CLEARING THE AIR FOLLOWING *NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS*: THE CLEAN AIR ACT AND THE CONSTITUTIONALITY OF HIGHWAY SANCTIONS

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Last year, in the highly anticipated healthcare decision in National Federation of Independent Business v. Sebelius (NFIB)*, the Supreme Court ruled that the federal government cannot threaten to take away Medicaid funding from a state that refuses to participate in the expansion of Medicaid mandated by the Patient Protection and Affordable Care Act. The Court's decision was momentous since it was the first time that it found a federal conditional spending program to be unconstitutionally coercive. The Court's holding will almost certainly lead to legal challenges of federal conditional spending programs, particularly the Clean Air Act (CAA). Under section 179*

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of that statute, the federal government may impose highway fund sanctions on any state that has a deficient or incomplete State Implementation Plan.

Despite the concerns of prominent legal scholars regarding the constitutionality of section 179 following NFIB*, this Note argues that the decision does not shake the statute's constitutional underpinnings. The CAA is distinguishable in several key respects. First, the availability of a Federal Implementation Plan under the CAA provides a viable alternative to the loss of highway funds.* NFIB *is a unique case, given that a state's loss of Medicaid funds would have affected vulnerable populations, and the beneficiaries of highway funds differ in their need and dependency. Furthermore, states can turn down highway funds more easily than Medicaid funds, since states receive fewer federal dollars for highways than for Medicaid, both as a total and as a percentage. This Note also argues that states had adequate notice of the conditions imposed for receipt of highway funding, and section 179 sanctions are sufficiently related to the goals of the CAA, given the ties between transportation and air pollution, for example. Indeed, invalidation of section 179 would undermine federalism by disturbing the delicate balance of power between the federal government and states with respect to clean air protection. Thus, section 179 should survive a facial or as-applied challenge.*

INTRODUCTION

On June 28, 2012, the U.S. Supreme Court issued the most anticipated opinion of the new century, *National Federation of Independent Business v. Sebelius* (*NFIB*).[1] In a divided opinion, the Court upheld the constitutionality of the individual mandate in the Patient Protection and Affordable Care Act, more commonly known as the Affordable Care Act (ACA).[2] One aspect of the ruling in the *NFIB* opinion, however, could have consequences for decades to come. The Court ruled that the federal government cannot take away all of a state's Medicaid funding if that state refuses to participate in the ACA's expansion of Medicaid.[3] According to the Court, such conditional spending is impermissibly coercive in light of the federalism principles embedded in the Constitution.[4] Because the Court had never before found a federal grant to be coercive,[5] this holding will likely embolden states to challenge conditional federal grants under the Spending Clause.[6]

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

[2] *Id.* at 2600.

[3] *Id.* at 2603-04.

[4] *See id.* at 2602.

[5] *Id.* at 2634 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[6] U.S. CONST. art. I, § 8, cl. 1.

One such challenge will likely involve the Clean Air Act (CAA),[7] the comprehensive federal law focused on air pollution abatement and control. Under section 179 of the CAA,[8] the U.S. Environmental Protection Agency (EPA) may impose highway fund sanctions on any state that has a deficient or incomplete State Implementation Plan (SIP).[9] States have already turned to *NFIB* to argue that such measures are unconstitutional. For example, in *Texas v. EPA*,[10] counsel for the State of Texas submitted a notice of supplemental authority to the U.S. Court of Appeals for the District of Columbia Circuit, contending that EPA's call to compel regulation of greenhouse gases (GHGs) is impermissibly coercive under the analysis set forth in *NFIB*.[11] More legal challenges are likely to come, given strong antiregulatory sentiment throughout the United States.[12]

Such litigation raises the question: Are the CAA's highway sanctions constitutional following *NFIB*? The question is an important one, as *NFIB* might have the effect of strengthening state power and leverage, particularly in negotiations with the federal government over air pollution regulation.[13] Given

[7] Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended in scattered sections of 42 U.S.C.). The CAA was significantly amended by the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, and the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399. Implementing regulations can be found at 40 C.F.R. pts. 50-99 (2013).

[8] Section 179 of the CAA is codified at 42 U.S.C. § 7509 (2006). For a list of which CAA sections correspond to which sections of the U.S. Code, see *Title I – Air Pollution Prevention and Control*, U.S. EPA, http://epa.gov/oar/caa/title1.html (last updated Aug. 15, 2013).

[9] 42 U.S.C. § 7509.

[10] Texas v. EPA, 726 F.3d 180 (D.C. Cir. 2013).

[11] Letter from Mark W. DeLaquil, Counsel for Petitioner State of Tex., to Mark J. Langer, Clerk, U.S. Court of Appeals for the D.C. Circuit (July 20, 2012), *available at* http://www.eenews.net/assets/2012/07/31/document_pm_03.pdf ("*NFIB* underscores the significant constitutional infirmities in EPA's SIP Call. EPA's decision to threaten states that did not forfeit their rights under the Clean Air Act to a reasonable time to revise their SIPs with a construction moratorium is no less a 'gun to the head' than Congress's threat to terminate Medicaid funding.").

[12] A recent Gallup poll found that forty-seven percent of the country has little to no trust in the federal government's ability to handle domestic problems. Lydia Saad, *More Americans Trust Government's Handling of Problems*, GALLUP (Sept. 25, 2012), http://www.gallup.com/poll/157673/americans-trust-government-handling-problems.aspx?utm_source=google&utm_medium=rss&utm_campaign=syndication. Accordingly, Members of Congress have introduced numerous bills to reverse the Obama Administration's environmental initiatives, including those related to air pollution and climate change. *See, e.g.*, S. Amend. 183 to S. 493, 112th Cong. (2011) (prohibiting EPA from regulating greenhouse gases).

[13] *See* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 920 (2013); *see also Supreme Court Review and Preview:*

that the *NFIB* opinion is relatively recent, however, academic literature currently provides few answers. Most articles analyzing the constitutionality of section 179 predate the *NFIB* opinion,[14] and thus are outdated since new challenges concerning the constitutionality of section 179 will likely turn on the arguments articulated in *NFIB*. Since *NFIB*, legal academics have published a small number of online articles and blog posts analyzing the subject in a cursory fashion, with these sources split on whether *NFIB* poses a serious threat to the CAA.[15] The emerging academic literature has instead focused on conditional spending in general[16] or on areas beyond the CAA,[17]

NFIB v. Sebelius *and* Sackett v. EPA, 42 ENVTL. L. REP. 11,091, 11,102 (2012) [hereinafter *Supreme Court Review and Preview*] (discussion among Professors Laurence H. Tribe, Professor, Harvard Law Sch., and Richard J. Lazarus, Professor, Harvard Law Sch., moderated by John C. Cruden, President, Envtl. Law Inst.).

[14] *See, e.g.*, Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377 (2005); William J. Klein, Note, *Pressure or Compulsion? Federal Highway Fund Sanctions of the Clean Air Act Amendments of 1990*, 26 RUTGERS L.J. 855 (1995); Mark A. Miller, Note, *The Clean Air Act Amendments of 1990 and an Unbridled Spending Power: Will They Survive on the Supreme Court's Road to Substantive Federalism?*, 46 CLEV. ST. L. REV. 159 (1998); Laura Rapacioli, Note, *Be Careful What You Ask for: Attacking the Constitutionality of the Clean Air Act Operating Permit Program*, 14 PACE ENVTL. L. REV. 323 (1996).

[15] *See generally* Richard Lazarus, *Texas Unconvincing in Clean Air Suit*, ENVTL. F., Sept.-Oct. 2012, at 12; David Baake, Note, *Federalism in the Air: Is the Clean Air Act's "My Way or No Highway" Provision Constitutional After* NFIB v. Sebelius*?*, 37 HARV. ENVTL. L. REV. ONLINE 1 (2012); Jonathan Adler, *Could the Health Care Decision Hobble the Clean Air Act?*, PERCOLATOR (July 23, 2012), http://percolatorblog.org/2012/07/23/could-the-health-care-decision-hobble-the-clean-air-act; Judah Lifschitz & Scott D. Burke, *How 'Obamacare' Will Affect Clean Air Act Litigation*, ELECTRIC LIGHT & POWER (Sept. 1, 2012), http://www.elp.com/articles/2012/09/how-obamacare-will-affect-clean-air-act-litigation.html; Damien M. Schiff, NFIB v. Sebelius*, Coercion, and the Unconstitutional Conditions Doctrine*, SCOTUS REP. (Aug. 6, 2012, 8:38 AM), http://www.scotusreport.com/2012/08/06/nfib-v-sebelius-coercion-and-the-unconstitutional-conditions-doctrine; Jonathan Zasloff, *Conditional Spending and the Clean Air Act*, LEGAL PLANET (June 28, 2012), http://legalplanet.wordpress.com/2012/06/28/conditional-spending-and-the-clean-air-act. A conference on this subject has also been held. *See Supreme Court Review and Preview*, *supra* note 13.

[16] *See generally* Michelle Biddulph & Dwight G. Newman, *Comparativist-Structural Approaches to Interpretation of the Post-Obamacare Spending Power*, 21 CARDOZO J. INT'L & COMP. L. 1 (2012); James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011-2012 CATO SUP. CT. REV. 67; 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 (2013); David Orentlicher, NFIB v. Sebelius*: Proportionality in the Exercise of Congressional Power*, 2013 UTAH L. REV. (forthcoming 2013); Tonja Jacobi, Strategy and Tactics in *NFIB v. Sebelius* (Aug. 20, 2012) (unpublished manuscript, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133045); Glenn H. Reynolds & Brannon P. Denning, *National Federation of Independent Business v. Sebelius*: Five Takes (Aug. 17,

and only two articles include some discussion of the CAA.[18] Thus this Note adds to the legal debate by thoroughly assessing the constitutionality of section 179 through the lens of *NFIB*.

