[77] 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.[78] 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.[79] If it would be realistically impossible to say "no" to unfairly conditioned new terms, a state that says "yes" cannot be

73. South Dakota v. Dole, 483 U.S. 203, 211–12 (1987); *Sebelius*, 132 S. Ct. at 2604–05 (applying this language from *Dole* to the facts in *Sebelius*).

74. *Sebelius*, 132 S. Ct. at 2605.

75. *Id.* at 2603–06.

76. *See id.* at 2602–03.

77. *Id.* at 2603.

78. *See id.* at 2607. 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). *See id.* at 2666. Because the Chief Justice's rationale is narrower than that of the dissenting justices, his controls.

79. *See id.* at 2605, 2607.

considered to consent voluntarily. Any agreement thus procured is one made coercively, under duress.[80]

The Chief Justice's coercive conditions analysis—roughly holding that Congress may not pressure a state to accept a new spending-power deal by threatening to terminate independent grants on which the state already relies[81]—required two critical interpretive moves.

First, he had to distinguish *Dole*. After all, the spending deal upheld in *Dole* had also conditioned ongoing funds for one purpose (highway maintenance) on participation in an indirectly related program (a national drinking age).[82] If independent conditions like these create constitutional difficulties, then the entire line of Spending Clause cases premised on *Dole* becomes suspect.

To resolve this potential problem, Chief Justice Roberts distinguished *Dole* and its progeny on the grounds that the Medicaid grants at issue in *Sebelius* were simply so much larger in size.[83] The plaintiff states may have willingly chosen to participate in the original Medicaid program, but they were now being "economic[ally] dragoon[ed]" into the expansion by the threatened loss of so large a percentage of their annual budgets.[84] 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."[85]

Second, and equally important, to make the "independent conditions" part of his analysis work, the Chief Justice had to construe acceptance of the Medicaid expansion as an "independent condition," not one organically related to the use of the funds at issue. To accomplish this, he characterized Congress's new vision of Medicaid as really being *two separate programs*: (1) the pre-existing program, requiring health

80. *Id.* at 2604.

81. *Id.* at 2603–04.

82. South Dakota v. Dole, 483 U.S. 203, 207–08 (1987). The *Dole* condition was considered indirectly related because highway maintenance grants are made to enhance highway safety, and lowering the drinking age would also enhance highway safety. *Id.*

83. *Sebelius*, 132 S. Ct. at 2604–05.

84. *Id.*

85. *Id.* at 2604.

insurance for discrete categories of vulnerable people; and (2) the "independent" expansion, requiring insurance for the general low-income population.[86]

While a joint dissent by Justices Scalia, Kennedy, Thomas, and Alito tied coercive abuse of the spending power primarily to the size of the federal grant at issue, the Chief Justice located coercion in the combined force of the size of the grant and the conditioning of that grant on assent to the terms of an unrelated program.[87] 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.[88]

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."[89] For the Chief Justice, the universality of the new plan appears to have strained the trajectory of the original partnership beyond foreseeability by

86. *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.").

87. *See* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 866–73 (2013) (contrasting the analyses of the Chief Justice and the joint dissent on this point).

88. *Sebelius*, 132 S. Ct. at 2603–04.

89. *Id.* at 2606.

the plaintiff states—justifying its treatment by the Court as an independent program, despite its characterization by Congress as an expansion of the existing program.

On this point, the Chief Justice's analysis appears to draw on the second criterion of *Dole*, requiring that federal conditions be stated unambiguously to the states.[90] This requirement preserves the integrity of state consent in spending-power bargaining by ensuring that states are fully enabled to make independent choices in their best interest. The *Sebelius* doctrine thus attempts to secure the foundations of genuine state consent by preventing Congress from (purposefully or inadvertently) luring a state into dependence on a spending-power deal that evolves from an unambiguous beginning into an unforeseeable end.

As Justice Ginsburg suggests in dissent, however, this primary point of contact between the Chief Justice's analysis and the leading spending-power precedent to this point is one of relatively few such points of contact.[91] An even stronger analysis might have elaborated more fully on how *Sebelius* follows from *Dole*'s other elements, and how the various constraints should work together going forward.[92]

B. *The Elements of the* Sebelius *Analysis*

The *Sebelius* analysis thus appears to hinge on three moving parts, each of which must be manifest before unconstitutional coercion is found. First, there must be an ongoing spending-power partnership in which states have

90. *Id.* at 2634 n.18 (Ginsburg, J., dissenting) (noting, perhaps disdainfully, that the relationship between the Chief Justice's opinion and *Dole* seems limited to the fact that he "appears to rely heavily" on the second *Dole* criterion).

91. *Id.*

92. *Sebelius*'s neglect of *Dole* is surprising, given its central place in Spending Clause jurisprudence. Then again, *Sebelius* was a historic decision in which Chief Justice Roberts was largely viewed as taking either heroic or anti-heroic steps (depending on one's point of view) to avoid toppling seventy-five years' worth of Commerce Clause jurisprudence. *See, e.g.*, Noah Feldman, *Roberts Chooses Restraint Over History on Obamacare*, BLOOMBERG VIEW, June 28, 2012, *available at* http://www.bloombergview.com/articles/2012-06-28/roberts-chooses-restraint-over-history-on-obamacare. He was apparently less uneasy about unsettling the same period's accumulation of Spending Clause jurisprudence, but perhaps his avoidance of deeper engagement with the existing constraints reflect a related desire to assert this result while leaving as much prior case law intact as possible. Whatever its origin, the result is that *Sebelius* lacks a more satisfying integration with preceding spending power precedent.

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.[93] Here, 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.[94]

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.[95] 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 constitutes coerced assent rather than voluntary agreement.[96]

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 even though the funds at issue might be enormous, the conditions attached to those funds would govern their use directly and straightforwardly, without impacting the pre-existing Medicaid program.

Sebelius affirms that Congress remains free to *directly* condition the disbursement of large federal grants as it wishes, subject only to the forgiving *Dole* limitations.[97] The ACA was coercive, however, because it *indirectly* conditioned pre-existing funds by making their continued receipt contingent on independent state obligations. The Chief Justice held that Congress may not procure state acceptance of the Medicaid expansion by threatening to defund pre-existing operations of

93. *Sebelius*, 132 S. Ct. at 2604–06.
94. *See id.* at 2601, 2603.
95. *Id.* at 2603–04.
96. *Id.*; *see also* Bagenstos, *supra* note 87, at 874–76.
97. *Sebelius*, 132 S. Ct. at 2607.

the original program.[98]

To remedy the defect, Chief Justice Roberts held that the provision entitling the Secretary to withhold all Medicaid funding for failure to comply with any Medicaid requirement could not apply to states rejecting the ACA expansion.[99] The four conservative justices agreed with the result, though not the rationale, while Justices Ginsburg and Sotomayor agreed only that the stricken penalty provision was severable. The ultimate ruling left the ACA intact while requiring the federal government to allow dissenting states to opt out of the Medicaid expansion while remaining in the pre-existing Medicaid program.[100]

Justice Ginsburg excoriated the Chief Justice's logic in a dissent joined by Justice Sotomayor, arguing that there was only one program before the Court: Medicaid.[101] 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."[102] 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.[103]

Justice Ginsburg also argued that the new doctrine—though purportedly designed to enhance state autonomy—would have the more likely effect of limiting it, because the alternative to state-federal spending-power bargaining is often federal fiat.[104] To discourage intergovernmental bargaining of this sort is to lose one of the more effective means of engaging state input in federalism-sensitive governance.[105] Most importantly, she criticized the Chief Justice for enforcing a new limitation on coercion without clarifying the point at which

98. *Id.* at 2606–07.

99. *Id.* at 2607–08.

100. For a fuller analysis of the binding precedent that follows from this ruling, see *infra* notes 108–11 and accompanying text.

101. *Sebelius*, 132 S. Ct. at 2635–36 (Ginsburg, J., dissenting).

102. *Id.* at 2630.

103. *Id.* at 2637–38.

104. *Id.* at 2632–33 ("The alternative to conditional federal spending, it bears emphasis, is not state autonomy but state marginalization.").

105. *Id.*

permissible persuasion gives way to undue coercion.[106] In passionate terms, she warned of the myriad ways in which this inquiry requires "political judgments that defy judicial calculation."[107]

C. Interpreting the Sebelius *Doctrine*

The *Sebelius* decision leaves much uncertainty in its wake. The array of concurring and dissenting opinions complicates efforts to determine exactly how the decision will bind future courts, as no rationale was supported by a majority of the court.[108] In *Marks v. Whitney,* the Supreme Court established that, "[w]hen 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 . . . .'"[109] Here, seven members of the court—the plurality and the conservative dissenters—concluded that the ACA violated the Spending Clause, and the Chief Justice's rationale constitutes the narrowest grounds on which they all agreed.[110]

As a technical matter, however, the conservative dissenters did not actually *concur* in the judgment, so their view may not count toward binding precedent under *Marks*. Meanwhile, the liberal dissenters concurred in the severance portion of the Chief Justice's analysis, but not in the conclusion that the Spending Clause had been violated. For this reason, one could argue that the *Sebelius* doctrine does not constitute fully binding precedent. Yet as a practical matter, future courts will follow the rationale they expect a majority of the court to support, and the Chief Justice's rationale is the narrowest that

106. *Id.* at 2640–41; *see also* Neil S. Siegel, *Collective Action Federalism and Its Discontents*, 91 TEX. L. REV. 1937, 1939–40 (2013) (citing Justice Ginsburg's dissent in *Sebelius* as a significant development for collective-action theory for "deem[ing] the logic of collective action constitutionally pertinent to the scope of Congress's commerce power"). Professor Siegel emphasizes Justice Ginsburg's simultaneous arguments "that Congress could have rationally concluded that the conduct of the uninsured, as a general class, substantially affects interstate commerce," and that "the scope and the nature of the problem rendered the federal government better situated than the states to solve it." *Id.*

107. *Sebelius*, 132 S. Ct. at 2641 (Ginsburg, J., dissenting).

108. Marks v. Whitney, 430 U.S. 188, 193 (1977).

109. *Id.*

110. *See* Bagenstos, *supra* note 87, at 868.

commanded the accord of the seven justices who found a spending-power problem.[111] This analysis therefore presumes that the elements of the Chief Justice's analysis are the elements that will matter to future interpreters.

