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# DOES EPA'S CLEAN POWER PLAN PROPOSAL VIOLATE THE STATES' SOVEREIGN RIGHTS?

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## Note from the Editor:

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## Related Links:

- *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units*, ENVIRONMENTAL PROTECTION AGENCY: <http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf>
- Op-ed, Michael B. Gerrard, *The Constitutional Foundation for the Clean Power Plan*, THE HILL, Mar. 19, 2015: <http://thehill.com/blogs/congress-blog/energy-environment/236185-the-constitutional-foundation-for-the-clean-power-plan>
- Rebecca Leber, *Sorry Rand Paul, Not Only Is the EPA Carbon Rule Legal, It's Mandated By Law*, THINKPROGRESS (Jun. 3, 2014): <http://thinkprogress.org/climate/2014/06/03/3444598/sorry-rand-paul-epa-climate-rule/>

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Congress's statement of policy in the Clean Air Act that "air pollution control at its source is the primary responsibility of States and local governments" is not merely hortatory.<sup>1</sup> It reflects both the practical reality of and constitutional limitations on federal regulation of air quality. The practical reality is that the federal government relies on the states both for the detailed policymaking necessary to achieve national goals on a state-by-state basis and for the implementation and enforcement of pollution-control programs with respect to particular sources. But, no matter its reliance, the federal government is forbidden from commandeering the states or their officials to carry out federal law, from coercing them to do so, and from invading the states' own powers. The Clean Air Act resolves this tension through a system of "cooperative federalism" that gives states the opportunity to regulate in accordance with federal goals and provides for direct federal regulation as a backstop should they fail to do so. This accommodation allows the federal government to enlist the states' assistance in achieving federal goals without exceeding its authority under the Constitution.

The Environmental Protection Agency's "Clean Power Plan" (the "Proposed Rule") abandons that careful accommodation and, in so doing, violates the Tenth Amendment and principles of federalism. The Proposed Rule requires each state to submit a plan to cut carbon-dioxide emissions by a nationwide average of 30 percent by 2030. Although ostensibly directed at emissions from fossil-fuel-fired power plants, the Proposed Rule sets targets for individual states that incorporate "beyond-the-

fenceline" cuts to be achieved by increasing reliance on natural gas generation, adopting zero-emissions generation such as wind and solar, and reducing electricity demand. The goal is to phase out coal-fired power plants, which currently account for nearly 40 percent of electricity generation.

In the service of achieving EPA's policy objectives, the Proposed Rule forces each state to overhaul its energy market. Just to keep the lights on, states will have to dramatically change their energy mix, to account for the loss of coal-fired generating capacity, and to rework their regulation of energy producers, power dispatch, and transmission. This will require changes to states' legal and regulatory structures, as well as numerous regulatory actions directed at their own citizens—energy producers and consumers alike. In order to accomplish these objectives, even a state that declines to implement the Clean Power Plan will have to employ EPA's "building blocks" to prevent the Plan from wrecking the state's energy economy. And states that refuse to accede to EPA's demand to implement this new program face the specter of financial sanctions. In short, EPA's Proposed Rule forces the states to act to carry out federal policy. It is a gun to the head of the states: "Your sovereignty or your economy" is EPA's ultimate demand.

But the federal government may not "require[] the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 926 (1997). Nor may it "command state or local officials to assist in the implementation of federal law." *Id.* at 927. Nor may it employ penalties and threats to "coerce[] a State to adopt a federal regulatory system as its own." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J.).

Because it violates those cardinal rules, the Proposed Rule's directives to the states "are, in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'" *Id.* at 2592 (quotation marks omitted). The Proposed

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Rule should be withdrawn. If the rule is finalized, and if it is held to be within EPA's statutory authority, the courts would be constrained to reject it as exceeding federal power under the Constitution.

## I. BACKGROUND

### A. *The Clean Air Act and Section 111(d)*

The Clean Air Act "made the States and the Federal Government partners in the struggle against air pollution."<sup>22</sup> As to stationary sources of emissions, the Act contains several programs under which EPA sets standards, such as for the concentration of certain pollutants in ambient air, that are then implemented and administered by the states through State Implementation Plans ("SIPs") prepared by the states.<sup>3</sup> These implementation plans address, among other things, enforceable emission limitations for sources, monitoring systems, enforcement programs, adequacy of personnel and funding available to implement the plan, and consultation and participation by local political subdivisions affected by the plan.<sup>4</sup>

EPA, in turn, is required to approve state implementation plans that satisfy the requirements of the Act and applicable regulations, including standards set by EPA.<sup>5</sup> Only if a state fails to submit an implementation plan, or submits one that is deficient, may EPA directly regulate sources itself through promulgation of a Federal Implementation Plan ("FIP").