This Note argues that section 179 can – and indeed should – survive a facial or as-applied challenge following *NFIB*. To lay the groundwork for this contention, Part I analyzes the evolution of the spending power doctrine and explains how the *NFIB* decision shaped constitutional thinking on spending. Part II focuses on the CAA, discussing how EPA sets air pollution standards, what the SIP process entails, and what kinds of sanctions are available to EPA. Part III then examines the constitutionality of section 179 following *NFIB* and argues that courts can still find highway sanctions constitutional. Specifically, the CAA offers an alternative to sanctions – namely, a Federal Implementation Plan (FIP) – and does not affect vulnerable populations. In addition, states receive fewer federal dollars for highways than Medicaid.[19] States also had adequate notice of the spending conditions, and section 179 sanctions are sufficiently related to air pollution and GHG abatement. Thus, section 179 can survive a facial or as-applied challenge, and it should survive, since striking down section 179 would undermine the balance of power between the federal government and states in the field of clean air protection.

I. EVOLUTION OF THE SPENDING POWER DOCTRINE

Article I, Section 8 of the U.S. Constitution, the "Spending Clause," states that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[20] The Supreme Court has interpreted the Spending Clause broadly, observing that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[21] In addition, the Court has recognized that Congress may condition federal grants on states' compliance "with federal statutory and administrative directives" in order to "further broad policy objectives."[22] Statutes containing conditional grants have therefore become commonplace.[23] But given concerns that such conditional

2012) (unpublished manuscript, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133669).

[17] *See generally* Eloise Pasachoff, *Conditional Spending After* NFIB v. Sebelius*: The Example of Federal Education Law*, 62 AM. U. L. REV. 577 (2013).

[18] Bagenstos, *supra* note 13, at 916-20; James R. May, *Healthcare, Environmental Law, and the Supreme Court: An Analysis Under the Commerce, Necessary and Proper, and Tax and Spending Clauses*, 43 ENVTL. L. 233, 250-53 (2013).

[19] *See infra* Part III.C (discussing dollar amounts per program).

[20] U.S. CONST. art. I, § 8, cl. 1.

[21] United States v. Butler, 297 U.S. 1, 66 (1936).

[22] Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).

[23] Examples of conditional spending, besides Medicaid and highway funding, include

grants may undermine state sovereignty through coercion, the Supreme Court has moved to articulate limits, as demonstrated in *NFIB*. A detailed examination of *NFIB* and Spending Clause precedent is a necessary first step before analyzing and distinguishing section 179 of the CAA.

A. *The Spending Power Doctrine Before* National Federation of Independent Business v. Sebelius

Steward Machine Co. v. Davis[24] was one of the first cases that recognized Congress's power to influence states through spending.[25] In *Steward*, the Court upheld a federal tax on employers that was abated if employers paid into a state unemployment plan meeting certain conditions.[26] The Court declined to find spending conditions inherently unconstitutional, but stated that "the point at which pressure turns into compulsion" is a "question of degree . . . [and] perhaps, of fact."[27] Later in *Pennhurst State School & Hospital v. Halderman*,[28] the Court confronted a case involving a state care facility that failed to comply with a condition of the Developmentally Disabled Assistance and Bill of Rights Act of 1975.[29] That Act established a federal grant program

Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.), Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2012), the Individuals with Disabilities Education Act, Pub L. No. 101-476, 104 Stat. 1142 (codified as amended in scattered sections of 20 U.S.C.), the Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504 (codified as amended at 42 U.S.C. § 300 to 300a-8), and the Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (codified as amended in scattered sections of 7 U.S.C.). Jennifer Cotner, Note, *How the Spending Clause Can Solve the Dilemma of State Sovereign Immunity from Intellectual Property Suits*, 51 DUKE L.J. 713, 726 (2001). Environmental statutes involving conditional spending include the National Pollution Discharge Elimination System permitting program, 33 U.S.C. § 1342 (2006), the Safe Drinking Water Act Underground Injection Control program, 42 U.S.C. § 300h (2006), the Resource Conservation and Recovery Act permitting program, 42 U.S.C. § 6926 (2006), and the Surface Mining Control and Reclamation Act program, 30 U.S.C. § 1235 (2006). May, *supra* note 18, at 250.

[24] Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

[25] *See id.* at 589-90 ("In like manner every rebate from a tax when 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. . . . Nothing in the case suggests the exertion of a power akin to undue influence . . . ."); *see also* Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 91 (2001).

[26] *Steward*, 301 U.S. at 585-86, 589-90.

[27] *Id.* at 550.

[28] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

[29] *Id.* at 5 ("At issue in these cases is the scope and meaning of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 . . . . [C]onditions at the Pennhurst State School and Hospital (Pennhurst), a facility for the care and treatment of the mentally retarded, violated those rights.").

to help states create programs to care for the developmentally disabled, but conditioned receipt of the federal funds upon compliance with a bill of rights.[30] The Court held that the Act did not create enforceable rights and obligations, since the state care facility did not have adequate notice that the funds were conditional.[31]

South Dakota v. Dole[32] later provided the Court's key test on spending conditions.[33] In that case, the Supreme Court upheld a federal law that conditioned a state's receipt of federal highway funding on its adoption of a minimum drinking age of twenty one.[34] The Court articulated a four-part test for determining the constitutionality of spending conditions: (1) "the exercise of the spending power must be in pursuit of 'the general welfare,'"[35] (2) Congress must "unambiguously"[36] inform states of the conditions, (3) the conditions must be related to "the federal interest in particular national projects or programs,"[37] and (4) the conditions must not violate any constitutional provision.[38] Relying on *Steward*, the Court also articulated a separate limitation: the conditions cannot be "so coercive as to pass the point at which 'pressure turns into compulsion.'"[39] Applying this four-part test, the Court found that the federal law at issue in *Dole* was not coercive, as South Dakota would only lose five percent of its highway funding if it chose not to raise the drinking age.[40] In the twenty-five years following *Dole*, however, courts did not apply rigorously the factors to strike down spending conditions.[41] For example, lower courts found the "relatedness" prong to be easily satisfied,[42] and judges applied the notice requirement leniently.[43]

[30] *Id.* at 11.

[31] *Id.* at 24-25.

[32] South Dakota v. Dole, 483 U.S. 203 (1987).

[33] *See id.* at 207-08; Huberfeld et al., *supra* note 16, at 50.

[34] *Dole*, 483 U.S. at 205, 211-12.

[35] *Id.* at 207 (citing Helvering v. Davis, 301 U.S. 619, 640-42 (1937); United States v. Butler, 297 U.S. 1, 65 (1936)).

[36] *Id.* (quoting *Pennhurst*, 452 U.S. at 17).

[37] *Id.* (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

[38] *Id.* at 208.

[39] *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

[40] *Id.*

[41] *See* KENNETH R. THOMAS, CONG. RESEARCH SERV., R42367, THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER *NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS* 6 (2012) ("Prior to *NFIB*, the doctrine of unconstitutional conditions had not been successfully invoked by the states.").

[42] *See, e.g.*, Kansas v. United States, 24 F. Supp. 2d 1192, 1198 (D. Kan. 1998) ("[T]he measures enacted by Congress in [the Personal Responsibility and Work Opportunity Reconciliation Act of 1996] are reasonably related to the federal interest in the national program."); Litman v. George Mason Univ., 5 F. Supp. 2d 366, 376 (E.D. Va. 1998) (finding the "relatedness" requirement easily satisfied in a Title IX gender discrimination

After *Dole*, as part of the "Federalism Revolution" led by Chief Justice William Rehnquist, the Supreme Court imposed limits on federal power through the Tenth Amendment,[44] which reserves powers not delegated to the federal government for the states.[45] The Spending Clause, however, was excluded from the Federalism Revolution, as the Court declined to recognize a Tenth Amendment limit in Spending Clause cases.[46] For example, in *New York v. United States*,[47] the Court held that a federal statute requiring states to accept low-level radioactive waste or regulate in accordance with the instructions of Congress was inconsistent with the Tenth Amendment.[48] By "commandeer[ing]"[49] states to take actions on behalf of the federal government, the statute undermined accountability, as state officials faced "the brunt of public disapproval" while federal officials remained "insulated."[50] The Court, however, recognized that conditional spending programs can serve as a permissible means for influencing state behavior.[51] Similarly, in *Printz v. United States*,[52] the Court struck down a federal law that commandeered state law enforcement officers to perform background checks on handgun buyers.[53] *Printz*, however, did not implicate the Spending Clause.

B. *The* National Federation of Independent Business v. Sebelius *Opinion*

When Congress passed the ACA, it expanded Medicaid in a number of ways. Most importantly, the ACA extended Medicaid coverage to all citizens and legal residents with incomes up to 133% of the federal poverty level.[54] The ACA also requires the federal government to pay 100% of the costs of newly eligible beneficiaries during the first three years of expansion, though this figure will be reduced to 95% in 2017 and to 90% in 2020.[55] The ACA itself does not give the federal government the power to withhold Medicaid funding

case).