Even so, the Chief Justice's rationale creates considerable uncertainty of its own. It is 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 recurring grant and its intersecting conditions make it realistically impossible for a state to refuse[112]—but his opinion offers neither a threshold nor a limiting principle for evaluating coerciveness in either manifestation. 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.[113] Yet prior decisions upheld challenged legislation under the spending power,[114] while *Sebelius* articulates a new constitutional limit—arguably creating responsibility to do more.[115]

Nevertheless, *Sebelius* interpreters must make sense of the new constitutional limit with precious little direction. The primary sources of uncertainty involve: (a) the point at which a federal grant becomes large enough to exert coercive effect on a state, and (b) the point at which changes to an ongoing spending partnership create independent obligations for continued receipt of the original funds, or "crossover conditions."

111. *See id.* at 868, n.24 ("But even though the aggregation of votes across those who joined the Court's judgment and those who dissented 'does not establish any authoritative legal propositions' that *bind* the lower courts, as a practical matter, lower courts can be expected to seek to identify and apply those propositions that would command the assent of five Justices to avoid reversal.") (citations omitted).

112. *Sebelius*, 132 S. Ct. at 2601–05 (applying the "reality" criterion in the context of the ACA).

113. *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.") (citation omitted).

114. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

115. *Cf.* Huberfeld et al., *supra* note 7, at 8 (discussing how Justice Roberts and the joint dissent "expressly declined to articulate any test or rubric for deciding whether a Spending Clause program crosses the coercion line," offering mere "slogans" that are "conspicuously fact specific and provide little guidance to future courts and litigants.").

1. Size of the Grant

The *Sebelius* doctrine's first indicator for potential coercion is the large size of an ongoing federal grant, but the decision provides dauntingly weak tools for identifying when this 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 percent of the state's overall budget) were too small for the threat of loss to be coercive, coupled with its holding that the threatened loss of $233 billion in Medicaid grants (on average, 10 percent of a state's budget) sufficed.[116] The highway funds at issue in *Dole* represented 0.19 percent of combined state expenditures that year, while the Medicaid funds at issue in *Sebelius* represented 21.86 percent of all state expenditures that year.[117]

We can probably conclude that any federal grants smaller than the size-related threshold of safety set by *Dole* will pass muster, while those larger than the Medicaid grants at issue in *Sebelius* will not. However, there *are* no federal grants larger than those at issue in *Sebelius*: Medicaid includes the largest of all federal grants to states, followed by those for public education and then highways.[118]

The doctrine thus leaves the many federal grant programs in the zone between 0.5 to 10 percent of a state's budget on uncertain ground for the purposes of *Sebelius* scrutiny—including those relating to public education,[119] civil rights,[120]

116. *Sebelius*, 132 S. Ct. at 2604–05 (identifying the federal funds at issue in *Dole* and *Sebelius*).

117. *Id.* at 2664 (Scalia, J., et al., dissenting) ("In *South Dakota v. Dole*, the total amount that the States would have lost if every single State had refused to comply with the 21-year-old drinking age was approximately $614 million—or about 0.19% of all state expenditures combined. Under the ACA, by contrast, the Federal Government has threatened to withhold 42.3% of all federal outlays to the states, or approximately $233 billion . . . equaling 21.86% of all state expenditures combined.").

118. *Id.* at 2663–64 (noting that education grants are second only to Medicaid in size, comprising 9.8 percent of total state spending); *see also* NAT'L ASS'N. OF STATE BUDGET OFFICERS, FISCAL YEAR 2010 STATE EXPENDITURE REPORT 62 (2011), *available at* http://www.nasbo.org/sites/default/files/Summary%20%20State%20Expenditure%20Report_2.pdf *and* http://www.nasbo.org/sites/default/files/2010%20State%20Expenditure%20Report_0.pdf [hereinafter "NASBO FY 2010 REPORT"] (summary and full report, respectively, describing federal contributions to state expenditures and showing that total transportation funds comprised 7.7 percent of total state spending that year, second only to education).

119. *E.g.*, No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2013)

highway infrastructure,[121] social services,[122] affordable housing,[123] and environmental law.[124]

(reauthorizing the Elementary and Secondary Education Act of 1965, 20 USC § 6301). Federal grants for elementary and secondary public education totaled $70.678 billion in FY 2010. NASBO FY 2010 REPORT, *supra* note 118, at 16. Note that a subsequent NASBO Report has become available since the Supreme Court's citations to the 2010 data in *Sebelius*, but this Article relies on the 2010 data to remain consistent with the *Sebelius* benchmarks.

120. *E.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1–2000e-17 (2013) (conditioning federal funds on state promises not to discriminate on the basis of race, sex, disability, and other proscribed categories); Title IX of Education Amendments of 1972, 20 U.S.C. §§ 1681–1683 (conditioning federal educational grants on gender equity in implementation); Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 (grants to states to support the education of children with disabilities); DEPT. OF EDUC., SPECIAL EDUCATION: FISCAL YEAR 2012 BUDGET REQUEST I-16 (2012), *available at* http://www2.ed.gov/about/overview/budget/budget12/justifications/i-specialed.pdf (reporting that federal grants through IDEA were $11,505,211,000 in FY 2009 and FY 2010).

121. NASBO FY 2010 REPORT, *supra* note 118, at 62 (describing federal grants for transportation, totaling $124.4 billion in 2010).

122. *E.g.*, Supplemental Security Income for Aged, Blind & Disabled, 42 U.S.C. §§ 1381–1382e(a) (2013) (grants to states to offer assistance to qualifying persons; these grants totaled $48 billion in 2009. CTR. ON BUDGET & POLICY PRIORITIES, INTRODUCTION TO THE SUPPLEMENTAL SECURITY INCOME (SSI) PROGRAM (2011), *available at* http://www.cbpp.org/cms/?fa=view&id=3367)); Supplemental Nutrition Assistance Program (SNAP), Food and Nutrition Act of 2008, 7 U.S.C. § 2013 (grants to states to provide food stamps to qualifying persons, totaling $74.6 billion in 2012, according to *SNAP Monthly Data*, U.S. DEPT. OF AGRIC., FOOD & NUTRITION SERV. (Jan. 10, 2014), http://www.fns.usda.gov/pd/34snapmonthly.htm); Temporary Assistance for Needy Families (TANF), 42 U.S.C. § 603 (grants to states to offer assistance to qualifying poor families, from an annual block grant totaling $16.5 billion, according to GENE FALK, CRS REPORT, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: RESPONSES TO FREQUENTLY ASKED QUESTIONS 1 (2013), *available at* https://www.fas.org/sgp/crs/misc/RL32760.pdf); Grants to States for Old-Age Assistance, 42 U.S.C. §§ 301–306 (allocated at the discretion of the Secretary).

123. *E.g.*, Fair Housing Act, 42 U.S.C. §§ 3601–3631 (2013) (Title VIII of the Civil Rights Act of 1968) (providing federal grants to states for affordable housing projects, totaling $612 million in 2010, according to NASBO FY 2010 REPORT, *supra* note 118, at 85).

124. *See infra* Part III (describing impacted environmental laws in detail) *and* NASBO FY 2010 REPORT, *supra* note 118, at 84 (all federal grants for environmental expenditures, totaling $1.5 billion in 2010). State capital expenditures for environmental purposes in 2010 composed 5.9 percent of total capital spending. *Id.* at 79.

The *Sebelius* Zone of Coercive Size Uncertainty

	Persuasion →? →? →? Coercion	
	***Dole* Grant**	***Sebelius* Grant**
Total Federal Outlay:	$614 million ($1.2 billion today)[125]	$233 billion
% Total State Expenditures:	0.19%	21.86%
% of Single State Budget:	> 0.5% (South Dakota)	10% on average
	Persuasion →? →? →? Coercion	

Indeed, the *Sebelius* upper threshold is itself loosely calculated: the Chief Justice appears to derive the 10 percent figure associated with the Medicaid grant by simply adjusting the average state budget's proportion of Medicaid spending (20 percent) by the lower range estimate of the average federal contribution (50 to 83 percent).[126] 50 percent of 20 percent yields a threshold of coercion at approximately 10 percent of a state's annual budget, but later interpreters are left longing for something more determinative of coercion than cocktail-napkin math. The difficulty of establishing more precisely where persuasion gives way to coercion is surely one reason the Court has declined to do so previously, reluctant to impose a discretionary constraint so vague that it can only exacerbate the existing uncertainty in federalism-sensitive lawmaking and litigation.

125. *Dole*'s $614 million in 1987 dollars would amount to $1.2 billion inflation-adjusted dollars in 2012. *See, e.g.*, *US Inflation Calculator*, COINNEWS MEDIA GROUP, http://www.usinflationcalculator.com (based on the consumer price index) (last visited Feb. 28, 2014).

126. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604–05 (2012) ("Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs." (citing NASBO FY 2010 REPORT, *supra* note 118, at 11, Table 5). I searched the opinion but was unable to determine any other source for the Chief Justice's use of this 10 percent figure.

2. Crossover Condition

The *Sebelius* doctrine also requires that interpreters distinguish (1) conditional funds that directly sponsor the program in question from (2) federal funds sponsoring one program that are conditioned on state participation in another program. While the former remain presumptively permissible, the latter are potentially coercive under the new limit.

Remarkably, 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 triggering *Sebelius* scrutiny. The plurality acknowledged this problem in conceding that Congress enacted the ACA as an amendment to the same Medicaid statute that the federal and state governments have jointly implemented for decades, but concluded that it need not defer to Congress's judgment about the boundaries between legislative programs.[127] Beyond noting that Congress cannot just "surprise" states with "retroactive conditions,"[128] the decision provides no tools for determining when modifications to an existing program create an independent program vulnerable to the new limit.[129]

D. Critiquing Sebelius

This second zone of uncertainty is an especially troubling feature of the new rule. When the Court creates a new doctrine in uncharted constitutional territory, it may be an exercise in judicial prudence to say no more than is necessary to allow the

127. *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.") (citation omitted).

128. *Id.* at 2606 (noting that the spending power does not enable Congress to "surpris[e] participating States with post-acceptance or 'retroactive' conditions'").

129. *Cf.* Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1286–89 (2013) (approving the result in *Sebelius* but not the rationale, and proposing his own framework for analyzing conditional grants). Professor Berman's work distinguishes between the anti-compulsion and anti-coercion principles and argues that the government "unconstitutionally penalizes the exercise of a right if it withholds a benefit for certain bad purposes or reasons." *Id.* at 1288.

gradual, case-by-case process of judicial refinement to begin its work. That said, *Sebelius* falls short of what is necessary. Constitutional interpretation draws on the common law tradition that enables the incremental development of legal principles, but even the common law tradition anticipates judicial discretion within bounds. When the Court creates a new rule, that Court is responsible for providing those bounds. Further development of the principle can take place through judicial elaboration over time—in other words, one doesn't have to decide everything all at once—but when innovating from scratch, there is an obligation to at least articulate meaningful limiting principles.