In this system, EPA is "charged by the Act with the responsibility for setting [national standards]," but "it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met" and "may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards."<sup>6</sup>

Section 111(d) implements this cooperative approach for setting "standards of performance" for certain existing stationary sources of air pollutants.<sup>7</sup> It provides for EPA to direct the states to submit plans that "establish[] standards of performance for any existing source for any air pollutant" which would be subject to an EPA-prescribed standard if emitted by a new source and that "provide[] for the implementation and enforcement of such standards of performance."<sup>8</sup> A "standard of performance" is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) [EPA] determines has been adequately demonstrated."<sup>9</sup> State plans, however, may also "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies."<sup>10</sup> Only in the event that a state "fails to submit a satisfactory plan," or fails "to enforce the provisions of such plan," may EPA step in and regulate itself by setting and enforcing standards.<sup>11</sup>

### B. *EPA's Proposed Rule*

EPA's Proposed Rule relies on the agency's Section 111(d) authority to set standards for existing fossil-fuel-fired power

plants.<sup>12</sup> It aims to reduce carbon dioxide emissions from the power sector by 30 percent by 2030, relative to 2005 levels, by requiring states to overhaul their "production, distribution and use of electricity."<sup>13</sup> States must submit state plans to achieve "emission rate-based CO<sub>2</sub> goals" that EPA has specified for each state.<sup>14</sup> These targets are based on projected emissions reductions that EPA believes can be achieved through the combination of four "building blocks":

1. Reducing the carbon intensity of generation at individual affected [power plants] through heat rate improvements.
2. Reducing emissions from the most carbon-intensive affected [power plants] in the amount that results from substituting generation at those [power plants] with generation from less carbon-intensive affected [power plants]....
3. Reducing emissions from affected [power plants] in the amount that results from substituting generation at those [power plants] with expanded low- or zero-carbon generation.
4. Reducing emissions from affected [power plants] in the amount that results from the use of demand-side energy efficiency that reduces the amount of generation required.<sup>15</sup>

In plain English, EPA's building blocks anticipate that, to meet EPA's targets, states will have to: (1) require plants to make changes to increase their efficiency in converting fuel into energy; (2) replace coal-fired generation capacity with increased use of natural gas; (3) replace fossil-fuel-fired generation capacity with nuclear and renewable sources, such as wind and solar; and (4) mandate more efficient use of energy by consumers.<sup>16</sup> These "building blocks," in one combination or another, are effectively the only ways that a state could reorganize its electric generating capacity to achieve the targets set by EPA.

EPA describes this as a "plant to plug" approach that comprehensively addresses all aspects of energy production and consumption based on "the interconnected nature of the power sector."<sup>17</sup> In this respect, unlike other emissions-control programs, EPA's Proposed Rule relies extensively on "beyond-the-fenceline" measures—that is, regulation of things other than the emissions of the sources it actually purports to regulate. This describes all but the first of EPA's building blocks.

The Proposed Rule requires states to submit implementation plans, including all necessary statutory and regulatory changes, by June 30, 2016, absent special circumstances.<sup>18</sup> Any state that does not submit an implementation plan consistent with the rule's requirements will be subject to a federal plan devised by EPA that regulates fossil fuel-fired power plants in the state.<sup>19</sup>

### C. *The Proposed Rule Requires States To Overhaul Their Energy Sectors*

Because EPA used "the combination of all four building blocks" to set state emissions targets,<sup>20</sup> those targets cannot be achieved only by employing controls at the sources ostensibly subject to Section 111(d) regulation: fossil-fuel-fired power

plants.<sup>21</sup> Accordingly, compliance with the Proposed Rule will require states to take “beyond-the-fenceline” measures that involve fundamentally restructuring their regulation and use of electricity.<sup>22</sup>

First, states will have to eke out whatever efficiency gains can be accomplished in a cost-effective manner from their existing coal-fired generation fleet. While this step may be within the existing statutory authority of state environmental regulators, feasible improvements may be few and far between, due to upgrades already implemented to comply with other regulations.<sup>23</sup> In general, states will be able to achieve improvements of only a few percentage points in emissions reduction, at most<sup>24</sup>—compared to the 30 percent, on average, that is required in total. Some upgrades could potentially trigger new source review obligations, making them economically infeasible.<sup>25</sup>

Second, states will have to revise the statutory and regulatory systems that govern dispatch among power plants to place coal-fired plants—which typically supply baseload power—at the rear of the pack.<sup>26</sup> That change, in turn, will require additional state actions to ensure that customers in certain areas relying on affected plants are not left without power or forced to bear unreasonable costs.<sup>27</sup> It will also require substantial changes to utility regulation as systems that put cost and reliability first in making dispatch determinations are reworked to consider other factors.<sup>28</sup> And in states where dispatch is controlled by federally regulated multi-state regional transmission organizations, other regulatory or inter-governmental actions will be required.<sup>29</sup>

Third, states will have to develop or incentivize zero-emissions generation, which will require state authorizing legislation and expenditures.<sup>30</sup> Developing sources such as wind and solar will inevitably implicate other environmental issues, such as endangered species protection, that states must also address, at considerable burden and expense.<sup>31</sup> They must also address how increased renewable capacity, which may fluctuate, fits into the transmission system and dispatch, as well as how such capacity will be compensated.<sup>32</sup> In states where it is not feasible to add renewable capacity, or that do not receive credit for such capacity that is exported, other measures will be required. For example, West Virginia anticipates that it “would be forced to participate in some form of interstate program that would include the states in which West Virginia-produced wind energy is sold. Such a program would require new statutory authority, significant groundwork in determining which states would participate, negotiations with those states, resources to develop interstate agreements to create an entity that would administer the interstate program, and time to create parallel regulations in each state to implement a program that would allow West Virginia to receive credit for the zero carbon emissions associated with current and future wind resources.”<sup>33</sup>