[43] *See, e.g.*, Counsel v. Dow, 849 F.2d 731, 735-36 (2d Cir. 1988) (upholding retroactive attorneys' fees under the Spending Clause because Congress made retroactive applicability explicit).

[44] Huberfeld et al., *supra* note 16, at 47.

[45] U.S. CONST. amend. X.

[46] Huberfeld et al., *supra* note 16, at 47-48.

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

[48] *Id.* at 175-77 (finding that either of these options would "commandeer" states and infringe upon state sovereignty protected by the Tenth Amendment).

[49] *Id.* at 175.

[50] *Id.* at 168-69.

[51] *Id.* at 168, 171-73.

[52] Printz v. United States, 521 U.S. 898 (1997).

[53] *Id.* at 902, 935 (describing the issue and subsequently denying that there is federal power to compel states to "enact or enforce a federal regulatory program").

[54] 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (Supp. V 2011).

[55] *Id.* § 1396d(y)(1).

if a state does not comply with the expansion; such authority existed prior to the ACA. Every state is required to submit to the U.S. Health and Human Services (HHS) a State Plan detailing how the state will comply with the Medicaid Act,[56] and prior to *NFIB* the Secretary of HHS had the authority to withhold funds if a State Plan was not in compliance.[57]

In *NFIB*, however, the Court held that the federal government cannot take away all of a state's Medicaid funding if that state refuses to partake in the Medicaid expansion mandated by the ACA.[58] That portion of the *NFIB* opinion garnered the support of seven Justices, split between the plurality opinion of Chief Justice John Roberts and the dissent jointly written by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito.

The Court in *NFIB* did not settle on one single coercion analysis. The opinion of Chief Justice Roberts declined to articulate a clear-cut line for finding coercion, instead ruling that the case before it was "surely beyond [that line]."[59] The Chief Justice found that federalism provides limits on conditional spending, since it seeks to prevent the federal government from gaining too much power and infringing on the liberties of the public.[60] The Chief Justice also relied on the Court's anticommandeering cases, including *New York* and *Printz*, to argue that the same accountability concerns should prevent Congress from indirectly coercing states.[61]

The plurality opinion provided two broad reasons for finding the conditional spending obligations unconstitutionally coercive. First, the Court characterized the inducement as "a gun to the head"[62] and "economic dragooning."[63] If the federal government were to withhold Medicaid funds, a large amount of funding would be at stake,[64] as Medicaid spending constitutes over twenty percent of the average state's budget.[65] Second, the plurality wrote that the Medicaid expansion constitutes a "shift in kind, not merely degree," because the ACA transformed Medicaid from a "program to care for the neediest

[56] *See* 42 U.S.C. § 1396a (2006).

[57] *Id.* § 1396c, *invalidated by NFIB*, 132 S. Ct. 2566, 2607 (2012) ("What Congress is not free to do is to penalize States that choose not to participate in th[e] new program by taking away their existing Medicaid funding. Section 1396c gives the Secretary of Health and Human Services the authority to do just that.").

[58] *NFIB*, 132 S. Ct. at 2607.

[59] *Id.* at 2606 ("It is enough for today that wherever that line may be, this statute is surely beyond it.").

[60] *Id.* at 2602.

[61] *See id.* at 2602-03.

[62] *Id.* at 2604.

[63] *Id.* at 2605.

[64] *See id.* at 2604 ("The Federal Government estimates that it will pay out approximately $3.3 trillion between 2010 and 2019 to cover the costs of *pre*-expansion Medicaid.").

[65] *Id.* at 2604-05 (contrasting the loss of ten percent of a state's budget with the loss of five percent of highway funds in South Dakota v. Dole, 483 U.S. 203 (1987)).

among us" into a "program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level."[66] The Court likened this shift to a unilateral modification of an existing contract, where states could not "voluntarily and knowingly accept[] the terms of the contract."[67] Citing *Pennhurst*, the Justices were reluctant to find adequate notice, even though the original Medicaid law contained a clause giving Congress the "right to alter, amend, or repeal any provision."[68]

The joint dissent reasoned similarly to the plurality. The joint dissent agreed that the conditional spending was unconstitutional, echoing the Chief Justice's concerns about federalism.[69] It also argued that states did not have a meaningful choice, as Congress did not provide a "backup scheme."[70] The joint dissent emphasized the amount and percentage of funding at stake for finding the conditions coercive.[71] The dissenters also wrote that spending conditions must be "coercive in fact" to be found unconstitutional,[72] though the Justices declined to indicate where the line between inducement and coercion might be.[73] Justice Ginsburg's opinion, which upheld the constitutionality of the Medicaid expansion, challenged many of these arguments and assumptions.[74]

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[66] *Id.* at 2605-06. Justice Ginsburg described the plurality as saying that coercion exists when the federal government threatens states with "the loss of 'existing' funds from one spending program in order to induce them to opt into another program." *Id.* at 2630 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[67] *See id.* at 2602 (plurality opinion) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 2 (1981) (internal quotation marks omitted)).

[68] 42 U.S.C. § 1304 (2006).

[69] *NFIB*, 132 S. Ct. at 2659-60, 2662 (joint dissent).

[70] *Id.* at 2657.

[71] *Id.* at 2659-60, 2663.

[72] *Id.* at 2661.

[73] *Id.* at 2662.

[74] Specifically, Justice Ginsburg characterized the Court's standards as "too amorphous to be judicially administrable." *Id.* at 2641 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (internal quotation marks omitted). For example, it is unclear whether a court must look at the total number of federal dollars spent or just the percentage of a state's budget – or even which state's budget – when determining whether coercion exists. *Id.* at 2640. Justice Ginsburg's opinion also criticized the contract analogy, as Congress could achieve the results it wants simply by repealing a statute and immediately reenacting it. *See id.* at 2629. She emphasized that states had adequate notice, as Congress had expressly reserved the "'right to alter, amend, or repeal'" any Medicaid provision. *Id.* at 2630 (quoting 42 U.S.C. § 1304 (2006)). In addition, Justice Ginsburg observed that the Medicaid expansion is not a "shift in kind," as Medicaid still has the aim, as it did in the past, of helping the poor receive basic health services. *Id.* (quoting *id.* at 2605 (plurality opinion)). Instead, her opinion relied on *Dole* for analyzing the constitutional issue and finding that no coercion exists under that framework. *Id.* at 2634.

It remains to be seen how much bite *NFIB* will have. *NFIB* may change little if it is merely an extension of *Dole*. That is, *Dole* held that the federal government cannot place too much pressure on states, and the Medicaid expansion may simply be an example of that.[75] This might explain why Justices Breyer and Kagan sided with the Chief Justice, in spite of their liberal leanings.[76] It is more likely, however, that *NFIB* has changed the coercion analysis, even if it is now a more convoluted one. For example, the plurality's characterization of the Medicaid expansion as a new program arguably reshapes the relatedness factor in *Dole*.[77] In addition, the Court in *NFIB* appeared to make the amount or percentage of funds at stake an important factor under the coercion analysis.[78] But the coercion test may be a narrow one, to be applied only when there are large amounts of federal money, changed terms of participation, *and* separate programs tied into one package.[79] That is, the presence of just one of these conditions may not be enough to find coercion, as all three of these conditions were central to the Chief Justice's more narrow opinion.[80] Constitutional challenges surrounding the standards set by the Court will almost certainly arise, particularly against section 179 of the CAA.

II. IMPLEMENTATION OF THE CLEAN AIR ACT AND SECTION 179

The leading vehicle for reducing air pollution in the United States is the CAA. The CAA is an example of cooperative federalism[81] as it authorizes the federal government to establish uniform national standards related to air pollution while providing states with flexibility in how to achieve those standards.[82] The SIP process and EPA's authority to impose sanctions are important tools for achieving compliance with National Ambient Air Quality Standards (NAAQS), which set nationwide air pollution limits.[83] A thorough

[75] Professor Laurence Tribe expressed this view, for example. *See Supreme Court Review and Preview*, *supra* note 13, at 11,102.

[76] *Id.*

[77] *See* Huberfeld et al., *supra* note 16, at 55-60.

[78] *See id.* at 61-64.

[79] Bagenstos, *supra* note 13, at 866-67.

[80] *Id.* at 867; *see also* 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) (plurality opinion))).

[81] *See, e.g.*, Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 800 (2008).

[82] *Id.* at 817.

[83] *See* 42 U.S.C. § 7408(a)(2) (2006) (establishing the procedures by which nationwide air pollution limits will be set).

understanding of the statutory provisions and regulations related to SIPs, NAAQS, and section 179 is necessary to distinguish the CAA in the post-*NFIB* era.

A. *State Implementation Plans*

Congress enacted the CAA to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[84] The CAA gives EPA the authority to determine which air pollutants are reasonably anticipated to "endanger public health or welfare."[85] The CAA does not specify how EPA must determine whether an air pollutant endangers public health and welfare.[86] EPA must publish air quality "criteria" that "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air."[87]

If EPA finds that an air pollutant endangers public health and welfare, it must promulgate NAAQS,[88] which specify the maximum allowable concentrations for that air pollutant, expressed in terms of concentration of pollutant in outdoor ambient areas.[89] EPA must review existing NAAQS every five years and revise them if appropriate.[90] NAAQS currently cover six criteria pollutants: sulfur dioxide, particulate matter, nitrogen oxide, carbon monoxide, ozone, and lead.[91] Each air quality control region within a state must attain and maintain the NAAQS for these six air pollutants.[92] An area is in "nonattainment" if it does not meet – or causes a nearby area to not meet – the

[84] *Id.* § 7401(b)(1).