The *Sebelius* spending-power holding absolves itself of too much. It creates principles without discernable limits, leaving too much uncertainty for future interpreters in all branches of both state and federal government. It engages existing precedent in a cavalier manner, lacking 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. It gives no deference to Congress's conceptualization of Medicaid as a legislative whole, even though the case turns on this issue of conceptual labeling, and despite *Dole's* admonishment that courts should give "substantial" deference to Congress in evaluating spending-power constraints.[130]

In the end, "I know it when I see it" reasoning won't do when assessing the labyrinthine political dimensions of

130. South Dakota v. Dole, 483 U.S. 203, 207 (1987).

Indeed, it is noteworthy that the Chief Justice twice declined deference to Congress's own characterization of what it was doing in the *Sebelius* decision, first when he held that the individual mandate was a tax rather than a penalty (as Congress had characterized it), *Sebelius*, 132 S. Ct. at 2594–95, 2597–98; and here, when he held the Medicaid expansion was an independent program rather than an amendment (as Congress had characterized it), *id.* at 2605. While courts are not bound by the mere form of legislative language, it is striking that the Chief Justice was unmoved by the usual norms of judicial-legislative deference even when the crucial issues of the case turned on questions of congressional labeling.

Moreover, while he found the individual mandate a hard question in part because of Congress's chosen terminology, he had no such qualms disregarding Congress's legislative conceptualization for the purposes of the spending analysis: "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." *Id.*

intergovernmental bargaining under the spending power, but neither the Chief Justice nor the more conservative dissenters provide more than that in their various assertions that such a limit must exist. As it stands, 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, especially with no deference to legislative conclusions. In so doing, the reviewing Court substitutes its judgment for that of Congress in an enterprise in which legislative capacity apexes while judicial capacity hits its nadir.[131]

Moreover, the rule threatens to be unworkable in implementation given legislative norms. No present Congress can bind future congressional choices,[132] 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 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—making *Sebelius* the *Bush v. Gore*[133] of spending-power jurisprudence. Given the enormous uncertainties associated with applying the rule, it may be that it will affect future changes only to the one statute we already know is vulnerable:

131. *See Sebelius*, 132 S. Ct. at 2639–41 (Ginsburg, J., dissenting).

132. *See, e.g.,* United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (affirming the "centuries-old concept that one legislature may not bind the legislative authority of its successors").

133. 531 U.S. 98 (2000) (resolving the dispute over the 2000 presidential election in a decision explicitly confining its reach to the facts at hand).

Medicaid. After all, Medicaid is unique among cooperative-federalism programs for both its enormous size and its uncertain footing in sources of federal authority beyond the spending power (at least under the limited view of the commerce authority embraced elsewhere in *Sebelius* by the Chief Justice and the conservative dissenters). 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.[134]

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.[135] For example, civil rights laws like Titles 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.[136]

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.[137] Indeed, if future courts extend the Chief Justice's narrowing commerce analysis of the ACA's individual mandate, it could further undermine the Commerce

134. *Sebelius*, 132 S. Ct. at 2664–65 (Scalia, J., dissenting).

135. *See* Eloise Pasachoff, *Conditional Spending After* NFIB v. Sebelius: *The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 612–62 (2013) (analyzing the effects of *Sebelius* on various forms of federal educational funding, including the Elementary and Secondary Education Act, and the Individuals with Disabilities Act, discussing the implications for the future of conditional spending in federal education law).

136. *See* EMILY J. MARTIN, AM. CONSTITUTION SOC'Y FOR LAW AND POLICY, TITLE IX AND THE NEW SPENDING CLAUSE (Issue Brief) (2012), http://www.acslaw.org/sites/default/files/Martin_-_Title_IX_and_the_New_Spending_Clause_1.pdf (discussing independent sources of federal authority for these programs).

137. *See* Rapanos v. United States, 547 U.S. 715, 786 (2006); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 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 constitutional grounds).

Clause 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.

III. ENVIRONMENTAL LAW AFTER *SEBELIUS*

This Part considers the post-*Sebelius* vulnerability of the nation's major environmental laws that involve programs of cooperative federalism. After reviewing efforts by the literature to make sense of the *Sebelius* limit, I test the new doctrine by applying it to a diverse collection of environmental federalism partnerships: the Clean Air and Water Acts; the Coastal Zone Management Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and 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.

Major Environmental Programs of Cooperative Federalism

- Clean Air Act (CAA)
- Clean Water Act (CWA)
- Coastal Zone Management Act (CZMA)
- Comprehensive Environmental Response, Compensation, & Liability Act (CERCLA or "Superfund")
- Emergency Planning & Community Right-to-Know Act (EPCRA)
- Endangered Species Act (ESA)
- Resource Conservation and Recovery Act (RCRA)
- Safe Drinking Water Act (SDWA)
- Surface Mining Control and Reclamation Act (SMCRA)

The analysis identifies those statutes that do not implicate the *Sebelius* doctrine, those that implicate only its first and second elements, and finally, the one statute that potentially implicates all three: the Clean Air Act's crossover conditioning of federal highway funds. The second half of Part III focuses specifically on the Clean Air Act's highway fund sanctions, evaluating the vulnerabilities of the program but concluding that it should nevertheless survive *Sebelius* scrutiny. Demonstrating how the elements of the doctrine engage with the various features of different state-federal partnerships provides insight not only into environmental law after *Sebelius*, but also the likely impacts of the new spending-power limit on other areas of law.

Yet as foreshadowed above, the most difficult part of the analysis is figuring out exactly how to test that limit. Immediately after the decision came down in 2012, commentators began struggling to ascertain the impacts of *Sebelius* on existing spending-power partnerships.[138] Spending deals tying federal funds to wholly unrelated policy goals have long been constitutionally infirm,[139] 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.[140] But as a threshold matter, when is an indirectly related condition sufficiently remote to constitute an "independent" program?

A common theme in the literature is the lack of a coherent test. In analyzing the impacts of the new doctrine on the Title IX federal education spending partnership, Emily Martin of the National Women's Law Center concludes that the Court articulated no clear test and accordingly analyzes the vulnerability of Title IX by distinguishing it point by point from Medicaid.[141] 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.[142]

138. *See infra* notes 141–44 and accompanying text.

139. South Dakota v. Dole, 483 U.S. 203, 207 (1987).

140. As discussed *supra* at notes 116–17 and accompanying text, grants larger than the $233 billion at stake under pre-ACA Medicaid are likely to be scrutinized, while those smaller than the $614 million/$1.2 billion in highway funds at issue in *Dole* are not. *See also* the figure following text at *supra* note 124.

141. *See generally* Martin, *supra* note 136. Emily Martin is General Counsel for the National Women's Law Center.

142. *See generally* KENNETH R. THOMAS, CONG. RESEARCH SERV., R42367, THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER NATIONAL

Professor Sam Bagenstos identifies similar elements and makes sense of the *Sebelius* limit as an "anti-leveraging principle," prohibiting the use of the spending power to leverage a state's substantial reliance on one spending-power program to coerce agreement to another.[143] 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.[144]

However, all analyses converge on the three main elements in the *Sebelius* doctrine identified in Part II, and Professor Bagenstos convincingly shows that all of them must be manifest before the coercion limit is triggered, according to the logic of the Chief Justice's analysis and where it departs from the conservative dissent.[145] The scholarly consensus thus appears to be that in order to violate the presumptive constraint, the following three elements must be present: First, 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. Second, the size of the grant at issue must be so large and forgoing it so economically infeasible to the state that its consent to the new offer is effectively involuntary. Third, 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).[146]

The Elements of *Sebelius* Analysis

0. Congress uses spending power to engage states
1. Entrenched spending partnership creates state reliance
2. Grant at issue so big, loss would affect coercion
3. 'Crossover' condition ties existing $ to independent term

Applying these criteria to the state-federal partnerships in

FEDERATION OF INDEPENDENT BUSINESSES V. SEBELIUS (2012).

143. Bagenstos, *supra* note 87, at 866.
144. *Id.* at 898–99, 905–06.
145. *Id.* at 870–71.
146. *Id.*

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 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 crossover provision conditioning funds for one purpose on state assent to indirectly related terms.

The following provides presumptive *Sebelius* analyses for the major federal environmental laws with programs of cooperative federalism, ordered from the least to most vulnerable. To summarize the ten independent analyses that follow:

The Emergency Planning & Community Right-to-Know Act does not rely on the spending power and thus does not implicate *Sebelius*. Neither does the Clean Water Act's National Pollution Discharge Elimination System (NPDES), although other parts of the Clean Water Act, discussed below, come closer. Four other statutes involve discrete spending-power partnerships: the Resource Conservation and Recovery Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Endangered Species Act; and the Surface Mining Control and Reclamation Act—but in each of these, the relevant federal funds are offered as one-time grants responding to specific tasks. By definition, these programs cannot create state expectations triggering even the first of *Sebelius*'s three elements.

Of all federal environmental laws, only four include recurring grant programs that meaningfully trigger *Sebelius*'s first element, only two of these potentially trigger the second element, and only one potentially triggers all three. The Coastal Zone Management Act includes a program of recurring grants to states, but these grants are comparatively tiny. The Clean Water Act's State Revolving Fund creates an ongoing spending partnership with more heft than the Coastal Zone Management Act, but the grants at issue still fall shy of the available benchmarks for coercive size.[147] The Safe Drinking Water Act involves grants potentially large enough to warrant scrutiny for size as well as reliance, but these grants are directly conditioned. Only the Clean Air Act—which links a state's satisfaction of air-quality requirements to its receipt of substantial federal highway funds—potentially includes all three indicators: an ongoing spending partnership involving large grants with a vulnerable crossover term.