Fourth, states will have to enact programs to reduce electricity demand in an enforceable fashion, requiring legislative and regulatory action.<sup>34</sup> States with deregulated electricity markets will face particular challenges, because power plants may be independent of power distribution companies.<sup>35</sup> This may also require, in some instances, regulation of consumers of electricity, which will be a new mission for state environmental and utility regulators.<sup>36</sup>

Finally, to achieve EPA’s targets, states will inevitably have to require the idling or retirement of some coal-fired power plants and deal with the consequences of doing so.<sup>37</sup> This includes maintaining electric reliability for all customers, ensuring that plant operators are appropriately compensated, and ensuring that the financial impact on electricity consumers is acceptable.<sup>38</sup>

In sum, the Proposed Rule, if adopted as proposed or in a substantially similar form, will require states to overhaul their regulation of electricity and public utilities and to take numerous regulatory and other actions to comply with and accommodate the Proposed Rule while maintaining electric affordability and reliability. And that will be the case regardless of whether states take direct action and adopt “state plans” or whether they decline to promulgate a state plan and become subject to a federal plan—which, even if it applied only to coal-fired plants, would presumably require their retirement—due to states’ pervasive regulation of the power sector, transmission, and utilities. For no state is doing nothing an option.

## II. THE PROPOSED RULE COMMANDEERS THE STATES IN VIOLATION OF THE TENTH AMENDMENT

The Tenth Amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>39</sup> It “states but a truism that all is retained which has not been surrendered.”<sup>40</sup> But part of what has been retained is the states’ sovereign authority.<sup>41</sup> Thus, “if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”<sup>42</sup> Among the powers denied to the federal government is the power to “use the States as implements of regulation”—in other words, to commandeer them to carry out federal law.<sup>43</sup> The Proposed Rule plainly does so and is therefore *ultra vires*.

While the Commerce Clause “authorizes Congress to regulate interstate commerce directly[,] it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”<sup>44</sup> Thus, in *New York v. United States*, the Supreme Court struck down a provision of the Low-Level Radioactive Waste Policy Amendments Act that required states either to legislate to provide for the disposal of radioactive waste according to the statute or to take title to such waste and assume responsibility for its storage and disposal.<sup>45</sup>

*New York* holds that such commandeering is incompatible with the clear lines of accountability embodied in the Constitution’s vertical separation of powers. The federal government may, the Court explained, encourage state action by “attach[ing] conditions on the receipt of federal funds.”<sup>46</sup> And it may “offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation.”<sup>47</sup> In both of these instances, the state is merely “encourage[ed]...to conform to federal policy choices,” and “the residents of the State retain the ultimate decision as to whether or not the State will comply” by holding state officials accountable for making such choices.<sup>48</sup> But that accountability is undermined “where the Federal Government directs the States to regulate, [because] it may be state officials who will bear the brunt of public disapproval, while the federal officials who

devised the regulatory program may remain insulated from the electoral ramifications of their decision.”<sup>49</sup> In enacting the “take title” provision, the Court concluded, “Congress has crossed the line distinguishing encouragement from coercion.”<sup>50</sup>

It made no difference that the provision allowed “latitude” to the States in choosing how to carry out the federal directive. While a state could choose to contract with a regional disposal compact, build a disposal site itself, etc., each of these options “underscore[d] the critical alternative a State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress.”<sup>51</sup> Also irrelevant was the importance of the federal interest at stake, as well as the states’ participation in the formulation of federal policy.<sup>52</sup> After all, “State governments are neither regional offices nor administrative agencies of the Federal Government,” but sovereigns in their own right.<sup>53</sup>

*Printz v. United States* reaffirmed and extended these principles to the commandeering of state officials.<sup>54</sup> At issue was a federal statute that, although it did not command states to regulate, directed certain state law enforcement officers to conduct background checks on gun buyers and perform related tasks.<sup>55</sup> In other words, the statute directed state officials “to participate...in the administration of a federally enacted regulatory scheme.”<sup>56</sup> And that was a step too far: “Preservation of the States as independent and autonomous political entities” is unacceptably “undermined...by ‘reducing them to puppets of a ventriloquist Congress.’”<sup>57</sup> Thus, the states may not be “dragooned...into administering federal law.”<sup>58</sup>

Yet that is precisely what the Proposed Rule would do. While the Proposed Rule ostensibly applies to the industrial category of fossil-fuel-fired plants, EPA makes no pretense that compliance can be achieved through the application of a system of emission reduction, such as pollution control technology, at those sources. Instead, EPA determined that the “best system of emission reduction” is a building-block approach that includes such beyond-the-fenceline measures as dispatch, development and integration of renewable generation capacity, and regulation of power consumers.<sup>59</sup> In this way, the Proposed Rule’s reach extends well beyond the fenceline of those sources, to the states’ regulation of their power sectors.