[85] *Id.* § 7408(a)(1)(A).

[86] Richard E. Ayres & Jessica L. Olson, *Setting National Ambient Air Quality Standards*, *in* THE CLEAN AIR HANDBOOK 13, 14 (Julie R. Domike & Alec C. Zacaroli eds., 3d ed. 2011).

[87] 42 U.S.C. § 7408(a)(2).

[88] *Id.* § 7409 (describing the promulgation, purpose, and revision of NAAQS); 40 C.F.R. pt. 50 (2013) (codifying the NAAQS). Two kinds of NAAQS exist: primary NAAQS which seek to protect public health (for example, pollution's effects on humans) and secondary NAAQS which are designed to protect public welfare (for example, visibility or damage to crops or buildings). *See* 40 C.F.R. § 50.2(b) (defining the national and primary ambient air quality standards).

[89] *National Ambient Air Quality Standards (NAAQS)*, U.S. EPA, http://www.epa.gov/air/criteria.html (last updated Dec. 14, 2012).

[90] 42 U.S.C. § 7409(d)(1).

[91] 40 C.F.R. §§ 50.4-.17 (codifying the NAAQS for the six major air pollutants).

[92] 42 U.S.C. § 7407(a).

NAAQS for that pollutant,[93] while an area is in "attainment" if it meets its NAAQS for that pollutant.[94]

NAAQS are implemented through SIPs, plans developed by states that include enforceable emissions limitations for those air pollutants.[95] SIPs include timetables for compliance, plans for monitoring and analyzing ambient air and reporting data to EPA, prohibitions against significant contributions to nonattainment in other areas, programs for issuing permits, and assurances regarding adequate implementing resources.[96] SIPs must also provide for certain transportation-related measures (for example, inspection and maintenance programs).[97] In addition, following EPA's promulgation of the Tailoring Rule, which enabled regulation of GHGs from stationary sources under the Prevention of Significant Deterioration and Title V programs of the CAA,[98] EPA required that SIPs provide adequate legal authority for regulating GHGs.[99]

EPA must defer to states' particular SIPs where possible, as well as consult state and local officials when establishing NAAQS.[100] In carrying out the CAA, EPA must approve every SIP[101] and determine if a SIP is complete, both in terms of administrative information and technical support information.[102] If EPA disapproves of a SIP, either in whole or in part, or finds it to be incomplete, EPA must impose a Federal Implementation Plan (FIP) within two years to replace the SIP.[103] If EPA finds a SIP to be "substantially inadequate"

[93] *Id.* § 7407(d)(1)(A)(i).

[94] *Id.* § 7407(d)(1)(A)(ii).

[95] *Id.* § 7410.

[96] *Id.* § 7410(a)(2).

[97] Monica Derbes Gibson, *Transportation and Conformity Requirements in State Implementation Plans*, *in* THE CLEAN AIR HANDBOOK, *supra* note 86, at 79, 80-86.

[98] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

[99] 42 U.S.C. § 7410(a)(2)(E)-(G); *see also* Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77,698, 77,698 (Dec. 13, 2010) (to be codified at 40 C.F.R. pt. 52) (stating that the SIPs for various states were insufficient due to failure to apply the Prevention of Significant Deterioration requirements to GHG-emitting sources).

[100] *See* Exec. Order No. 13,132, 3 C.F.R. 206, 207 (2000) (requiring federal agencies to take federalism principles into account when "formulating and implementing policies that have federalism implications"); *id.* at 208 (discussing state implementation of federal laws and directing agencies to defer to a state's standards and consult state and local officials if establishing uniform national standards).

[101] 42 U.S.C. § 7410(a)(2)(M)(B).

[102] 40 C.F.R. pt. 51, app. V (2013).

[103] 42 U.S.C. § 7410(c)(1).

for attaining NAAQS, preventing against interstate pollution transport, or complying with the CAA, the agency may require the state to revise its SIP.[104]

B. *Sanctions*

Section 179 of the CAA directs EPA to impose automatic sanctions if the agency determines that a state failed to submit a required SIP or revision, if EPA disapproves a SIP, or if EPA finds that a SIP is not being implemented.[105] Section 179 includes two kinds of mandatory sanctions. The first includes highway sanctions that specifically prohibit the U.S. Department of Transportation from approving any projects or providing grants for projects funded under Title 23 of the U.S. Code.[106] The sanctions apply to a variety of funding programs, including the Surface Transportation Program, the National Highway System, the Interstate Maintenance Program, and the Highway Bridge Replacement and Rehabilitation Program.[107] Section 179, however, exempts projects that have the principal purpose of improving safety.[108] In addition, section 179 exempts a variety of projects related to clean air.[109]

The second kind includes offset sanctions that require each ton of emissions from new or modified major facilities under the New Source Review Program be offset by a reduction of two tons of emissions from existing sources.[110] Under its own regulations, EPA must impose offset sanctions eighteen months after finding that an area is noncompliant, and must impose both offset and

[104] *Id.* § 7410(k)(5).

[105] *Id.* § 7509.

[106] *Id.* § 7509(b)(1)(A).

[107] *Clean Air Act Sanctions*, FED. HIGHWAY ADMIN., http://www.fhwa.dot.gov/environment/air_quality/highway_sanctions/index.cfm#subject (last updated May 3, 2013).

[108] 42 U.S.C. § 7509(b)(1)(A). In defining the safety exemption, the CAA requires that the project or grant be "based on accident or other appropriate data" submitted by states and the principal purpose of the project must be "an improvement in safety to resolve a demonstrated safety problem . . . [that] likely will result in a significant reduction in, or avoidance of, accidents." *Id.*

[109] *Id.* § 7509(b)(1)(B). The following programs qualify for this exemption: (1) capital programs pertaining to public transit; (2) the building of roads or lanes for bus or high occupancy vehicle use; (3) plans to reduce vehicle emissions during employee work trips; (4) highway ramp metering, traffic signalization, and related programs that reduce congestion and net emissions; (5) certain parking facilities for multiple occupancy vehicles programs or transit operations; (6) programs to curtail vehicle use in downtown areas or areas with high emissions (for example, through road use charges, tolls, parking surcharges, vehicle restricted zones, vehicle registration programs); (7) programs for breakdown and accident scene management, nonrecurring congestion, and vehicle information systems that would reduce traffic; and (8) any other transportation programs that would improve air quality, as long as they do not encourage single occupancy vehicle capacity. *Id.* The Congestion Mitigation and Air Quality Program, however, is subject to sanctions. *Clean Air Act Sanctions*, *supra* note 107.

[110] *See* 42 U.S.C. § 7509(b)(2).

highway sanctions if the problem is uncorrected twenty-four months after the finding.[111] The sanctions remain in effect until EPA determines that the area is in compliance.[112]

EPA may also impose discretionary sanctions, which include highway and offset sanctions.[113] Unlike mandatory sanctions, which only apply to nonattainment areas, discretionary sanctions can apply statewide, but EPA may not impose them until two years after it has made a nonattainment or SIP determination.[114]

Despite the availability of sanctions, EPA has rarely imposed them.[115] For example, between the passage of the CAA Amendments of 1990 and October 1997, EPA found incomplete SIPs or rejected states' SIPs 855 times in total, but only imposed sanctions in fourteen cases.[116] As of November 6, 2013, highway and offset sanctions were in effect in only one locale,[117] and EPA stayed sanctions for four other locales in 2013.[118] Even though EPA has rarely imposed sanctions, section 179 is still likely to face legal challenges following *NFIB*, necessitating a close look at its constitutionality.

III. THE CONSTITUTIONALITY OF SECTION 179 FOLLOWING *NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS*

Following *NFIB*, some scholars have expressed concerns about the constitutionality of section 179, lending credence to Texas's arguments before the Court of Appeals for the District of Columbia. According to Professor

[111] 40 C.F.R. § 52.31(d) (2013).

[112] 42 U.S.C. § 7509(a).

[113] *Id.* § 7410(m).

[114] *See id.*; 40 C.F.R. § 52.30(b).

[115] JAMES E. MCCARTHY, CONG. RESEARCH SERV., 97-959 ENR, HIGHWAY FUND SANCTIONS FOR CLEAN AIR ACT VIOLATIONS 3 (1997).

[116] *Id.* at 3-4.

[117] *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 (last updated May 3, 2013) [hereinafter *Status of Sanction Clocks*].

[118] In January 2013, EPA stayed sanctions for Imperial County, California. Interim Final Determination to Stay Sanctions, Imperial County Air Pollution Control District, 78 Fed. Reg. 894, 894 (Jan. 7, 2013) (to be codified at 40 C.F.R. pt. 52). In August 2013, EPA finalized approval of permitting rules for the Sacramento Metro Air Quality Management District in California; this action should terminate the sanctions clock, although the final rule does not mention sanctions explicitly. Revision of Air Quality Implementation Plan; California; Sacramento Metropolitan Air Quality Management District; Stationary Source Permits, 78 Fed. Reg. 53,270, 53,270 (Aug. 29, 2013). In September 2013, EPA announced that it would reset the sanctions clock for the Placer County Air Pollution Control District and the Feather River Air Quality Management District in California. Revision of Air Quality Implementation Plan; California; Placer County Air Pollution Control District and Feather River Air Quality Management District; Stationary Source Permits, 78 Fed. Reg. 58,460, 58,461 (Sept. 24, 2013).