Two Views of Environmental Federalism After *Sebelius*

1. *Sebelius* Applied to Environmental Federalism

- ***Sebelius* Not Implicated: No Spending Partnership (SP)**
  - EPCRA
  - CWA NPDES Program
- **Implicates *Sebelius*: SPs with One-Time Grant**
  - CERCLA
  - RCRA
  - SMCRA
  - ESA
- ***Sebelius* Element 1: Ongoing SPs with Small Grant**
  - CZMA Administrative Grants
  - CWA State Revolving Fund ($164–238M < $614M)
- **Elements 1 & 2: Ongoing SPs with Large Grant**
  - SDWA State Revolving Loan Fund ($1.4B)
  - CAA SIP Sanctions ($62B)
- **Elements 1, 2, & 3: Ongoing, Large Grant, & Crossover**
  - CAA Highway Fund Sanctions

---

147. *See supra* note 116 and accompanying text (discussing Chief Justice Roberts's determination that the $614 million in highway grants at issue in *Dole* were too small to act coercively but the $233 billion Medicaid grants at issue in *Sebelius* were coercive in size).

2. Environmental Federalism as *Sebelius* Typology

Type of Cooperative Federalism Program	**Relevant Environmental Statutes**	***Sebelius* Application**
No Spending Partnership	EPCRA CWA NPDES Program	*Sebelius* doctrine not implicated
Spending Partnership with One-Time Grants	CERCLA RCRA ESA SMCRA	*Sebelius* doctrine implicated, but first threshold element not triggered
Ongoing Spending Partnership with Small Recurring Grants	CZMA Administrative Grants CWA State Revolving Fund ($164–238 million)	*Sebelius* doctrine implicated and first element triggered, but second and third elements not triggered
Ongoing Spending Partnership with Large Recurring Grants	SDWA State Revolving Loan Fund ($1.4 billion) CAA SIP Sanctions ($62 billion)	*Sebelius* doctrine implicated, first and second elements triggered, but third element not triggered (no crossover conditions)
Ongoing Spending Partnership with Large Grants & Crossover Condition	CAA SIP Sanctions & Highway Funds	*Sebelius* doctrine implicated and all three elements triggered

The following Sections walk through application of the *Sebelius* doctrine to each law, demonstrating the independent operation of the three different elements of the doctrine. The analysis concludes that all will ultimately pass constitutional muster.

A. *Non-Spending Power Programs of Environmental Federalism:* Sebelius *Is Not Implicated*

Emergency Planning and Community Right-to-Know Act (EPCRA). EPCRA engages state and local actors in coordinated planning for chemical emergencies, provides for notification of emergency releases of chemicals, and addresses communities' rights to know about toxic and hazardous chemicals.[148] The Act establishes State Emergency Response Commissions, drawing technical expertise in the field of emergency response from various state agencies.[149] It further authorizes the Environmental Protection Agency (EPA) to order any facility owner or operator to comply with emergency planning provisions.[150] However, as EPCRA partnerships are not premised on any spending-power bargaining, they do not implicate the *Sebelius* doctrine.[151]

Clean Water Act National Pollution Discharge Elimination System (NPDES). The Clean Water Act,[152] which regulates point-source pollutants to the nation's waters,[153] provides another example of a significant program of environmental federalism that operates independently of the spending power.

148. 42 U.S.C. §§ 11001–11050 (2012).

149. *See id.* §§ 11001(a), 11045; *see also State Emergency Response Commissions*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/region4/air/epcra/sercs.htm (last visited Apr. 17, 2014) (listing commissioners).

150. 42 U.S.C. §§ 11001(a), 11045 (2013).

151. EPCRA is likely premised on the Commerce Clause and other sources of federal authority to assist states with emergency response, although this has yet to be confirmed in any official congressional or judicial statement. The House of Representatives now requires that new bills specify the applicable source of constitutional authority, but EPCRA was passed prior to the enactment of this House Rule in 2010. *See* CLERK OF THE H.R., 113TH CONG., RULES OF THE H.R. r. XII, cl. 7(c)(1) (2013) (providing that sponsors must submit a statement citing "as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution" to be published in the Congressional Record).

152. Clean Water Act, Pub. L. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251–1387 (2013)).

153. 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; *see also* Rapanos v. United States, 547 U.S. 715, 787,126 S. Ct. 2208, 2252 (2006) (Stevens, J., dissenting); Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173–74 (2001) (confirming the basis of federal authority for the Clean Water Act in the Commerce Clause).

State and federal actors cooperate in enforcing the Clean Water Act's pollution permitting program through shared supervision of the NPDES program, which prohibits the discharge of pollutants into protected water bodies without a permit.[154] The law allows the EPA either to act as the permitting authority or to delegate permitting authority to willing states.[155] All but a handful of states have chosen to self-administer the program even without offsetting federal funding, because they prefer the greater autonomy it allows them in managing in-state water resources and economic development.[156] As the arrangement is not premised on the exchange of federal money, it too is invulnerable to a *Sebelius* challenge. (Other CWA programs that do involve the spending power are discussed below.)

B. Spending Partnerships with One-Time Grants: Implicates Doctrine but Does Not Trigger First Threshold Element

<u>Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).</u> CERCLA, the "Superfund" act, imposes liability for the use, harboring, or transportation of hazardous substances that substantially endanger human health or the environment.[157] The program enables Congress to allocate discretionary § 104(k) "Superfund" grants to encourage state participation and leadership in cleanup efforts.[158] States and tribes are also eligible for § 128(a) Brownfield Grants to cope with less-contaminated sites.[159] However, like those at issue in RCRA, none of these grants could reasonably be

154. 33 U.S.C. § 1342(b) (2013).
155. *Id.* § 1342(a).
156. *E.g.*, N.M. ENV'T DEP'T, NPDES STATE PROGRAM AUTHORIZATION BRIEFING PAPER (2004), http://www.nmenv.state.nm.us/swqb/PSRS/NPDES-DelegationBriefingPaper_June-04.pdf (discussing the benefits of self-administration).
157. Pub. L. No. 96-510, 94 Stat. 2767 (1980), *amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended throughout 42 U.S.C. §§ 9601–9675 (2013).
158. *See id.* § 9604.
159. *Id.* §§ 9604(k) (discussing brownfields revitalization funding), 9628(a)(1)(B)(ii) (providing that States and tribes may use grants to capitalize a revolving loan fund for brownfield remediation). Section 128(a) was added to CERCLA in 2002 by the Small Business Liability Relief and Brownfields Revitalization Act. Pub. L. No. 107-118, § 128(a), 115 Stat. 2356, 2376–2377 (2002) (codified as amended at 42 U.S.C. § 9628 (2013)).

construed as ongoing in a way that would create *Sebelius*-worthy reliance interests.[160] Congress makes Superfund grants to the states for the limited purpose of cleaning up toxic Superfund sites. Once the site has been remediated, the receiving state would not ordinarily expect ongoing federal funding under this program.

Endangered Species Act (ESA). The ESA provides for the conservation of endangered and threatened species of fish, plants, and other wildlife.[161] Section Six authorizes grants to states through the Cooperative Endangered Species Conservation Fund, Habitat Conservation Planning Assistance Grants, and Habitat Conservation Plan Land Acquisition Grants.[162] However, ESA spending partnerships are very limited in size and scope.[163] Like RCRA and CERCLA funds, the ESA's one-time grants do not trigger the doctrine's first element of an ongoing partnership.

Resource Conservation and Recovery Act (RCRA). RCRA is a cooperative-federalism program regulating hazardous

160. CERCLA is also firmly authorized under both the Commerce and Tax powers, potentially providing additional constitutional support for Congressional regulation involving state participants. For cases indicating CERCLA's firm footing in the commerce power, see Freier v. Westinghouse Elec. Corp., 303 F.3d 176 (2d Cir. 2002); United States v. Olin Corp., 107 F.3d 1506, 1510 (11th Cir. 1997). The Superfund itself is supported by a tax on the petrochemical industry, utilities, and crude oil importers, and through reimbursement from responsible parties, 42 U.S.C. §§ 9611–12, 9631–33, 9661–62, 9671–72 (1995), suggesting that CERCLA is also authorized independently by the same tax power under which *Sebelius* upheld the ACA. *See* Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147, 149 at n.18 (2001) (discussing the use of the Tax power in the Superfund program).

161. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§1531–1544 (2012)). The ESA was enacted pursuant to Congress's authority under the Commerce Clause. Gibbs v. Babbitt, 214 F.3d 483, 487 (4th Cir. 2000).

162. *Section 6 of the Endangered Species Act*, U.S. FISH & WILDLIFE SERV. (Jan. 3, 2013), http://www.fws.gov/midwest/endangered/grants/S6_grants.html.

163. Traditional Section Six Conservation Grants provide financial assistance to state activities preserving listed species, including habitat restoration, species status surveys, public education, and outreach, captive propagation and reintroduction, nesting surveys, genetic studies, and development of management plans. *Id.* In 2008, all such grants made to the Midwestern states were for less than $50,000 per year, and the majority fell within the $10,000 to $20,000 federal contribution range. U.S. Fish & Wildlife Service, Midwest Region, *Traditional Section Six Grants Made to States in 2008*, http://www.fws.gov/midwest/endangered/grants/2008/index.html (last visited Feb. 28, 2014) (providing links to grant information for Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, and Wisconsin).

substances through "cradle to grave" oversight.[164] The statute enables states to choose whether to become authorized to implement the program within their boundaries or submit to federal regulation.[165] The statute originally provided funding mechanisms to assist states developing and implementing new regulatory programs, and these funds have been sporadically reauthorized by Congress, but none involve recurring grants that could create state expectations implicating *Sebelius*'s first element. Once a state successfully implements the new program, it could have no reasonable expectations for grant renewals that could trigger further scrutiny under *Sebelius*.

<u>Surface Mining Control and Reclamation Act (SMCRA)</u>. SMCRA prevents water pollution, soil erosion, ecological destruction, and social and economic disruption as a result of surface mining.[166] States may implement their own regulatory programs or submit to federal regulation.[167] The Act further authorizes cooperative agreements with states to enable state regulation of surface coal mining and reclamation operations on federal lands within the state.[168] The Act provides for discretionary grants to assist states in developing, administering and enforcing state programs, but grants cease after a state becomes fully certified to regulate.[169] Because grants are designed to end after a temporary start-up period, states cannot form reasonable expectations of a long-term funding partnership that could implicate *Sebelius*.[170]

164. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as part of the Solid Waste Disposal Act, 42 U.S.C. §§ 6901–6992 (2013)). *See also* 42 U.S.C. § 6901(a)(4) (explicitly noting that improper disposal of hazardous substances affects interstate commerce).

165. EPA, *Authorizing States to Implement RCRA*, *in* RCRA ORIENTATION MANUAL 2011, *at* III-133, III-134 (2011), www.epa.gov/osw/inforesources/pubs/orientat/rom311.pdf ("As of August 2008, all states, with the exception of Alaska and Iowa, are authorized to implement the RCRA hazardous waste program.").