All of these things require EPA to enlist the states and their officers. While the agency has authority to directly regulate emissions by regulated sources in lieu of a state doing so—which regulation EPA anticipates will account for only a small fraction of total reductions<sup>60</sup>—the remainder of the actions required will have to be carried out by the states and their officials. Indeed, federal law expressly recognizes states’ exclusive jurisdiction “over facilities used for the generation of electric energy[,] over facilities used in location distribution or only for the transmission of electric energy in interstate commerce, [and] over facilities for the transmission of electric energy consumed wholly by the transmitter.”<sup>61</sup> As the Supreme Court has recognized, the “economic aspects of electrical generation”—which lie at the very heart of the Proposed Rule—“have been regulated for many years and in great detail by the states.”<sup>62</sup> That includes states’ “traditional authority over the need for additional generating capacity, the type of generating facilities

to be licensed, land use, ratemaking, and the like.”<sup>63</sup> And it is “state public utility commissions or similar bodies [that] are empowered to make the initial decision regarding the need for power.”<sup>64</sup> EPA does not—and could not, under its governing statute—purport to exercise or preempt these traditional state powers.<sup>65</sup> Instead, it expects that the states will exercise them to carry out its ends.

The agency is remarkably candid on this point. It acknowledges that states’ “utility regulatory structure” will affect precisely how each complies.<sup>66</sup> It anticipates that administration of its rule will “extend federal presence into areas that, to date, largely have been the exclusive preserve of the state and, in particular, state public utility commissions and the electric utility companies they regulate,” but without entering those areas itself.<sup>67</sup> It expects that a state plan will include “public utility commission orders.”<sup>68</sup> It even recognizes that “affected entities” will include any “entity that is regulated by the state, such as an electric distribution utility, or a private or public third-party entity.”<sup>69</sup> Indeed, each state must “demonstrate that it has sufficient legal authority to subject such affected entities other than affected [power plants] to the federally enforceable requirements specified in its state plan.”<sup>70</sup> All of these things reflect EPA’s awareness that achieving its emissions targets will require far more than just emissions controls: compliance will require states to fundamentally revamp their regulation of their utility sectors and undertake a long series of regulatory actions, all at EPA’s direction.

The states have no choice in this matter. While EPA makes much of the “State Flexibilities” on offer,<sup>71</sup> what states lack, as in *New York*, is the choice to “decline to administer the federal program.”<sup>72</sup> Instead, the states are treated as “administrative agencies of the Federal Government.”<sup>73</sup> For that reason, the Proposed Rule impinges on the states’ sovereign authority and therefore, like the actions under review in *New York* and *Printz*, exceeds the federal government’s power.<sup>74</sup>

The Proposed Rule is different in kind from the sort of actions that the Supreme Court has identified as permissible ways to encourage state action: offering states the first shot at regulation, backstopped by federal preemption, and attaching conditions to the receipt of federal funds.<sup>75</sup> As to the former, EPA does not have the authority to preempt states’ regulation of their utility sectors and energy usage.<sup>76</sup> Therefore states do not have the option of leaving compliance entirely in the hands of the federal government; they must take action to carry out federal policy.<sup>77</sup>

As to financial inducement,<sup>78</sup> even states that refuse to submit implementation plans—thereby leaving the means of achieving CO<sub>2</sub> goals to EPA in a federal plan—will still be forced to either carry out any beyond-the-fenceline measures identified by EPA or to account for the disruption and dislocation caused by the imposition of impossible-to-achieve emissions limits on power plants. If EPA effectively mandates the retirement of coal-fired plants, state utility and electricity regulators will have to respond in the same way as if the state itself had ordered the retirements. Likewise, if EPA mandates the installation of massively expensive control technologies or requires measures that disrupt the output of coal-fired plants,

the states again will be left to pick up the regulatory slack. In other words, even if a state is willing to accept the consequences of declining to regulate it still does not remain free to decline to carry out aspects of the Proposed Rule—that is, to implement federal policy.<sup>79</sup> In addition, as discussed below, to the limited extent that the Proposed Rule may be regarded as imposing conditions on the receipt of federal highway funds, it is unconstitutionally coercive.

This “heads EPA wins, tails the State loses” aspect of the Proposed Rule is particularly damaging to political accountability. It will be counterintuitive, to say the least, for citizens of a state that declines to directly implement the Clean Power Plan to understand that the higher electric rates that they suffer as a result of state measures to maintain reliability are actually the consequence of EPA’s actions. To the contrary, citizens are far more likely to draw the conclusion that these negative impacts are the result of the state’s actions, which would get the chain of causation backwards.

Finally, the Proposed Rule is not the kind of regulation of state activities that the Supreme Court upheld in *South Carolina v. Baker*<sup>80</sup> and *Reno v. Condon*.<sup>81</sup> *Baker* upheld a federal statute that effectively required states to issue registered bonds.<sup>82</sup> And *Reno* upheld a federal statute restricting a state’s ability to sell drivers’ personal information without their consent.<sup>83</sup> The Court found in both cases that the laws at issue “‘regulated state activities,’ rather than ‘seeking to control or influence the manner in which States regulate private parties.’”<sup>84</sup> By contrast, the Proposed Rule does exactly what both opinions identified as impermissible: “require the [state] to enact any laws or regulations” and “require state officials to assist in the enforcement of federal statutes regulating private individuals.”<sup>85</sup> That means, as the Court recognized in *Reno*, that *New York* and *Printz* control.

In sum, the Proposed Rule violates the Tenth Amendment’s anti-commandeering doctrine and therefore exceeds the federal government’s constitutional authority.<sup>86</sup>

### III. THE PROPOSED RULE UNLAWFULLY COERCES THE STATES

Just as the federal government may not commandeer states to carry out federal policy, it also may not coerce them to the same end by denying them “a legitimate choice whether to accept the federal conditions.”<sup>87</sup> The Proposed Rule violates this anti-coercion doctrine in two respects: first, by potentially leveraging federal highway funds to coerce states into implementing a new federal regulatory program; second, by threatening to punish the citizens of states (as well as the states themselves) that do not carry out federal policy.