Jonathan Adler, section 179 is vulnerable because it ties two unrelated programs together – highways and air pollution.[119] The amount of funds subject to sanctions is arguably substantial, and changes to clean air regulations have imposed new and unanticipated conditions on states.[120] Professor Samuel Bagenstos has echoed these concerns, arguing that section 179 may be vulnerable, because it authorizes the federal government to take away funds from an entrenched program if states do not participate in a separate and independent program.[121] Section 179 will raise particular constitutional concern if the federal government withholds all federal highway funds from a state in response to stationary sources of pollution.[122]

Despite such concerns, section 179 could survive a facial or as-applied challenge. Two-to-one offset sanctions do not pose any constitutional quandaries, because they regulate private pollution sources rather than states[123] and do not involve federal grants. While highway sanctions do implicate the Spending Clause, they still can be found constitutional under *NFIB*'s coercion analysis.[124] The CAA can be meaningfully distinguished from Medicaid with regard to the availability of a backup scheme, the programs at stake, the amount of spending, the notice provided, and the relatedness between the spending and the federal conditions.[125] Thus, states can decline highway funding more easily than Medicaid funding. While no clear line exists between coercion and noncoercion following *NFIB*, section 179 should fall on the side of the latter, particularly since invalidating section 179 would do little to effectuate the goals of federalism.

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[119] Adler, *supra* note 15.

[120] *Id.*

[121] Bagenstos, *supra* note 13, at 916-18 (describing the CAA as imposing "cross-over conditions").

[122] *Id.* at 920.

[123] Virginia v. Browner, 80 F.3d 869, 882 (4th Cir. 1996).

[124] The fact that the CAA characterizes this form of encouragement as a "sanction" is irrelevant for determining the constitutionality of section 179; the inquiry focuses on functionality rather than Congress's label. *See NFIB*, 132 S. Ct. 2566, 2605 (2012) ("If the expansion is not properly viewed as a modification of the existing Medicaid program, Congress's decision to so title it is irrelevant."); Baake, *supra* note 15, at 5 n.36.

[125] This Section does not explore in depth the *Dole* factors not at stake in *NFIB* – namely, the general welfare and constitutional bar requirements. Even if courts will consider these factors in any challenge, they are easily satisfied. In *Dole*, the Court indicated that it would generally defer to the judgment of Congress with regard to the general welfare requirement. South Dakota v. Dole, 483 U.S. 203, 207 (1987). Since air pollution clearly implicates the general welfare, that requirement can be met. Furthermore, the regulation of air pollution violates no clause in the Constitution, thus satisfying the constitutional bar requirement. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473-74 (2001) (holding that EPA's authority to promulgate NAAQS does not constitute an unconstitutional delegation of legislative power).

A. *Backup Scheme*

The CAA cannot be analogized to the Medicaid expansion, as states have alternatives to following the federal government's commands. Rather than foregoing highway funding altogether, states can instead petition EPA to implement FIPs.[126] EPA enacts FIPs to replace deficient SIPs;[127] no statutory provision requires a SIP to take precedence where a state prefers a FIP.[128] While the text of section 179 is certainly ambiguous on this possibility,[129] EPA may be willing to offer FIPs to states as an alternative to either compliance or loss of highway funds.[130]

EPA demonstrated its willingness to grant a FIP with the Clean Air Interstate Rule (CAIR), which covers twenty-seven eastern states and protects downwind states from cross-border air pollution through a cap-and-trade system.[131] With the CAIR, EPA finalized a FIP to serve as a backstop and ensure timely emissions reductions in accordance with a deadline established by a consent decree.[132] EPA finalized the FIP well before the deadline for states to submit their CAIR SIPs.[133] The agency gave states the option of simply accepting the FIP, in lieu of ultimately revising their SIPs, so that states would not have to expend additional time and resources.[134] EPA imposed the

[126] Lazarus, *supra* note 15, at 12; Baake, *supra* note 15, at 6-7.

[127] *See* Cent. Ariz. Water Conservation Dist. v. EPA, 990 F.2d 1531, 1541 (9th Cir. 1993) (finding that, through a FIP, "EPA 'stands in the shoes of the defaulting State, and all of the rights and duties that would otherwise fall to the State accrue instead to EPA'" (quoting 54 Fed. Reg. 36,948, 36,952 (proposed Sept. 5, 1989) (to be codified at 40 C.F.R. § 52))).

[128] Baake, *supra* note 15, at 6 n.43 ("[T]he structure of the statute suggests that a state should not be sanctioned for failing to enact a SIP if EPA has enacted a FIP in that state.").

[129] *See* 42 U.S.C. § 7509(a) (2006) (stating that EPA shall apply sanctions "unless [a SIP] deficiency has been corrected"); Baake, *supra* note 15, at 6 n.43.

[130] *See* Rulemaking on Section 126 Petition from North Carolina to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Federal Implementation Plans, 71 Fed. Reg. 25,328, 25,339 (Apr. 28, 2006) [hereinafter Rulemaking on Section 126].

[131] *Clean Air Interstate Rule (CAIR)*, U.S. EPA, http://www.epa.gov/cair (last updated Mar. 20, 2013). The CAIR is controversial, as the U.S. Court of Appeals for the District of Columbia Circuit ruled in 2008 that the CAIR was insufficient for protecting public health. Jeremy P. Jacobs, *EPA Seeks Dismissal of Enviro Lawsuit on CAIR Memo*, E&E NEWS PM (Mar. 18, 2013), http://www.eenews.net/eenewspm/2013/03/18/archive/5?terms=cair. EPA later replaced the CAIR with the Cross-State Air Pollution Rule, but the same court tossed out the new rule in August 2012, leaving the CAIR in place. Jason Plautz, *EPA, Enviros Urge Supreme Court to Review Cross-State Rule*, GREENWIRE (Apr. 1, 2013), http://rlch.org/news/epa-enviros-urge-supreme-court-review-cross-state-rule; *see also* EME Homer City Generation L.P. v. EPA, 696 F.3d 7, 12 (D.C. Cir. 2012).

[132] Rulemaking on Section 126, 71 Fed. Reg. at 25,339; *see also* Baake, *supra* note 15, at 6 n.43.

[133] Rulemaking on Section 126, 71 Fed. Reg. at 25,339.

[134] *Id.*

FIP without any sanctions, and noted that the rule did not indicate any concerns about states complying with the CAIR.[135] EPA emphasized that a desire to provide states with flexibility guided its decision.[136] Thus, the example of CAIR underscores how EPA can finalize FIPs without finding deficient SIPs beforehand.

Although the CAA does not require EPA to impose a FIP upon petition, federal conditions do not become coercive simply because states do not know that a FIP is available.[137] Indeed, nothing in *NFIB* suggests that had the federal government been willing to completely pay for and administer the Medicaid expansion (instead of making states partially bear the costs of it after the first three years), that arrangement would have been coercive.[138] The joint dissent opinion in *NFIB* even argued that the Medicaid expansion was unconstitutional because Congress did not provide a "backup scheme."[139] Given the availability of a backup scheme in the case of the CAA, highway sanctions arguably warrant different treatment, and section 179 can survive a constitutional attack.

B. *Programs at Stake*

Medicaid and highway funding also differ in another material regard, as Medicaid provides entitlements to vulnerable populations.[140] In fiscal year 2010, total federal Medicaid outlays amounted to 68% of all Medicaid spending.[141] The federal government matches state funds, relying on Federal Medicaid Assistance Percentage calculations to determine the federal government's share of costs for every state.[142] Prior to the expansion of Medicaid, the program covered several categories of low-income beneficiaries, including: pregnant women and children under the age of six with family incomes at or below 133% of the federal poverty level (FPL), children ages six through eighteen with family incomes at or below 100% of the FPL, elderly and disabled Supplemental Security Income recipients, and parents and

[135] *Id.*

[136] *Id.* (stating that, ultimately, "the FIP will increase the options available for a State to comply with CAIR").

[137] Baake, *supra* note 15, at 7.

[138] Lazarus, *supra* note 15, at 12.

[139] *NFIB*, 132 S. Ct. 2566, 2657 (2012) (joint dissent); Lazarus, *supra* note 15, at 12.

[140] For a brief discussion distinguishing Medicaid from the CAA due to entitlements, see Jonathan Zasloff, *Conditional Spending and the Clean Air Act*, LEGAL PLANET (June 28, 2012), http://legalplanet.wordpress.com/2012/06/28/conditional-spending-and-the-clean-air-act. That piece, however, missed the human aspect of the problem.

[141] OFFICE OF THE ACTUARY, CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS., 2011 ACTUARIAL REPORT ON THE FINANCIAL OUTLOOK FOR MEDICAID, at i (2011), *available at* https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/downloads/MedicaidReport2011.pdf.

[142] *See* 42 U.S.C. § 1396b (2006).

caretakers meeting certain financial eligibility requirements.[143] Under federal Medicaid law, states must cover inpatient/outpatient hospital care, physician care, family planning, home health (in cases where individuals qualify for nursing care), and laboratory and x-ray services, among others.[144] In 2009, approximately sixty-two-million Americans received Medicaid benefits.[145] Thus, because a large segment of the U.S. population depends on Medicaid for basic health services, states cannot turn down Medicaid funds easily.