166. Surface Mining Control and Reclamation Act of 1977, Pub. L. 95-87, 91 Stat. 445 (1977) (codified as amended at 30 U.S.C. §§ 1201–1328 (2013)).

167. *See id.* §§ 1253, 1254 (describing the state and federal programs for regulating surface coal mining and reclamation operations).

168. *Id.* § 1273.

169. *Id.* § 1295; OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT, *Regulatory Programs Overview*, *in* FEDERAL ASSISTANCE MANUAL (2010), http://www.osmre.gov/lrg/fam/5-100.pdf; *Basics of SMCRA Title IV*, W. PA. COAL. FOR ABANDONED MINE RECLAMATION (May 2007), http://www.wpcamr.org/projects/smcra_reauth/TitleIV%20Basics.pdf.

170. SMCRA is also authorized under the Commerce Clause, as recognized in United States v. Lopez, 514 U.S. 549, 559 (1995) (citing Hodel v. Va. Surface

C. *Spending Partnerships with Small Recurring Grants: Triggers First Element Only*

Coastal Zone Management Act (CZMA). The CZMA is a voluntary program of cooperative federalism fully structured as a spending-power partnership, designed to protect coastal resources from interregional development pressure.[171] The CZMA offers four different kinds of federal funding to encourage states to create coastal management plans: § 306 administrative grants, § 309 enhancement grants, § 6217 nonpoint pollution control grants, and § 315 estuarine research reserve grants.[172]

Administrative grants are ongoing grants,[173] potentially implicating the first element of *Sebelius.* But as they typically fall far shy of even the *Dole* threshold of size-related safety, they are unlikely to reach the threshold of coercive size. In fiscal year 2012, a mere $65.9 million was allocated toward all coastal management programs.[174] This figure encompasses more than just the recurring administrative grants, but even if all of such funding were to trigger *Sebelius* scrutiny (and even unadjusted for inflation), it still amounts to a small fraction of the $614 million *Dole* threshold, which tops $1 billion in today's dollars.[175]

Clean Water Act State Revolving Fund. The Clean Water Act, the comprehensive water-quality statute that includes the NPDES permitting program discussed previously,[176] also includes various provisions authorizing federal grants to

---

Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 282 (1981)).

171. Coastal Zone Management Act of 1972, Pub. L. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451–1466 (2013)). The CZMA was enacted pursuant to Congress's commerce power. *See* Winter v. Natural Resources Def. Council, Inc., 555 U.S. 7, 18 (2008) (discussing the president's authority to grant exemptions from the CZMA, and quoting 16 U.S.C. § 1456(c)(1)(B)).

172. 16 U.S.C. §§ 1455 (administrative grants), 1456b (enhancement grants), 1455b (nonpoint pollution control grants), 1456-1 (estuarine research reserve grants).

173. 16 U.S.C. § 1455 (grants are available to coastal states for the purpose of administering a qualifying management program).

174. This figure includes not only the administrative grants but also enhancement and coastal nonpoint pollution control program grants. *FY 2012 OCRM Budget Allocations by Program*, U.S. DEP'T OF COMMERCE: NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 30, 2013), http://coastalmanagement.noaa.gov/funding/welcome.html.

175. *See supra* note 125 and accompanying graph.

176. *See supra* notes 152–56 and accompanying text.

states.[177] The most significant for purposes of *Sebelius* scrutiny are those made under the State Revolving Fund (SRF) for the purpose of distributing low-interest loans to cities and towns for infrastructure and water-quality projects.[178] 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).[179]

Grants are awarded to states to develop conservation plans, implement management programs, and to issue loans to local communities to construct treatment works.[180] Twenty-seven states have implemented programs that leverage these funds by issuing bonds secured by SRF assets, increasing the value of the federal grants to finance more projects over time.[181] Since 1987, cumulative assistance under the SRF has surpassed $69 billion.[182] 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 $155.9 million in 2013.[183]

---

177. The CWA includes fourteen categorical grant programs to states, including those to provide water pollution control program support, public water system supervision, underground water source protection, beach monitoring, and nonpoint source pollution control. U.S. ENVTL. PROT. AGENCY, NATIONAL WATER PROGRAM GUIDANCE FISCAL YEAR 2011, 49–50 (Apr. 2010), http://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100E5WU.pdf.

178. Clean Water Act, 33 U.S.C. § 1381 (2013).

179. 33 U.S.C. §§ 1382 (annual capitalization grants funding municipal projects for wastewater treatment), 1329 (nonpoint source pollution control), 1330 (watershed and estuary management).

180. *See, e.g.*, 33 U.S.C. §§ 1381 (discussing capitalization grants to the states to develop and implement conservation and management plans), 1382 (water pollution control revolving fund), 1383 (water pollution control revolving loan funds).

181. U.S. ENVTL. PROT. AGENCY, 2007 ANNUAL REPORT: CLEAN WATER STATE REVOLVING FUND PROGRAMS 11 (2007), http://water.epa.gov/grants_funding/cwsrf/upload/2008_07_29_cwfinance_cwsrf_2007-annual-report.pdf (noting that "27 states have chosen to implement leveraging approaches by issuing revenue and general obligation bonds that are secured by CWSRF assets," and that "[t]hrough leveraging, states have increased their capacity to finance important water quality projects by $20.6 billion").

182. U.S. ENVTL. PROT. AGENCY, 2008 ANNUAL REPORT: CLEAN WATER STATE REVOLVING FUND PROGRAMS 2 (2008), http://water.epa.gov/grants_funding/cwsrf/upload/2009_05_05_cwfinance_cwsrf_cwsrf_ar2008_final.pdf (noting that from its initiation in 1987 until 2008, "the CWSRF has provided $69 billion in cumulative assistance for wastewater infrastructure, nonpoint source, and estuary projects").

183. *Clean Water Act Section 319(h) Grant Funds History*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/polwaste/nps/319hhistory.cfm (last updated Oct. 9,

CWA State Revolving Fund grants are substantially larger than CZMA administrative grants. The fact that grants are made on a recurring basis clearly triggers the first "reliance" element of *Sebelius*. However, even the largest of these grants would survive scrutiny under the remaining elements, because they are still much smaller than the *Dole* standard of size-related safety—whether compared in absolute terms or as a percentage of overall state spending. The SRF 2003 figure of $238 million is far smaller than the absolute value of the *Dole* figure, especially when adjusted for inflation.[184] It also constitutes less than 0.1 percent of total state expenditures for the fiscal year,[185] half the parallel *Dole* threshold of 0.19 percent of total state expenditures in 1987.[186]

Moreover (and foreshadowing the subsequent stages of analysis), both the CZMA and SRF grants would survive scrutiny even if they exceeded the size threshold, because the federal conditions that attach to these funds are directly related to the use of the funds. States are entitled to use these funds only for qualifying coastal management and water-quality projects, respectively. Because there are no conditions tying the availability of these funds to a state's agreement to indirectly related conditions, the critical third element of a crossover condition also is missing from both spending-power partnerships.

2012) (table listing total grants for each year since 1990).

184. *Dole*'s $614 million in 1987 dollars would amount to $1.2 billion inflation-adjusted dollars in 2012. *See, e.g.*, *US Inflation Calculator*, COINNEWS MEDIA GROUP, http://www.usinflationcalculator.com (based on the consumer price index) (last visited Feb. 28, 2014).

185. According to the National Association of State Budget Officers, total state expenditures for 2003 totaled $326 billion. 2003 NAT'L ASS'N OF STATE BUDGET OFFICERS STATE EXPENDITURE REPORT 6, http://www.nasbo.org/sites/default/files/ER_2003.pdf. The 2003 SRF figure of $238 million is 0.07 percent of total state expenditures for that year. A perfect comparison to the *Dole* benchmark would require calculating a specific state's SRF grant in proportion to its specific budget, and figures could vary from this approximation. However, the 0.07 percent figure leaves a large margin for variation without exceeding the *Dole* threshold.

186. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604–05 (2012) and *supra* text accompanying note 116 (explaining the *Dole* thresholds).

D. Spending Partnerships with Large Recurring Grants: Triggers First and Second Elements

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.[187] The SDWA also 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.[188] Similar to the CWA SRF, DWSRLF annual capitalization 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.[189]

The DWSRLF provides long-term federal financing of state infrastructure through annual grants, and like the CWA SRF, it represents an entrenched spending partnership likely to trigger the *Sebelius* reliance element.[190] But in contrast to CWA funds, federal DWSRLF funding may have exceeded the clear safety zone for coercive size established in *Dole*.[191] The original statute authorized appropriations through only 2003, providing for $599 million in 1994 and $1 billion for each of the fiscal years between 1995 and 2003.[192] Total funds made

---

187. Safe Drinking Water Act § 1443, 42 U.S.C. § 300f. The Safe Drinking Water Act is premised on the Commerce Clause. *See* Nebraska v. EPA, 331 F.3d 995, 999 (D.C. Cir. 2003) ("[T]he Commerce Clause provides the constitutional authority for the [Safe Drinking Water] Act.").

188. Pub. L. 104-182, 110 Stat. 1613 (1996) (codified as 42 U.S.C.A. § 300f-j (2013)). The SDWA also includes a few other recurring 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 Grants – UIC,* U.S. ENVT'L PROT. AGENCY, http://water.epa.gov/type/groundwater/uic/Grants.cfm (last updated Oct. 17, 2013).

189. 42 U.S.C. § 300j-12 (2013).

190. *See Sebelius,* 132 S. Ct. at 2636–39 and *supra* text accompanying note 93 (explaining the *Sebelius* reliance element).

191. 42 U.S.C.A. § 300j-12(m) (2013); *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, *available at* http://water.epa.gov/grants_funding/cwsrf/upload/FY-2012-SRF-Procedures-and-Attachments.pdf (last visited Feb. 28, 2014).

192. 42 U.S.C. § 300j-12(m) (2013). The Fiscal Year 2012 Consolidated Appropriations Act sets forth implementing requirements and administration

available to the states in 2010 approached $1.4 billion[193]—still far short of Medicaid's coercive $233 billion, but now in the gray zone between that $233 billion and the $614 million/$1.2 billion held acceptable in *Dole*.[194]

The DWSRLF's $1.4 billion dollars in 2010 would have amounted to $729 million in *Dole's* 1987 inflation-adjusted dollars, exceeding the *Dole* threshold of safety in absolute terms.[195] However, as a percentage of overall state spending, 2010 DWSRLF spending still constitutes less than 0.1 percent of total state expenditures,[196] lower than the parallel *Dole* figure of 0.5 percent of South Dakota's total budget. Of course, a perfect comparison to the *Dole* benchmark would require calculating a specific state's grant in proportion to its specific budget, and figures could vary from this approximation. A state with a small overall budget but a large DWSRLF grant might see this percentage exceed 0.5 percent. Either way, we are now operating in the zone of size-related uncertainty left open after *Sebelius*.