#### A. The Spending Clause

The Constitution empowers Congress 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.”<sup>88</sup> “Incident to this power, Congress may attach conditions on the receipt of federal funds” and thereby encourage states to carry out federal policy.<sup>89</sup> But the federal government exceeds its constitutional authority when “the financial inducement” is “so coercive as to pass the point at which pressure turns into compulsion.”<sup>90</sup>

Thus, in *NFIB v. Sebelius*, the Supreme Court severed a statutory provision that leveraged states’ existing Medicaid funding to coerce them to implement a fundamentally new program.<sup>91</sup> The Chief Justice reasoned that, when new conditions imposed by Congress on funding “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.”<sup>92</sup> That pressure becomes unconstitutional compulsion when the amount of funds at stake comprises a substantial portion of existing funding and the new conditions “accomplish[] a shift in kind, not merely degree” to the existing program<sup>93</sup>—that is, they “surpris[e] participating States with post-acceptance or ‘retroactive’ conditions.”<sup>94</sup> Thus, the Medicaid expansion constituted unconstitutional coercion because it amounted to an attempt to “conscript state agencies into the national bureaucratic army.”<sup>95</sup> The remedy was to give states the option of participating in the new program, without putting at risk their existing funding.<sup>96</sup> The Court’s reasoning has been described as establishing an “anti-leveraging principle.”<sup>97</sup>

That principle calls into question, as a general matter, the constitutionality of the Clean Air Act’s threat to withhold federal highway funding from states that fail to implement and enforce certain regulatory requirements.<sup>98</sup> The basic argument is straightforward: “Congress has told states that wish to continue participating in the entrenched and lucrative federal highway program that they can do so only if they *also* agree to participate in a separate and independent program for reducing air pollution.”<sup>99</sup>

Professor Jonathan Adler of Case Western Reserve University School of Law has spelled out the argument’s particulars:

First, the Clean Air Act conditions the receipt of money for one program (highway construction) on compliance with conditions tied to a separate program (air pollution control). This may be problematic because a majority of the Court [in *NFIB*] thought Congress was trying to leverage state reliance on funding for one program (traditional Medicaid) to induce participation in another program (the Medicaid expansion). While the money at stake under the Clean Air Act is far less—most states receive substantially less in highway funds than in Medicaid funds—highway funding is less directly related to air pollution control (particularly from stationary sources) than traditional Medicaid is to the Medicaid expansion.

Though highway funding is less than that for Medicaid, it still may be enough to raise constitutional concerns. Highway funds are raised from a dedicated revenue source in gasoline taxes and placed in the Highway Trust Fund. For many states, federal highway funds represent the lion’s share of their transportation budget. As a consequence, threatening to take highway funds may strike some courts as unduly coercive under *NFIB*...

The Court in *NFIB* also stressed that conditional grants of federal funds operate much like a contract, and that the parties are limited in their ability to unilaterally revise the terms. This could expose another vulnerability in the

Clean Air Act because while the statutory requirements don't regularly change, what states must actually do to comply with the Clean Air Act's terms do. The requirements for state pollution control plans are constantly changing, as the EPA tightens or otherwise revises federal air quality standards and additional pollutants become subject to Clean Air Act regulation. Were this not enough, the recent inclusion of greenhouse gases as pollutants subject to regulation under the Act has radically altered states' obligations, such that states will now have to do many things they could not have anticipated when the Clean Air Act was last revised in 1990.<sup>100</sup>

The Proposed Rule is particularly vulnerable under this analysis, for three reasons. First, the regulation of emissions by stationary sources—unlike, arguably, emissions by mobile sources—has absolutely nothing to do with the purposes of the highway funds program.<sup>101</sup> Regulation of dispatch, development and integration of zero-emissions generation capacity, and demand-side energy efficiency regulation are even further removed. Second, the Proposed Rule surprises states with new conditions that they never could have imagined when they chose to accept highway funds or to regulate under the Clean Air Act. Whereas prior conditions concerned the control of emissions, the Proposed Rule requires states, for the first time ever, to exercise their previously independent regulatory authority over energy resources and utilities to carry out federal policy. Third, in addition to the substantial amount of money at stake,<sup>102</sup> the Proposed Rule conditions states' continued electric reliability on states' regulatory actions to mitigate the impact of the steps necessary to achieve the rule's targets. States, of course, depend on electric reliability to carry out their core police powers, such as public safety and the basic operation of government. EPA's inducement is therefore "much more than relatively mild encouragement—it is a gun to the head."<sup>103</sup>

*NFIB* suggests that the appropriate remedy would be to sever the penalty. While the federal government may offer conditional grants to encourage states to act, what it "is not free to do is to penalize States that choose not to participate in that new program by taking away their existing [programmatic] funding."<sup>104</sup> Like the statute at issue in *NFIB*, the Clean Air Act contains a severability clause.<sup>105</sup>