In contrast, federal highway spending is not an entitlement program. Federal highway dollars come from congressional authorizations and the Highway Trust Fund (the latter of which derives revenue from excise taxes on motor fuels, trucks and trailers, and truck tires; taxes on certain vehicles; and interest).[146] In recent years, the federal government has become an unreliable source of highway funding due to increased contentiousness over transportation reauthorizations[147] and dwindling funds in the Highway Trust Fund.[148] Thus, some have proposed alternatives, such as toll financing; private financing; a National Infrastructure Bank; and Transportation Infrastructure Finance and Innovation Act (TIFIA) financing where the federal government

[143] *Focus on Health Reform: A Guide to the Supreme Court's Decision on the ACA's Medicaid Expansion*, KAISER FAMILY FOUND. 2 (Aug. 2012), http://www.kff.org/healthreform/upload/8347.pdf.

[144] *Introduction to Medicaid*, CTRS. FOR MEDICARE & MEDICAID SERVS. 2, http://www.cms.gov/Outreach-and-Education/Training/CMSNationalTrainingProgram/Downloads/Medicaid-Tip-Sheet.pdf (last visited Oct. 9, 2013).

[145] *See Health Care Programs: Medicaid*, U.S. SOC. SEC. ADMIN., http://www.ssa.gov/policy/docs/statcomps/supplement/2011/8e.html (last visited Nov. 11, 2013) (listing the total number of Medicaid recipients in 2009, the latest year with available Medicaid data, as 62,458,000).

[146] *The Highway Trust Fund and Paying for Highways: Hearing Before the S. Comm. on Fin.*, 112th Cong. 4 (2011) (statement of Joseph Kile, Assistant Director for Microeconomic Studies, Congressional Budget Office), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/121xx/doc12173/05-17-highwayfunding.pdf.

[147] Transportation reauthorizations are controversial for several reasons. Some states serve as "donor states," while others are "donee states," and increased concerns over spending and earmarks have complicated the need to allocate billions of dollars to aging infrastructure. *Can Congress Shift into Drive? Federal Highway Funding*, 8 CTR. FORWARD BASICS 1 (2012), *available at* http://www.center-forward.org/wp-content/uploads/2012/06/Highway-Funding.pdf.

[148] Highway Trust Fund money has been falling due to fewer vehicle miles traveled (for example, higher fuel economy standards, greater availability of hybrid vehicles), sluggish economic growth (for example, weakened demand for freight shipments, reduced work-related driving), and stagnant motor fuel taxes that have not kept pace with inflation. ROBERT S. KIRK & WILLIAM J. MALLETT, CONG. RESEARCH SERV., R42877, FUNDING AND FINANCING HIGHWAYS AND PUBLIC TRANSPORTATION 1, 3 (2012), *available at* https://www.fas.org/sgp/crs/misc/R42877.pdf.

provides secured loans, loan guarantees, and lines of credit.[149] Furthermore, unlike Medicaid funds, the recipients of federal highway dollars typically consist of state and local governments and contractors, rather than indigent populations. Thus, highway construction and other highway projects are optional programs for states, as evidenced by states' ability to withstand construction delays, an all-too-common reality.[150] While budget shortfalls[151] may lead some to characterize states as another category of "needy" recipients, states' abilities to tax their own citizens and collect revenues give them greater resiliency to loss of federal funds. Although taxation is admittedly a politically unpopular choice, states have succeeded nonetheless in increasing taxes without provoking backlash at the polls.[152]

These differences make the loss of highway funds more tolerable for states than the loss of Medicaid funds. In *NFIB*, the Supreme Court hinted that the unique characteristics of Medicaid may have served as a reason for finding undue coercion. The Chief Justice wrote: "The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act. *Given the nature of the threat and the programs at issue here*, we must agree."[153] While it is not clear exactly what the Court meant, it is conceivable that the character of assistance provided by Medicaid played a role in the Chief Justices's opinion, and the differences between Medicaid and highway funding warrant different treatment of the latter in any constitutional challenge. This distinction supports the argument that section 179 is constitutional.

C. *Spending*

Another critical distinction between Medicaid and highway funding concerns the amount and percentage of funding at stake.[154] In terms of total

[149] *Id.* at 14-26 (describing a series of alternative funding strategies the federal highway program might use to meet the growing deficit).

[150] One Federal Highway Administration study found that thirty-one to fifty-five percent of all highway projects are delayed beyond the original contract time. Ralph D. Ellis, The Root Causes of Delays in Highway Construction 1 (July 25, 2002) (unpublished manuscript, available at http://www.ltrc.lsu.edu/TRB_82/TRB2003-000646.pdf).

[151] Phil Oliff et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET & POLICY PRIORITIES (June 27, 2012), http://www.cbpp.org/cms/index.cfm?fa=view&id=711 (finding that thirty-one states have projected budget shortfalls for fiscal year 2013 and that the budget gap is fifty-five billion dollars).

[152] *See States Find Ways to Raise Taxes Without Saying So*, DAILY FIN. (June 29, 2013), http://www.dailyfinance.com/2013/06/29/states-find-ways-to-raise-taxes-without-saying-so.

[153] *NFIB*, 132 S. Ct. 2566, 2603 (2012) (emphasis added). Arguably, this phrase may just be a reference to the amount and percentage of funding at stake since that analysis follows shortly after the quotation. Yet the phrase indicates that the Court might have been sensitive to the fact that Medicaid serves disadvantaged populations.

[154] Three articles provide an excellent start for calculating how much funding is a stake

dollars, states receive substantially fewer highway dollars than Medicaid dollars. Specifically, the average state receives more than four billion dollars for Medicaid every year, but only three-quarters of a billion dollars for transportation.[155] In addition, transportation funding constitutes a smaller share of states' budgets than Medicaid. Medicaid accounts for 22% of the average state's budget, but transportation accounts for less than 8% of the average state's budget.[156] Furthermore, the federal government pays for less than one-third of states' transportation funding, but pays for two-thirds of states' Medicaid funding.[157]

Even fewer federal dollars are at stake in the case of highway sanctions since funds related to safety and air quality improvement, for example, are exempt from sanctions, and only nonattainment areas are usually subject to sanctions. Little public data exist on the precise amount of funding exempted from sanctions, but the government data that do exist provides some guidance. For example, three programs that would likely qualify for safety exemptions are the Highway Safety Improvement Program,[158] the Railway-Highway Crossings Program,[159] and the Safe Routes to School Program.[160] Out of the $37.5 billion apportioned for highways in fiscal year 2012, approximately $1.5 billion went to these three programs.[161] An additional $2.6 billion went to

with highway sanctions. *See generally* Bagenstos, *supra* note 13, at 917; May, *supra* note 18, at 253; Baake, *supra* note 15, at 8. Bagenstos, however, focuses largely on transportation funding as a whole, Bagenstos, *supra* note 13, at 916-20, while May only provides one statistic. May, *supra* note 18, at 253. Baake does not explain why Maintenance and Highway Services – a seemingly broad category – would qualify for the safety exemption. This Note provides additional data.

[155] Bagenstos, *supra* note 13, at 919 (citing ROBERT S. KIRK, CONG. RESEARCH SERV., R41869, THE DONOR-DONEE STATE ISSUE IN HIGHWAY FINANCE 10-12 tbl.1 (2011); NAT'L ASS'N OF STATE BUDGET OFFICERS, FISCAL YEAR 2010 STATE EXPENDITURE REPORT 44-46, 64 tbl.38 (2011)).

[156] *Id.* In fiscal year 2010, transportation funding constituted a substantial portion of two states' budgets – 17% in Alaska and 25.9% in Utah. NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 155, at 65. This unusually high percentage was due to spending from the federal stimulus bill, the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115. *See* NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra*, at 62. In fiscal year 2011, transportation funding as a percentage of Alaska's and Utah's state budgets fell to 11.9% and 10%, respectively. *Id.* at 65.

[157] Bagenstos, *supra* note 13, at 919 (citing NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 155, at 46 fig. 16, 62 fig.18).

[158] Highway Safety Improvement Program, 23 U.S.C. § 148 (2012).

[159] Railway-Highway Crossings, 23 U.S.C. § 130.

[160] Safe Routes to School Program, Pub. L. No. 109-59, § 1401, 119 Stat. 1144, 1219 (2005).

[161] *See Revised Fiscal Year (FY) 2012 Supplementary Tables – Apportionments Pursuant to the Surface Transportation Extension Act of 2011, Part II, as Amended*, FED. HIGHWAY ADMIN. tbl.1 (Sept. 18, 2012), http://www.fhwa.dot.gov/legsregs/directives/notices/

projects such as commuter carpooling and vanpooling, guardrails, and safety rest areas, with the additional funding coming out of allocated funds for the Interstate Maintenance, National Highway System, Surface Transportation, Congestion Mitigation and Air Quality, and Recreational Trails programs.[162] Therefore, $33.4 billion (or $668 million per state) could have been subject to sanctions – a conservative estimate given that additional money would likely qualify for exemptions.[163]

Past data on sanctions also indicate that states stand to lose a smaller proportion of highway funds than Medicaid funds. For example, on August 9, 2012, the Federal Highway Administration (FHWA) announced that Imperial County, California would be sanctioned for nonattainment of particulate matter-10 standards.[164] The sanctions only impacted $54 million out of $366 million in highway funding.[165] In 2004, issues with Connecticut's motor vehicles emissions testing program threatened up to $230 million in federal highway funding, or fifty-two percent of Connecticut's annual highway funding.[166] In addition, in the 1990s, Missouri sued the federal government over sanctions that would result in the loss of $400 million in highway funding.[167] While these amounts may initially seem large, they pale in comparison with the $4.5 billion received annually by the average state for

n4510758.htm (listing, by state, the amount of federal funds apportioned to various highway programs in 2012). The Highway Safety Improvement Program received approximately $1.2 billion, the Railway-Highway Crossings Program $205 million, and the Safe Routes to School Program $168 million. *Id.*

[162] *Id.* at tbl.9. The Highway Safety Improvement Program was subtracted to avoid double counting.