The SDWA thus potentially triggers two of the three *Sebelius* indicators: it includes an entrenched grant program creating reliance interests by the states, and its grants might exceed the threshold for coercive size, at least if a court were to interpret that limit conservatively. Nonetheless, the program would still survive scrutiny because it lacks the third indicator—a crossover condition. Like the CZMA and CWA SRF, all funds are conditioned directly on their use within the program.[197]

---

priorities for both the Clean Water Act and Safe Drinking Water Act State Revolving Fund Programs, and it keeps the DWSRLF program current by authorizing additional appropriations. Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786, 1016–19 (2011).

193. *Final State Allotment of Drinking Water State Revolving Fund Appropriation for Fiscal Year 2010,* U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/grants_funding/dwsrf/allotments/Final-State-Allotment-of-Drinking-Water-State-Revolving-Fund-Appropriation-for-Fiscal-Year-2010.cfm.

194. *See supra* note 125 and accompanying graph.

195. *See, e.g.,* U.S. INFLATION CALCULATOR, COINNEWS MEDIA GROUP LLC, http://www.usinflationcalculator.com (based on the consumer price index) (last visited Apr. 11, 2014).

196. *See* NASBO FY 2010 REPORT, *supra* note 118, at 7 (reporting that total state expenditures in 2010 were $1.6 trillion). The 2010 DWSRLF figure of $1.4 billion is 0.09 percent of the $1.6 trillion of total state expenditures for the year.

197. The SDWA includes other ongoing grant programs to states and tribes with primary enforcement for federal programs authorized under the Act, including State Public Water System Supervision Grants and State Underground

E. Spending Partnerships with Large Recurring Grants and Crossover Conditions: Triggers All Three Elements

Clean Air Act (CAA). Among all environmental laws, only the CAA approaches the potentially combustible mix of all three *Sebelius* indicators. The CAA is designed to protect and improve air quality and the stratospheric ozone layer.[198] 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.[199] Federal highway funds are among the largest federal grants to states,[200] 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 from 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."[201] Non-attainment areas are those that have not achieved the CAA's National Ambient Air Quality Standards, which define the level of air quality necessary to protect the public health and welfare.[202] The EPA maintains initial discretion about how and

Water Source Protection Grants, but their size puts them well below the *Dole* threshold of concern. *See Grants – UIC,* U.S. ENVT'L PROT. AGENCY, http://water.epa.gov/type/groundwater/uic/Grants.cfm (last updated Oct. 17, 2013).

198. Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C.A. §§ 7401–7626) (2013). The CAA is authorized by the Commerce Clause. *See* Virginia v. Browner, 80 F.3d 869, 881 (4th Cir. 1996).

199. 42 U.S.C.A. § 7509(b)(1) (2013).

200. *See supra* text accompanying note 118.

201. 42 U.S.C.A. § 7509, § 7509(b)(1)(A) (2013). ("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.A. § 7410(m); *see also* EPA Regulations on Sanctions, 40 C.F.R. § 52.30–52.32; *Clean Air Act Sanctions*, FED. HIGHWAY ADMIN., http://www.fhwa.dot.gov/environment/air_quality/highway_sanctions/#subject (last updated Nov. 6, 2013).

202. *E.g.,* 42 U.S.C.A. §§ 7511(a) (ozone), 7512 (carbon monoxide), 7513

when to apply sanctions after notice and a grace period, but the Act mandates withholding of funds if noncompliance continues beyond eighteen and twenty-four months.[203] The 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,[204] and funds for certain specified transportation projects.[205] The EPA also retains discretion to apply leniency for states that have made good-faith efforts to comply.[206]

An important detail mitigating SIP requirements and penalties is the availability of a federal alternative. A state may effectively opt out of the responsibility to prepare a SIP and effectively elect a Federal Implementation Plan (FIP), which shifts planning and implementation responsibilities to the EPA.[207] If a state declines to create a SIP, or if the EPA concludes that a submitted SIP fails to meet statutory criteria, the EPA is required to create a FIP for that state within two years.[208] The state is then alleviated of its obligation to prepare a SIP and the potential for further sanctions under § 179 is negated.[209] Nevertheless, most states prefer the autonomy of managing their own plans, and the EPA has reportedly used its potential authority to withhold transportation funds as a threat to encourage full CAA compliance.[210]

In contrast to all other environmental laws, then, the CAA

(particulate matter), and 7514 (nitrogen dioxide).

203. *Id.* § 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) shall apply until the Administrator determines that the State has come into compliance.").

204. *Id.* § 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").

205. *Id.* § 7509(b)(1)(B).

206. *Id.* § 7509(a).

207. *Id.* § 7410(c)(1).

208. *See id.*

209. Section 179 is ambiguous on this point, but the EPA has formalized this interpretation in the implementing regulations, 40 C.F.R. § 93.120 (2013), to which a reviewing court must defer. *See* Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984).

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

courts controversy because it potentially implicates all three elements of the *Sebelius* doctrine: (1) a new condition changes the terms of an entrenched spending partnership, (2) the size of the grants at issue are potentially coercive, and (3) the new offer conditions those large federal funds on compliance with indirectly related obligations.

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[211]—still short of Medicaid's monster grants, but substantially larger than the funds at issue in *Dole*, whether compared in absolute terms or as a percentage of overall state spending. Highway funds comprised nearly 4 percent of overall state spending in 2010.[212] That said, 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.[213] The total would be further lowered as other exempted programs were subtracted from withholding, but it may yet exceed *Dole*'s clear margin of safety. Notably, however, it is hard to apply real numbers in this guessing game, because while the EPA frequently warns states in noncompliance about the potential of withholding, it has only actually withheld highway funds on one occasion, and only for a small part of a state (in East Helena, Montana in 1996).[214]

211. 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. 1, 8 (2012) (citing figures from the Federal Highway Administration and the National Association of State Budget Officers). Baake notes that of the overall $62 billion, only $33 billion was eligible for withholding, reducing the absolute value and percentage of overall state spending by nearly half. *Id.*

212. *See* NASBO FY 2010 REPORT, *supra* note 118, at 7 (reporting that total state expenditures in 2010 were $1.6 trillion). The 2010 figure of $62 billion in highway funds represents 3.86 percent of the $1.6 trillion in total state expenditures for the year.

213. *See* Baake, *supra* note 211, at 8 (noting that of the $62 billion in federal highway funds, "approximately $9 billion was spent on Highway Law Enforcement and Safety, and approximately $20 billion was spent on Maintenance and Highway Services, two spending categories probably eligible for the safety exemption under Section 179").

214. *Clean Air Act Sanctions*, *Status of Sanction Clocks Under the Clean Air Act*, FED. HIGHWAY ADMIN., http://www.fhwa.dot.gov/environment/air_quality/highway_sanctions/ sanctionsclock.cfm (updated by EPA, Jan. 7, 2013); *see also* JAMES E. MCCARTHY, CONG. RESEARCH SERV., IB10004, CLEAN AIR ACT ISSUES IN

In addition to the large grants involved, the CAA condition is 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.[215] 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 germaneness requirements of *Dole*, because the use of state highways will contribute 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. At best, there is an imperfect correlation between the use of the funds and the attached condition.

Conditioning highway funds authorized under a transportation statute on a state's compliance with air-quality management obligations that go beyond transportation seems 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 United States Code.

F. Assessing the Vulnerability of the CAA's Highway Sanctions

Legal commentators have reached conflicting conclusions about potential *Sebelius* problems with the CAA sanctions. For

THE 106TH CONGRESS (2000), *available at* http://www.csa.com/discoveryguides/ern/00may/air-24.php.

215. Pub. L. No. 84-627, 70 Stat. 374 (1956).

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."[216] David Baake concludes just as certainly that the sanctions are not unconstitutionally coercive, because the funds at issue are smaller than Medicaid's by a factor of seven, and also because the penalty is so much more avoidable than the one at issue in the ACA.[217]

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 the ACA may be distinguishable in size and nuance.[218] 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,"[219] but emphasizes that the problem is not *Dole*'s germaneness inquiry but *Sebelius*'s crossover condition.[220] 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.[221]

At least one state has already experimented with 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 the EPA's new requirement that states update their SIPs with greenhouse gas regulations.[222] Under the new

216. Jonathan H. Alder, *Could the Health Care Decision Hobble the Clean Air Act?*, PERC BLOG (July 23, 2012), http://perc.org/blog/could-health-care-decision-hobble-clean-air-act.

217. Baake, *supra* note 211.

218. Bagenstos, *supra* note 86, at 917–20 (quoting Missouri v. United States, 918 F. Supp. 1320, 1333 (E.D. Mo. 1996), *vacated for lack of jurisdiction*, 109 F.3d 440 (8th Cir. 1997)).

219. *Id.* at 918 (quoting *Missouri*, 918 F. Supp. at 1333).

220. *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).

221. *Id.* at 918–19.

222. Petitioner State of Texas's Notice of Supplemental Authority, Utility Air Regulatory Group v. EPA, No. 11-1037 (D.C. Cir. July 20, 2012), http://www.eenews.net/assets/2012/07/31/document_pm_03.pdf.

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.[223] Frustrated by the consequences of an invalid SIP during this time, Texas argued that the EPA should allow a buffer period of three years before invalidating its old SIP.[224] The July 2012 filing implied that Texas would be unconstitutionally coerced otherwise, although the issue was not raised during oral argument on May 7, 2013.[225]

The court ultimately dismissed the claim and distinguished the facts from those at issue in *Sebelius*, finding that "the circumstance [sic] here are not comparable to Congress's coercive financial threat to withhold all Medicaid funds from States in the [ACA] provision challenged under the Spending Clause in *National Federation of Independent Business v. Sebelius*."[226] Though unsuccessful (and distinguishable from a pure highway fund challenge), Texas's claim nevertheless demonstrates that states unhappy with CAA requirements are seeking opportunities to make use of the new *Sebelius* doctrine.