Alternatively, the preamble of the Proposed Rule states EPA's view that its individual "building blocks" are severable, "such that in the event a court were to invalidate our finding with respect to any particular building block, we would find that the [standard of performance] consists of the remaining building blocks."<sup>106</sup> "Whether the offending portion of a regulation is severable depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision."<sup>107</sup> Because the courts examine these two factors independently, an agency's preference with respect to severability is not dispositive of the question.<sup>108</sup> The D.C. Circuit has declined, over an agency's entreaties, to sever a portion of a regulation where so doing would cause "loss of flexibility" (a key concern of the regulation) among regulated parties.<sup>109</sup> Elsewhere in the Proposed Rule, EPA recognizes

that "state flexibilities"—its way of referring to things other than source-level emissions controls—are essential to achieving the rule's interim and final targets.<sup>110</sup> As a result, despite EPA's stated preference to the contrary, the individual building blocks are not severable in light of the Proposed Rule's structure and requirements.<sup>111</sup> Accordingly, the Act's severability clause should govern with respect to any penalties.

Published reports of recent public remarks by the EPA Administrator suggest that EPA's current position is that it lacks authority to withhold highway funds from states that do not submit Clean Power Plan SIPs or from states whose SIPs EPA disapproves, on the basis that the Act's highway-funds penalty applies only to SIPs under the national ambient air quality standards program.<sup>112</sup> While this position is the best reading of the Clean Air Act, and may well be the only permissible reading, EPA does not appear to have made any legally binding statements that this is how it interprets the Act. And if EPA were to do so, the Agency likely would be due deference on such jurisdictional determinations,<sup>113</sup> raising the specter that not addressing the coercive aspects of the Clean Power Plan would simply do nothing more than delay the problem until the Plan is sufficiently entrenched throughout the country that the practical effects of its coercive regime would be impossible to reverse.

In sum, the Proposed Rule cannot be regarded as a proper exercise of the federal government's Spending Clause power to encourage the states to act. It is, instead, an improper attempt to leverage the states' receipt of highway funds to implement a new and surprising set of conditions and, therefore, violates the anti-coercion principle.

### *B. The Commerce Clause*

The anti-coercion rationale of *NFIB* applies equally to attempts to employ the Commerce Clause power as a "weapon of coercion, destroying or impairing the autonomy of the states."<sup>114</sup> Whether Congress is threatening to abuse its Spending Clause authority by curtailing existing funding to force states to implement a new and fundamentally different program, or threatening to impair states' sovereign prerogatives and injure their citizens if they choose not to "opt in" to a cooperative federalism program promulgated under the auspices of the Commerce Clause, the Tenth Amendment operates to prevent the federal government from acting to "conscript state [agencies] into the national bureaucratic army."<sup>115</sup>

Applying the same factors as under the Spending Clause, a Commerce Clause regulation "has crossed the line distinguishing encouragement from coercion" when it leverages an existing and substantial entitlement of the citizens of a state or the state itself on a conditional basis in order to induce the state to implement federal policy.<sup>116</sup> When, "not merely in theory but in fact," such threats amount to "economic dragooning that leaves the States with no real option but to acquiesce" to federal demands, they impermissibly "undermine the status of the States as independent sovereigns in our federal system."<sup>117</sup>

That describes the Proposed Rule. EPA has stated that, if the states decline to implement its terms, the agency will impose a federal plan that does so.<sup>118</sup> But the agency lacks authority to

carry out the actions described in its second, third, and fourth building blocks.<sup>119</sup> Thus, a federal plan would have to focus on heat-rate improvements at coal-fired facilities, and—to achieve anywhere near the 30 percent average reduction in CO<sub>2</sub> emissions targeted by EPA—would have to impose controls so burdensome that they would force plant retirements and cripple the states’ electric power systems.<sup>120</sup> The point, of course, would be to force states to pick up the slack necessary to maintain affordable and reliable electric service through “beyond-the-fenceline” measures that are beyond EPA’s authority, regardless of whether a state chooses to fix the problems that EPA has created through a state implementation plan or through other “voluntary” measures. In neither instance could it be said that the decision to adopt or reject EPA’s preferred policies “remained the prerogative of the States.”<sup>121</sup> Instead, EPA’s “inducement” “is a gun to the head,” in light of the disruption and dislocation to citizens and the state itself if EPA were to carry out its threat.<sup>122</sup>

In sum, while EPA has the authority pursuant to the Commerce Clause to directly regulate certain emissions by stationary sources, a federal plan to implement the Proposed Rule would be inevitably and inherently coercive to the states.<sup>123</sup>

#### IV. CONSTITUTIONAL AVOIDANCE

A court reviewing final action that is materially similar to EPA’s Proposed Rule could apply the doctrine of constitutional avoidance to preclude EPA from interpreting Section 111 in a way that exceeds the limits of federal power. The statutory language is not only readily amenable to such an interpretation, but is best read that way.

Out of respect for Congress, which is also bound by and swears an oath to uphold the Constitution, federal courts must construe statutes, “if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.”<sup>124</sup> Thus, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”<sup>125</sup>

Such an acceptable construction is available here. The key statutory term underlying EPA’s constitutionally suspect “building block” approach is “best system of emission reduction,” which the agency defines to include any possible “measures... to improve emission rates and to reduce or limit... emissions.”<sup>126</sup> In effect, the agency views anything relating to a source—no matter how tenuously related or far removed—as fair game for regulations that nominally apply to the source alone. Among the problems with this approach is that it brooks no limiting principle; EPA claims authority to force states to regulate anything connected to the electric system and anyone using electricity, in any way that might reduce electricity consumption. As shown above, the Proposed Rule’s constitutional infirmities are the result of its attempted centralization of the energy economy through measures that occur beyond the fenceline, in addition to more typical source-level requirements.