[163] For example, states are afforded flexibility and can transfer highway funds to transit projects. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-19R, FLEXIBLE FUNDING CONTINUES TO PLAY A ROLE IN SUPPORTING STATE AND LOCAL TRANSPORTATION PRIORITIES 2 (2012), *available at* http://www.gao.gov/products/GAO-13-19R. Between 2007 and 2011, states transferred approximately five billion dollars to the Federal Transit Administration for transit projects. *Id.* at 3.

[164] U.S. EPA, INFORMATION SHEET: IMPERIAL COUNTY FEDERAL HIGHWAY FUNDING RESTRICTIONS 1 (2012), *available at* http://www.epa.gov/region9/air/actions/pdf/ca/imperial/imperial-funding-restrictions-EPA-FHWA-infosheet-8-6-2012.pdf.

[165] Alejandro Davila, *County Not Impacted by Federal Air Sanctions*, IMPERIAL VALLEY PRESS (Aug. 22, 2012), http://articles.ivpressonline.com/2012-08-22/imperial-county-transportation-commission_33349062.

[166] Tom Ichniowski, *Connecticut Tries to Avert Federal Highway Fund Sanctions*, ENGINEERING NEWS-REC. (Sept. 13, 2004), http://enr.construction.com/news/transportation/archives/040913.asp.

[167] Missouri v. United States, 918 F. Supp. 1320, 1333 (E.D. Mo. 1996), *vacated on jurisdictional grounds*, 109 F.3d 440 (8th Cir. 1997); *see also* Laurel Shaper Walters, *Missouri Wants to Be Shown Why It Should Accept EPA Penalties*, CHRISTIAN SCI. MONITOR (Dec. 2, 1994), http://www.csmonitor.com/1994/1202/02031.html.

Medicaid. Thus, the CAA is substantially less coercive than the Medicaid program at issue in *NFIB*.

Discretionary sanctions, however, would likely pose a greater constitutional quandary. The amount and percentage of federal dollars subject to discretionary sanctions can be substantially higher; discretionary sanctions can apply statewide, while mandatory sanctions can only apply to nonattainment areas.[168] Despite the availability of discretionary sanctions, however, EPA has instead preferred to target sanctions at nonattainment areas within a state.[169] In addition, the statutory authority to impose discretionary sanctions is found in a different section of the CAA, section 110, rather than section 179.[170] Thus, even if a court were to find discretionary sanctions unconstitutional, that provision could be severed to preserve the mandatory sanction provision under section 179.[171] Therefore, EPA can retain the ability to impose highway sanctions under section 179 regardless of any constitutional attack on the discretionary sanction provisions.

D. *Notice*

The best argument that the CAA violates the Spending Clause turns on notice, and the argument may be articulated as follows. Since the adoption of the CAA, air pollution limitations for the six criteria pollutants have grown progressively stricter.[172] Such changes have arguably imposed new conditions on states, much like unilateral modifications to contracts.[173] Even though the CAA authorizes EPA to revise NAAQS, notice of these new conditions may have been unclear, because states may not have been able to anticipate the new limitations set on criteria air pollutants. For example, since highway projects take multiple years to complete, a state may find itself forced to comply with new conditions imposed midway through a project.[174] Furthermore, EPA's decision to regulate GHGs could be said to have "radically altered states' obligations."[175] This argument presents a daunting challenge to the constitutionality of section 179.

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[168] *See* 42 U.S.C. § 7410(m) (2006); *supra* Part II.B.

[169] *See Status of Sanction Clocks*, *supra* note 117.

[170] *See* 42 U.S.C. § 7410(m).

[171] *See id.* § 7615 ("If any provision of this chapter, or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter shall not be affected thereby.").

[172] For example, when EPA set the first NAAQS for particulate matter with an aerodynamic diameter of 2.5 micrometers or less, the twenty-four-hour standard was 65 $\mu g/m^3$. National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,711 (July 18, 1997). Today, that value is 35 $\mu g/m^3$. 40 C.F.R. § 50.13 (2013).

[173] Adler, *supra* note 15.

[174] Lifschitz & Burke, *supra* note 15.

[175] Adler, *supra* note 15.

Nevertheless, a fine but critical distinction between Medicaid and the CAA weakens this argument. When the federal government expanded Medicaid, it proceeded via a new statute, the ACA. In contrast, when the federal government adopted stricter air pollution requirements, it proceeded via regulations. Thus, in modifying the ACA, Congress had virtually unlimited authority to adopt any changes within the bounds of the Constitution, but in modifying the CAA, EPA was constrained by the specific commands of the CAA's language. To illustrate, Congress reserved the "right to alter, amend, or repeal any provision" of Medicaid – a broad authority too vague to provide any useful notice.[176] In contrast, the CAA specifically gave EPA the authority to regulate pollutants that "endanger public health and welfare"[177] and regularly revise NAAQS in accordance with scientific findings[178] – a far more specific command. While EPA certainly had wide discretion within the bounds of the CAA to adopt varied policies, states cannot persuasively argue that they did not have notice that EPA had the authority to adopt stricter air pollution requirements or regulate additional air pollutants.[179] These provisions were critical components of the federal-state deal that sought to address the persistent environmental problems plaguing the country. Therefore, instead of characterizing a change made under the CAA as a unilateral modification to a contract, a better analogy might be that the CAA is like a contract between a principal and an agent, where an agent exercises significant discretion yet still remains under the control of the principal.[180] Principal-agent relationships have an element of foreseeability, since principals can establish the scope of the agent's actions in advance, even if the agent's specific actions cannot be known or anticipated at the time of the parties' agreement. Likewise, the CAA put states on notice that the federal government would adopt stricter air pollution limitations, and it is unreasonable to expect the CAA to remain "frozen in time."[181] Thus, states received sufficient notice of federal conditions related to the CAA, distinguishing it from the facts of *NFIB*.

E. *Relatedness*

Given the Court's distinction between the "old" and "new" Medicaid, *NFIB* is likely to increase judicial scrutiny over whether conditions are sufficiently

[176] 42 U.S.C. § 1304.

[177] *Id.* § 7408(a)(1)(A).

[178] *Id.* § 7408(c).

[179] *See* May, *supra* note 18, at 253.

[180] A number of scholars have pointed out the agency-principal relationship embedded in environmental policy, including the CAA. *See, e.g.*, Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1630 (2008); *see also* Todd B. Adams, *Can the "Clear Skies Initiative" Reduce the Coordination Failures in New Source Review and Cooperative Federalism Under the Clean Air Act?*, 16 TUL. ENVTL. L.J. 127, 154-55 (2002).

[181] May, *supra* note 18, at 253.

related to spending for existing programs.[182] According to Professors Adler and Bagenstos, section 179 may not withstand such scrutiny, because the CAA's requirements are separate and independent from the highway grant program.[183] For example, the CAA does not specify how states should build or maintain highways, and the CAA also does not indicate how highways are to be used.[184] Further complicating matters, section 179 provides an exemption for highway funds targeting air pollution.[185]

Nonetheless, highway funding is sufficiently related to the CAA. Criteria air pollutants regulated under the NAAQS can be attributed to exhaust from on-road vehicles.[186] Given that highway construction fosters urban sprawl and increased vehicle use,[187] the link between highway funding and air pollution is strong. Furthermore, lower courts have rejected the argument that highway funding is unrelated to the CAA, and those courts' analyses are still persuasive today. For example, after EPA found that Virginia failed to comply with Title V of the CAA (which governs operating permits for stationary sources), Virginia challenged the constitutionality of highway sanctions on the basis that they are unrelated to air pollution from *stationary* sources.[188] The Fourth Circuit held in *Virginia v. Browner* that "[t]he CAA as a whole is a comprehensive scheme to cope with the problem of air pollution from all sources. Congress may ensure that funds it allocates are not used to exacerbate the overall problem of air pollution."[189] In another challenge brought by the State of Missouri, a federal court similarly held that "Congress has stated its

[182] Huberfeld et al., *supra* note 16, at 55.

[183] Adler, *supra* note 14, at 450 ("While Congress repeatedly noted the potential environmental impacts of highway construction, none of these statutes establishes that a purpose of the federal highway programs is environmental protection."); Bagenstos, *supra* note 13, at 917-19 ("For a number of years, states and commenters have argued that the requirements imposed by the CAA are not germane to the purposes of federal highway funding.").

[184] Bagenstos, *supra* note 13, at 917-19.

[185] *See id.* at 919.