However, *Sebelius* claims targeting SIP and highway fund sanctions must contend with a critical point that distinguishes the CAA crossover condition from the invalidated Medicaid expansion condition. In contrast to the ACA, the CAA provides states with the straightforward option to avoid all SIP-related obligations and sanctions by simply opting out of the SIP program and invoking the federal FIP alternative.[227] After all,

223. *See* 42 U.S.C. §§ 7475(a), 7477 (2013) (prohibiting construction of a "major emitting facility" without a permit that requires the proposed facility use "the best available control technology" for each pollutant subject to regulation under the Act, regardless of applicable SIP provisions).

224. Lawrence Hurley, *Texas Wastes No Time in Citing Supreme Court Health Care Ruling in Clean Air Act Litigation*, ENV'T & ENERGY PUBL'G (Aug. 1, 2012), http://eenews.net/public/Greenwire/2012/08/01/1.

225. 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).

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

227. *See, e.g.*, Richard Lazarus, *Texas Unconvincing in Clean Air Suit*, ENVTL. FORUM, Sept./Oct. 2012, at 12, http://www.law.harvard.edu/faculty/rlazarus/docs/columns/LAZARUS_FORUM_2012_SEP-OCT.pdf; Damien M. Schiff, NFIB v. Sebelius*, Coercion, and the Unconstitutional Conditions Doctrine*, SCOTUSREPORT (Aug. 6, 2012), http://www.scotusreport.com/2012/08/06/nfib-v-sebelius-coercion-and-the-unconstitutional-conditions-doctrine/; David Baake,

the premise of the *Sebelius* doctrine 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.

Consider how the facts of a pure SIP highway fund challenge would differ 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 existing highway fund partnership by opting for the EPA to directly regulate in-state polluters through a FIP.[228] In that case, the EPA becomes the author and implementer of plans to regulate pollution in the state, and sanctions against a state for noncompliance disappear.[229]

The fact that most states prefer the autonomy conferred by the SIP option over direct EPA regulation under the FIP alternative is irrelevant to the *Sebelius* coercion inquiry. The point is that states relying on recurring highway grants may continue to receive them independently from any SIP obligations by opting out of the SIP program entirely. If states decide that they prefer the regulatory control that a SIP offers over a FIP, that represents a freely bargained-for position that does not implicate *Sebelius* coercion.

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.[230] For example, in 2010, federal funding comprised 42 percent of all state expenditures on Medicaid, but

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, 6–7 (2012), http://www3.law.harvard.edu/journals/elr/2012/10/17/federalism-in-the-air-is-the-clean-air-acts-my-way-or-no-highway-provision-constitutional-after-nfib-v-sebelius/.

228. *See supra* note 209 and accompanying text.

229. *Id.*

230. *See supra* notes 116, 212 and accompanying text.

only 7.3 percent of all state transportation funding.[231] A court reviewing a *Sebelius* challenge to the highway fund sanctions could easily conclude that the funds at issue are so much smaller in size and impact than Medicaid funding that the CAA sanctions are just too small to meet the size-related coercion factor. That said, 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*.

As noted, however, the CAA provides the 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, rendering the overall force of the penalty less "coercive" in impact. 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. The 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.[232] The administrator also retains discretion not to apply the penalty if the state is making good-faith efforts to comply,[233] an option that the Court apparently considered unavailable to Secretary Sebelius regarding Medicaid sanctions.

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 may have become mooted by subsequent state expectations generated through years of experience under the existing program. If the program were

231. NASBO FY 2010 Report, *supra* note 118, at 9–10 (describing sources of state funds by expenditure category and federal fund expenditures).

232. 42 U.S.C. § 7509(b)(1)(A) (2013) ("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." (emphasis added)).

233. 42 U.S.C.A. § 7509(a) (2013).

later amended in some meaningful way, however, this defense could be weakened.

With all this in mind, a successful facial challenge seems extremely unlikely, because it is difficult to imagine the law proving coercive in every possible application.[234] The worst case scenario for the CAA is more likely 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.[235] That would leave the overall statutory program intact, providing relief only to the state demonstrating coercion in a particular instance.

Of course, even the threat of a successful as-applied challenge may be enough to prompt the EPA to enforce sanctions more mildly, which in turn could weaken the rigor with which states comply. In this way, *Sebelius* could meaningfully impact the way the CAA functions, even if it does not undo the current terms of the statute. Given the fact that the EPA has only enforced the sanctions one time in the history of the statute,[236] one might argue that even that kind of change would be modest—but the fact that EPA has infrequently enforced the sanctions could just as easily suggest that the threat of enforcement alone was effective. If the threat of *Sebelius* litigation served to undermine the overall culture of enforcement within the statutory partnership, it could prove devastating to the goals of the CAA.

One final point of legal analysis warrants mention here. If the CAA were challenged for exceeding the new *Sebelius* limit, it would be tempting to argue that even if the sanction did somehow violate the new spending-power limit, its terms are independently authorized under the Commerce Clause.[237]

234. 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.

235. *Cf.* Bagenstos, *supra* note 87, 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.").

236. *See supra* note 214 and accompanying text.

237. For example, the Fourth Circuit upheld the CAA against a federalism challenge in *Virginia v. Browner* in 1996, 80 F.3d 869, 881 (4th Cir. 1996), holding

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. Here, the issue is whether the federal government is impermissibly compelling state implementation of the Clean Air Act, a federal regulatory program, in violation of the Tenth Amendment. In cases like *Sweat v. Hull*[238] and *Missouri v. United States*,[239] challengers argued that the threat of sanctions unconstitutionally coerced the states to participate in the federal program, in violation of the Tenth Amendment anti-commandeering doctrine.[240] Notably, these suits failed.

However, the *Sebelius* decision alters some of this precedent.[241] 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 could have less force after *Sebelius*.

Still, the change will most likely 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 avoid the risk of sanctions entirely by opting for direct EPA regulation from a FIP. Even the landmark New Federalism anti-commandeering decision, *New York v. United States,* affirmed that the Tenth

---

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" (internal quotations omitted). 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. Md. 1968).

238. 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).

239. 918 F. Supp. 1320 (E.D. Mo. 1996) (rejecting Tenth Amendment challenge to Clean Air Act requirements for State Implementation Plans).

240. New York v. United States, 505 U.S. 144, 161 (1992).

241. *See, e.g.*, Joondeph, *supra* note 15, at 833 (discussing how *Sebelius* altered the anti-commandeering doctrine and the implication this may have on federal regulation of state and local taxation).

Amendment is satisfied when Congress presents the states with a choice of at least one constitutional alternative.[242]

IV. COOPERATIVE FEDERALISM AFTER *SEBELIUS*: CHANGING THE DYNAMICS OF STATE-FEDERAL BARGAINING

The CAA thus has good chances in court, but of course, that is not the end of *Sebelius*'s impact. In environmental law and elsewhere, *Sebelius* will be felt not in the outcomes of litigation but in the changed dynamics of state-federal bargaining. In the context of interjurisdictional governance, statutes and litigation frame the outer boundaries of a working relationship that is more wholly comprised of negotiation, consultation, and competition.[243] It is within this fabric of state-federal exchange that the most federalism-sensitive governance takes place,[244] and this is where *Sebelius* takes aim. This Part briefly considers how *Sebelius* may change the dynamics of intergovernmental bargaining between state and federal actors.

On the surface, the doctrine is designed to favor states' interests over federal interests, and at least on the surface of state-federal relations, it will do so. 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. Even setting aside the costs of litigation at a time of strained budgets, a risk-averse agency may shy away from enforcing even defensible terms just to avoid the fallout from federalism lawsuits that can easily become political lightning rods.

Indeed, we have learned from previous environmental federalism controversies that the threat of litigation—even litigation that is unlikely to be successful—can profoundly change the way that the implementing federal agencies behave, especially when the Court's ruling creates considerable

242. *New York*, 505 U.S. at 176 (1992).
243. *See generally* Ryan, *supra* note 18; RYAN, *supra* note 7, at 265–314 (both discussing negotiated federalism as a general enterprise of interjurisdictional governance).
244. *Id.*

uncertainty. For example, after two Supreme Court decisions clouded the extent of federal Clean Water Act authority to regulate wetlands, the federal agencies substantially pulled back from enforcement efforts in realms of regulatory uncertainty.[245] An 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.[246]

As a result of this shift in leverage, Congress will be more cautious in drafting laws that create spending-power partnerships, and agencies will be more hesitant in implementing them. Indeed, the 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, the 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. In addition, states may continue the trend of negotiating towards individualized waivers from more generally applicable laws, and the EPA may be more receptive.

Federal lawmaking may also shift after *Sebelius*. Assuming it withstands *Sebelius* scrutiny as I suggest above, the "FIP Model" of conditional preemption—allowing states the choice between direct federal regulation and state implementation of federal goals—is likely to become a fixture in spending-power partnerships far beyond environmental law. Indeed, one scholar intimate with the development of the ACA suggests that if the drafters could do it again, they would likely have structured some sort of federal fallback provision (like the FIP alternative) into the Medicaid expansion.[247] The FIP model

245. Rapanos v. United States, 126 S. Ct. 2208, 2252 (2006); Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173–74 (2001).

246. Charles Duhigg & Janet Roberts, *Rulings Restrict Clean Water Act, Foiling EPA*, N.Y. TIMES, Feb. 28, 2010, http://www.nytimes.com/2010/03/01/us/01water.html?emc=eta.

247. Professor Sara Rosenbaum, email correspondence of April 7, 2014 (on file with author); *see also* Sara Rosenbaum, *Open Exchanges to the Poor in States that Opt Out of Medicaid*, ROLL CALL (July 26, 2013), *available at* http://www.rollcall.com/news/open_exchanges_to_the_poor_in_states_that_opt_out_of_medicaid_commentary-226677-1.html. Professor Rosenbaum teaches at the Milken Institute School of Public Health at George Washington University.

will protect the core constitutional concern of the *Sebelius* doctrine, which is to preserve genuine state choice (although, as in the case of the CAA, some states may well dislike both alternatives).