But EPA’s unbounded definition of “best system of emission reduction” is not the only or the best reading of the term.

The Supreme Court, viewing this language, easily recognized that it refers to “technologically feasible emission controls”—that is, emission-reduction technologies implemented at the source.<sup>127</sup> Indeed, EPA has reached the same conclusion in the context of Section 111(b) standards, which rely on the same term, explaining that that provision “assur[es] cost-effective controls are installed on new, reconstructed, or modified sources.”<sup>128</sup> This reading, limited to source-level measures, also avoids constitutional doubt, because it concerns only sources of emissions themselves, which Congress unquestionably has the authority to regulate.

Accordingly, to avoid the constitutional problems identified in this analysis, a federal court would be required to read the statutory term “best system of emission reduction” to encompass only source-level measures and would, on that basis, have to vacate EPA’s action as contrary to law.

#### V. Conclusion

What’s past is prologue, and this is not the first time that EPA has been oblivious to the constitutional limits on its authority to force the states to administer its own programs. In the mid-1970s, as the agency was still working out the terms of its relationship with the states under the Clean Air Act Amendments of 1970, it “order[ed] the states to enact statutes and to establish and administer programs to force their citizens to comply with [its] federal directive[s].”<sup>129</sup> That effort was stopped in its tracks by three decisions, in quick succession, of the courts of appeals, astonished that a federal agency would attempt to arrogate such authority to itself.<sup>130</sup> By the time the Supreme Court agreed to review the regulations, “the Government declined even to defend them, and instead rescinded some and conceded the invalidity of those that remained.”<sup>131</sup>

Since that time, the Supreme Court has been particularly attentive to overreaching by the federal government in its relationship with the states. Decisions like *New York, Printz*, and *NFIB* have recognized clear prohibitions on federal attempts to commandeer the states, to commandeer their officials, and to coerce them into action. The only constant in this changing field is that EPA has ignored these constitutional imperatives in its zeal to regulate. The best that can be said of the agency’s proposed Clean Power Plan is that, if finalized in anything like its current form, it will provide another valuable opportunity for the courts to advance the cause of federalism when they strike it down.

#### Endnotes

- 1 42 U.S.C. § 7401(a)(3).
- 2 *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990).
- 3 *See generally* 42 U.S.C. § 7410.
- 4 *See* 42 U.S.C. § 7410(a)(2)(A)–(M).
- 5 *Train v. NRDC*, 421 U.S. 60, 71 n.11 (1975).
- 6 *Id.* at 79.
- 7 42 U.S.C. § 7411(d)(1).
- 8 *Id.*
- 9 42 U.S.C. § 7411(a)(1).

10 42 U.S.C. § 7411(d)(1)(B).  
11 42 U.S.C. § 7411(d)(2).  
12 79 Fed. Reg. 34,830, 34,832/2 (June 18, 2014).  
13 *Id.* at 34,832/3.  
14 *Id.* at 34,833/1.  
15 *Id.* at 34,836/1.  
16 *Id.* at 34,836, 34,859, 34,862–63, 34,866–68, 34,871.  
17 EPA, Fact Sheet: Clean Power Plan Flexibility: Flexible Approach to Cutting Carbon Pollution, June 2, 2014, <http://www2.epa.gov/carbon-pollution-standards/fact-sheet-clean-power-plan-flexibility>.  
18 79 Fed. Reg. at 34,954/1.  
19 *Id.*  
20 *Id.* at 34,836/2.  
21 *Id.* at 34,926/2 (reciting EPA’s assumption that efficiency gains will reduce emissions by 6 percent, on average).  
22 *See, e.g.*, Decl. of Scott Deloney, Indiana Department of Environmental Management, at ¶ 3, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014); Decl. of Laura Crowder, West Virginia Department of Environmental Protection, at ¶¶ 4, 7, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014); Decl. of Thomas Gross, Kansas Department of Health and Environment, at ¶ 3, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014); Decl. of Brian Gustafson, South Dakota Department of Environment and Natural Resources, at ¶¶ 6, 8, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014); Decl. of Todd Parfitt, Wyoming Department of Environmental Quality, at ¶¶ 5–6, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).  
23 *See, e.g.*, Decl. of Laura Crowder, West Virginia Department of Environmental Protection, at ¶ 4, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).  
24 79 Fed. Reg. at 34,926/2 (6 percent, on average, per EPA). And even that may not be achievable in many states. *See, e.g.*, Decl. of Laura Crowder, West Virginia Department of Environmental Protection, at ¶ 4, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).  
25 *See, e.g.*, Decl. of Laura Crowder, West Virginia Department of Environmental Protection, at ¶ 4, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014); Decl. of Thomas Gross, Kansas Department of Health and Environment, at ¶ 3, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).  
26 *See* Decl. of Brian Gustafson, South Dakota Department of Environment and Natural Resources, at ¶ 9, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).  
27 *Id.*  
28 *See, e.g.*, Decl. of Robert Hodanbosi, Ohio Environmental Protection Agency, at ¶ 5.B, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014) (current law and practices “require[] that the plants are dispatched in an economic manner with the most economic being used first”).  
29 Decl. of Scott Deloney, Indiana Department of Environmental Management, at ¶ 3, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014); Decl. of Robert Hodanbosi, Ohio Environmental Protection Agency, at ¶ 5.B, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).  
30 Decl. of Brian Gustafson, South Dakota Department of Environment and Natural Resources, at ¶ 10, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).  
31 Decl. of Todd Parfitt, Wyoming Department of Environmental Quality, at ¶ 6, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).  
32 Decl. of Thomas Gross, Kansas Department of Health and Environment, at ¶ 3, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).  
33 Decl. of Laura Crowder, West Virginia Department of Environmental Protection, at ¶ 5, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014);  
34 Decl. of Thomas Gross, Kansas Department of Health and Environment,