[186] On-road vehicles are responsible for nitrogen oxide, particulate matter, and carbon monoxide emissions. *Transportation Air Quality Facts and Figures*, FED. HIGHWAY ADMIN., http://www.fhwa.dot.gov/environment/air_quality/publications/fact_book/page15.cfm (last updated July 6, 2011). Ground-level ozone also forms due to chemical reactions between nitrogen oxides and volatile organic compounds emitted from cars. *Ground-Level Ozone: Basic Information*, U.S. EPA, http://www.epa.gov/glo/basic.html (last updated Nov. 1, 2012). Prior to the ban on leaded gasoline, lead emissions from vehicles were a significant problem. *See Human Health and Lead*, U.S. EPA, http://epa.gov/superfund/lead/health.htm (last updated July 19, 2013). EPA also regulates sulfur in diesel fuel. *Diesel Fuel*, U.S. EPA, http://www.epa.gov/otaq/fuels/dieselfuels/index.htm (last updated Oct. 23, 2012).

[187] *Stop Sprawl: New Research on Population, Suburban Sprawl and Smart Growth*, SIERRA CLUB, http://www.sierraclub.org/sprawl/whitepaper.asp (last visited Oct. 9, 2013).

[188] Virginia v. Browner, 80 F.3d 869, 872-73, 882 (4th Cir. 1996).

[189] *Id.* at 882.

desire that highway construction be carried out in a manner that does not contribute to air pollution."[190]

Moreover, highway sanctions are sufficiently tied to federal efforts to reduce GHGs. The transportation sector is the largest source of GHGs (even considering the electricity sector), contributing up to twenty-seven percent of U.S. GHG emissions.[191] One study found that the construction of one mile of highway increases carbon dioxide emissions by over 100,000 tons over fifty years.[192] Extending the logic of *Browner*, it is not problematic that the CAA regulates GHGs from stationary sources because GHGs from such sources contribute to the overall problem of GHG emissions. Thus, a coherent connection exists between the CAA and highway funding, and section 179 can withstand judicial scrutiny.

Given the precedential effect that an invalidation of section 179 could have on areas of the law beyond environmental protection, courts should recognize the broad and dangerous implications that striking down section 179 may have. For example, Title VI of the Civil Rights Act of 1964 forbids racial discrimination "under any program or activity receiving Federal financial assistance."[193] Title IX of the Education Amendments of 1972 contains an identical provision for sex discrimination.[194] If section 179 is invalidated, Title VI and IX could also be vulnerable to constitutional attack, since antidiscrimination is arguably unrelated to programs such as health care or education. Invalidation of Title VI and IX would be an alarming outcome, given the important role played by the federal government in safeguarding individual liberties and the difficulty in addressing persistent problems such as discrimination. Thus, courts should resist relying on the relatedness factor to completely revolutionize the spending doctrine in the wake of *NFIB*.

F. *Federalism Concerns*

In *NFIB*, the Court recognized limitations to the federal government's Spending Clause powers in order to preserve separation of powers and, thus, individual liberties.[195] Invalidating section 179, however, would frustrate, rather than further, these aims, since the CAA already achieves an appropriate balance of power between the federal government and states. If courts were to strike down highway sanctions, states would gain an undue amount of power

[190] Missouri v. United States, 918 F. Supp. 1320, 1333 (E.D. Mo. 1996), *vacated on jurisdictional grounds*, 109 F.3d 440 (8th Cir. 1997).

[191] *Transportation and Climate: Basic Information*, U.S. EPA (Sept. 19, 2012), http://www.epa.gov/otaq/climate/basicinfo.htm.

[192] CLARK WILLIAMS-DERRY, SIGHTLINE INST., INCREASES IN GREENHOUSE-GAS EMISSIONS FROM HIGHWAY-WIDENING PROJECTS 1 (2007), *available at* http://smartgrowthamerica.org/RP_docs/Sightline_widening_emissions.pdf.

[193] 42 U.S.C. § 2000d (2006).

[194] 20 U.S.C. § 1681(a) (2012).

[195] *NFIB*, 132 S. Ct. 2566, 2579, 2600 (2012).

that would harm individual liberties through environmental harms. Thus, from a normative perspective, courts should uphold the constitutionality of section 179.

If EPA could no longer impose highway sanctions, the agency would have to rely on less effective tools for implementing NAAQS – namely, FIPs. FIPs are difficult to implement because EPA must take over state permitting programs and expend additional time and resources to promulgate FIPs – a significant burden considering ongoing disputes over the federal budget and deficit.[196] Without a strong alternative like highway sanctions to encourage state compliance, EPA would have difficulty enforcing NAAQS in recalcitrant states, especially where local industries hostile to environmental regulations have substantial influence with state agencies or legislatures.[197] By refusing to achieve or maintain NAAQS, states can harm the health of not only their own citizens, but also those of other states, given the borderless nature of air pollution and global warming.[198] The problem may be especially compounded if a "race to the bottom" occurs, where states lower environmental standards to attract business in response to the federal government's inability to enforce a minimal federal standard.[199] Citizens cannot fully enjoy their fundamental liberties when states refuse to regulate air pollution and GHGs. Thus, invalidation of section 179 would make a "mockery" of cooperative federalism by "conscripting federal taxpayers into service for the recalcitrant states, thereby substituting the Articles of Confederation in [the Constitution's] stead."[200]

Challengers may seek to invalidate section 179 with the goal of correcting an alleged imbalance of power between the federal government and states. While federal regulations certainly can be costly or burdensome for some states, the CAA nonetheless achieves an appropriate division of power. The federal government only provides a floor for air pollution control, while states enjoy wide discretion in implementing and enforcing these standards. The details that states must fill in are incredibly important to state and local governance, particularly in land use and economic development.[201] In addition,

[196] For example, EPA has threatened to take over state permitting programs in those states that have refused to allow regulation of GHGs. Texas v. EPA, 726 F.3d 180, 197 (D.C. Cir. 2013).

[197] Industries are often well organized at the local level, whereas environmental groups are comparatively less organized in many cases. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1213 (1977).

[198] Air pollution and global warming can cause a host of health problems, such as pulmonary, cardiovascular, and neurological impairments. *Health Effects of Air Pollution*, U.S. EPA, http://www.epa.gov/region07/air/quality/health.htm (last updated May 7, 2013).

[199] *See, e.g.*, Stewart, *supra* note 197, at 1211-12.

[200] May, *supra* note 18, at 252.

[201] John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV.

the federal government has been quite responsive to state concerns, given the need for cooperation and the agency's hesitancy to provoke political backlash.[202] The national political process also protects states' interests, given that federal legislators frequently guard their states' interests by exerting pressure on EPA.[203] Thus, costs borne by states are not an abuse, rather, they are part of the inherent "give and take" of cooperative federalism. These arguments demonstrate that section 179 poses no threat to the balance of power, and accordingly courts should reject calls to strike down section 179 on federalism grounds.

CONCLUSION

In *NFIB*, the Chief Justice remarked, "[t]he States are separate and independent sovereigns. Sometimes they have to act like it."[204] In July 2013, the U.S. Court of Appeals for the District of Columbia Circuit took these words to heart, dismissing Texas's argument that EPA's GHG program runs afoul of *NFIB*.[205] The court found that a construction delay of up to twelve months for new major facilities would not be of the same magnitude as the cutoff of Medicaid funds in *NFIB*.[206] The court's opinion lends further credence to this Note's argument that section 179 is constitutional under the Spending Clause. The D.C. Circuit's statement, however, does not definitively put the issue to rest, since the case turned on a construction ban rather than highway fund sanctions. In addition, the D.C. Circuit only addressed the constitutional question briefly, and another circuit could potentially hear a challenge.[207] Thus, the constitutionality of section 179 continues to remain an open legal question.

As discussed in this Note, while the expansion of Medicaid may have been an example of coercion, key differences between the ACA and CAA warrant

1183, 1198 (1995).

[202] *Id.* at 1199, 1213 (recounting, for example, how EPA declined to impose discretionary sanctions on California after the Northridge earthquake).

[203] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555 (1985); Dwyer, *supra* note 201, at 1216.

[204] *NFIB*, 132 S. Ct. 2566, 2603 (2012).

[205] Texas v. EPA, 726 F.3d 180, 197 (D.C. Cir. 2013) ("[T]he circumstance[s] here are not comparable to Congress's coercive financial threat to withhold all Medicaid funds from States in the Patient Protection and Affordable Care Act provision challenged under the Spending Clause . . . .").

[206] *Id.*

[207] *See* 42 U.S.C. § 7607(b) (2006) ("[A]ny other final action of the Administrator . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit."); Virginia v. Browner, 80 F.3d 869, 872-73 (4th Cir. 1996) (finding that the Fourth Circuit had jurisdiction over claims, where Virginia challenged EPA's disapproval of its Title V permitting program and argued that the highway sanctions were unconstitutional).

different treatment for the latter. In the case of the CAA, states have an alternative to loss of funding given the availability of FIPs. Highway funds are not an entitlement received by indigent populations, and states receive substantially fewer funds for highways, both as a total amount and as a percentage of state budgets. States also had notice of many of the conditions imposed for receipt of funding, and highway funds are sufficiently related to the goals of the CAA. Thus, although questions remain regarding the application and scope of *NFIB*, the Court's new coercion analysis does not require invalidation of section 179. In addition, the CAA achieves an appropriate balance of power between the federal government and states, and invalidation of section 179 would undermine cooperative federalism by tipping the scale too far in favor of states. Therefore, in a facial or as-applied challenge, courts should find that the legal arguments supporting the constitutionality of section 179 weigh heavily in favor of upholding the CAA.