Another feature for export from the Clean Air Act may be its model of carefully tailored, proportional sanctions, which may prove more resilient against challenges of coercion. In certain governance contexts, especially those prone to the pronounced geographical diversity that environmental management often confronts, proportional sanctions are a more equitable alternative to the all-or-nothing alternative of the Medicaid model. Indeed, even the ACA would have benefited from more formal statutory recognition for the informal sanctioning discretion that some experts claim the Secretary had all along.[248] However, proportional sanctions may reduce the overall force of sanctioning threats, which could complicate interjurisdictional governance where national uniformity rightly takes precedence over local diversity.[249]

Nevertheless, although the *Sebelius* doctrine is designed to advance state interests, the resulting changes in state-federal dynamics could also harm the interests of states. Fear of liability and uncertainty may prompt Congress to reduce or avoid state-federal partnerships in regulatory arenas where states might prefer them.[250] 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.[251] *Sebelius* is intended to enhance the

248. Interview with Professor Barbara Safriet, Portland, OR (Oct. 22, 2013). Professor Safriet was the Associate Dean for Academic Affairs and Lecturer in Health Law at Yale Law School, and she currently teaches at Lewis & Clark Law School.

249. Ryan, *supra* note 18, at 66–69 (discussing the advantages of local diversity and national uniformity in market-related regulatory contexts of motor vehicle emissions and carbon markets).

250. *Cf.* Metzger, *supra* note 14, at 87 (arguing that *Sebelius* "may carry the seeds of its own irrelevance. By cabining money and potentially making it less effective as a regulatory tool, *NFIB* may encourage a return to centralized programs and direct regulatory approaches, or—more likely—a switch to more discretionary financial incentives. Such a move to greater discretion is already well afoot in many cooperative-federalism contexts. The net result may well be a change in the form of federal measures, but little restriction on the scope of federal power.").

251. *See* Pasachoff, *supra* note 135, at 651 (concluding that *Sebelius* is unlikely to impact federal education grants 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

power of states negotiating with a formidable federal partner, but this new leverage is only meaningful to the extent the federal government remains at the bargaining table.

Justice Ginsburg flagged exactly this problem in her dissent, where she worried that the combined effect of these impacts could perversely act to limit state influence in interjurisdictional governance.[252] She warned that "[t]he alternative to conditional federal spending, it bears emphasis, is not state autonomy but state marginalization,"[253] and contrasted the history of the Medicaid spending partnership with the fully federal Medicare program:

> In 1965, Congress elected to nationalize health coverage for seniors through Medicare. It could similarly have established Medicaid as an exclusively federal program. Instead, Congress gave the States the opportunity to partner in the program's administration and development. Absent from the nationalized model, of course, is the state-level policy discretion and experimentation that is Medicaid's hallmark; undoubtedly the interests of federalism are better served when States retain a meaningful role in the implementation of a program of such importance.[254]

Indeed, the reason that all but a handful of states elect to design air quality state implementation plans under the Clean Air Act and approve water pollution discharge permits under the Clean Water Act is that they prefer the resulting autonomy and engagement to direct federal regulation by the EPA. The *Sebelius* anti-coercion doctrine is all about preserving state choice, but sometimes the state's best choice is an intergovernmental partnership. After all this, it would be a great shame (and an even greater irony) if a doctrine intended to foster state autonomy inadvertently acted to undermine it.

Moreover, *Sebelius* could harm both state and federal interests by making it more difficult for the federal government

state-federal partnerships).

252. *See supra* notes 104–05 and accompanying text (discussing this argument in her dissent).

253. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2632–33 (2012) (Ginsburg, J. dissenting).

254. *Id.*

to make adjustments to existing spending partnerships. If federal actors fear the uncertain point at which statutory amendments create independent obligations and crossover conditions, fewer changes will be made—even positive changes that might assist the ultimate beneficiaries of regulation, the American public. For example, Congress will (hopefully) learn from its experiences in the early years of the expanded Medicaid program. But as discussed earlier, will the threat of ongoing litigation—and perhaps the requirement of a third track of a state-elected Medicaid option—blunt the enthusiasm of lawmakers and agency personnel to adopt responsive reforms?[255]

Finally, the doctrine could also inhibit the kinds of integrative creativity in intergovernmental bargaining that accrues to the benefit of all parties.[256] As one former state attorney explained, the state attorney general's office often advised the legislature that the state's interests in interjurisdictional governance are best served by maintaining maximum flexibility in both directions, preserving the largest possible scope of state-federal bargaining.[257] As he noted, limiting federal discretion out of ideological opposition to federal power does not necessarily correspond to more beneficial outcomes for the state.[258]

Win-win solutions often require that both sides be enabled to bargain freely with many sources of trade, including not only tangible resources like funding, technical expertise, and other forms of governance capacity, but also intangible resources such as regulatory authority, permissions, political credit, and normative principles.[259] Because the *Sebelius* doctrine limits

255. *See supra* text following note 132 (discussing the possibility of multiple Medicaid tracks).

256. *See generally* Erin Ryan, *Zoning, Taking, & Dealing: The Problems and Promise of Bargaining in Land Use Planning,* 7 HARV. NEGOT. L. REV. 337 (2002) (analyzing the theoretical disconnect between the Supreme Court's anti-bargaining takings jurisprudence and the potential for integrative bargaining in land use planning).

257. Interview with Professor H. Jefferson Powell, former special counsel to the Attorney General for the State of North Carolina, New York, NY (Mar. 14, 2014). Professor Powell has served in a variety of state and federal positions over the years, most recently as deputy assistant attorney general in the Office of legal Counsel at the United States Department of Justice.

258. *Id.*

259. *See* RYAN, *supra* note 7, 326–38 (discussing the various sources of trade in state-federal negotiations), 356–67 (discussing expanded possibilities for

the permissible scope of state-federal bargaining in new and uncertain ways, it has the potential to hamper the creativity and flexibility of all parties in ways that could prevent state-federal bargaining from reaching the Pareto frontier.

CONCLUSION

This, then, is what environmental law looks like after *Sebelius*—and indeed, how much regulatory law is likely to appear. The foregoing analysis teases apart the elements of the new spending-power limit and applies it to a body of law with many spending-power partnerships, in order to explore its impact on cooperative federalism more generally. The analysis is useful both to understand the prospects of environmental federalism as we know it, and to explore how the new doctrine will interact with state-federal partnerships in all areas of law.

After *Sebelius*, 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 is 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 may also mitigate the frustration of states' reliance interests that drove the plurality's analysis of the ACA Medicaid expansion.

Nevertheless, the impacts of the doctrine may extend far beyond the courtroom. As the post-*SWANNC*/*Rapanos* wetland cases demonstrate, the threat of even uncertain litigation can seriously alter the norms of statutory implementation. The *Sebelius* doctrine will change the dynamics of state-federal bargaining within programs of cooperative federalism in ways

integrative bargaining in state-federal negotiations); *see also* Ryan, *supra* note 18, at 86–101, 121–34 (same).

that may surprise its architects. Some changes may favor state interests, increasing their leverage at the negotiating table and reducing the threat of sanctions for regulatory noncompliance. Others may redound to their detriment, prompting federal lawmakers to circumscribe spending-power partnerships in ways that marginalize state influence, or avoid state-federal partnerships altogether.

Meanwhile, and despite its substantial flaws, the *Sebelius* decision exposes a problem in spending-power bargaining that fairly warrants our attention: that is, how the analysis shifts when the states are not opting in or out of a cooperative-federalism program from scratch, but after having developed substantial infrastructure around a long-term partnership.

The states, like people, sometimes have to make uncomfortable choices between undesirable alternatives, and this alone should not undermine genuine consent. But admittedly, most of us build the infrastructure of our lives around agreements that will (hopefully) last longer than one fiscal year. The Chief Justice's analysis should provoke at least a little sympathy for the occasionally vulnerable position of states that have seriously invested in an ongoing federal partnership that suddenly changes.[260] (Indeed, those sympathetic to the ACA but frustrated with No Child Left Behind's impositions on dissenting states should consider how to distinguish them.)[261]

260. *Cf.* Heather K. Gerken, *Federalis(m) Society*, 36 HARV. J. L. & PUB. POL'Y 941, 946 (2013) (discussing how Chief Justice Roberts' decision represented a rough "effort to think about how to regulate the ongoing, iterative relationship between the States and the federal government when they partner."). As Professor Gerken writes, "[t]he Chief Justice wanted to ensure that the principal cannot pull the rug out from under the agent, even when the agent rebels. It may not be the right way to think about cooperative and uncooperative federalism, but it is an effort to think about it." *Id. See also* Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427, 434 (2013) (suggesting further exploration of "whether (and when) uncooperative federalism is normatively attractive," "how uncooperative federalism actually works under particular statutory schemes and how constitutional doctrine might enhance it," and "underlying motivational questions about *why* state officials would want to engage in uncooperative dissenting behavior").

261. *See, e.g.*, Sierra Fisher, *Compulsory Accountability Renders the No Child Left Behind Act Unconstitutional: The Texas Education Agency's Ultimate Tool to Ensure Its Waiver from the Department of Education*, 14 TEX. TECH ADMIN. L. J. 467, 480–81 (2013) (discussing how the Texas Education Agency may be successful in challenging the No Child Left Behind Act (NCLB) as unconstitutionally coercive because NCLB is a major alteration to a longstanding governmental program and Congress passed NCLB as a conditional spending

It is important to take bargaining consent seriously, because an awful lot of American governance really is negotiated between state and federal actors.[262] Supplanting appropriately legislative judgment with incoherent judicial rules seems like the wrong response, but perhaps the political branches can do more to address the problem. For example, to avoid coerced consent after amending an ongoing program, Congress could provide states a phase-out period to ramp down from a previous partnership without having to simultaneously ramp up to new requirements—effectively creating a COBRA policy for states voluntarily leaving a partnership.[263] This would create additional administrative challenges, but surely it would be preferable to the thicket of confusion *Sebelius* creates by allowing judicial declarations of new legislative programs for the express purpose of judicial federalism review.

While the new doctrine thus legitimately focuses our attention on matters of fairness in state-federal bargaining, it is not yet clear whether it will accomplish its greater goal. In the end, the great project of American federalism is to inform interjurisdictional governance with the appropriate balance of local and national perspectives, expertise, and values.[264] At the moment, it is hard to see how far *Sebelius* will advance that project; only time will tell. In the meanwhile, we can at least hope that it won't hold us back.

program).

262. RYAN, *supra* note 7, 265–367; *see also*, Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011); Gerken, *supra* note 260, at 946 ("But when the policymaking gods close a door, they sometimes open a window. Here, the policymaking gods have guaranteed that state officials will play a crucial role in administering a crucial federal law. They will be able to provide a source of dissent, resistance, and change for a national program that's going to matter a great deal to a great many people.").

263. *Cf.* Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986) (enabling employees a limited period in which to continue existing health insurance coverage after leaving employment).

264. *See* RYAN, *supra* note 7, xi–xxix