at ¶ 3, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).  
35 Decl. of Robert Hodanbosi, Ohio Environmental Protection Agency, at ¶ 5.D, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).  
36 *Id.*  
37 79 Fed. Reg. at 34,899/3, 34,901/3, 34,907/1, 34,933/1, 34,935/1 (acknowledging that the Proposed Rule will require retirements).  
38 Decl. of Todd Parfitt, Wyoming Department of Environmental Quality, at ¶ 6, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).  
39 U.S. CONST. amend. X.  
40 *United States v. Darby*, 312 U.S. 100, 124 (1941).  
41 *New York v. United States*, 505 U.S. 144, 156 (1992).  
42 *Id.*  
43 *Id.* at 161.  
44 *Id.* at 166.  
45 *Id.* at 153–54. If the state did not take possession of the waste, it would nonetheless be “liable for all damages directly or indirectly incurred” as a result of its failure to do so. *Id.*  
46 *Id.* at 167 (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)). Which is not to suggest that the Proposed Rule is a proper exercise of that power. *See infra* § III.A.  
47 *Id.*  
48 *Id.* at 168.  
49 *Id.* at 169.  
50 *Id.* at 175.  
51 *Id.* at 176–77.  
52 *Id.* at 178, 181.  
53 *Id.* at 188.  
54 521 U.S. 898 (1997).  
55 *Id.* at 903–04.  
56 *Id.* at 904.  
57 *Id.* at 928 (alterations omitted) (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975), *vacated on other grounds*, 431 U.S. 99 (1977)).  
58 *Id.* (quotation marks omitted).  
59 79 Fed. Reg. at 34,836/1.  
60 *Id.* at 34,859/3 (“EPA believes that implementation of all identified best practices and equipment upgrades at a facility could provide total heat rate improvements in a range of approximately 4 to 12 percent.”).  
61 16 U.S.C. § 824(b)(1). *See also* 42 U.S.C. § 2021(k) (recognizing presumptive role of states in power regulation).  
62 *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 206 (1983).  
63 *Id.* at 212.  
64 *Id.* (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 550 (1977)).  
65 Crucially, the statute says absolutely nothing about preempting states’ traditional regulation of utilities and generation. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”); *United States v. Bass*, 404 U.S. 336, 349 (1971) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”); *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.”); *Bond v. United States*, 134 S. Ct. 2077, 2088–90 (2014). Moreover, the Proposed Rule and its preamble do not discuss or even mention preemption. *Cf. Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009) (suggesting that an agency’s

assertion of preemption may be a necessary, but not sufficient, condition for an ambiguous federal statute to preempt state law).

66 79 Fed. Reg. at 34,833/2, 34,900/3.

67 *Id.* at 34,902/1.

68 *Id.* at 34,914/3.

69 *Id.* at 34,917/3.

70 *Id.*

71 *Id.* at 34,897/1–98/1.

72 505 U.S. at 177. Although EPA may impose, administer, and enforce a federal plan that addresses the kind of efficiency improvements implicated by its first building block, 42 U.S.C. § 7411(d)(2), as described below, implementation of the other building blocks will require state action, which EPA does not claim the authority to preempt.

73 505 U.S. at 188.

74 *FERC v. Mississippi*, 456 U.S. 742 (1982), does not alter this conclusion, for two reasons. First, *FERC* upheld “only the ‘command’ that state agencies ‘consider’ federal standards, and again only as a precondition to continued state regulation of an otherwise pre-empted field.” *Printz*, 521 U.S. at 926. The Proposed Rule, by contrast, requires states to carry out federal policy and does not offer to relieve states of the burden of so doing. Second, to the extent that *FERC* could be read to approve a broader conception of permissible commandeering, that holding has been narrowed (if not entirely overruled) by *New York*, 505 U.S. at 161–62 (*FERC* “upheld the statute at issue because it did not view the statute as such a command”), and *Printz*, 521 U.S. at 926. See also *New York*, 505 U.S. at 204–05 (White, J., concurring in part and dissenting in part) (accusing the majority of overriding *FERC*).

75 *Id.* at 167.

76 In at least one instance, EPA has approved a SIP revision limiting utilization of a facility, which would be among the measures required to carry out the Proposed Rule’s second building block. Approval and Promulgation of Air Quality Implementation Plans; Oklahoma; Regional Haze and Interstate Transport Affecting Visibility; State Implementation Plan Revisions; Revised BART Determination for American Electric Power/Public Service Company of Oklahoma Northeastern Power Station Units 3 and 4, 79 Fed. Reg. 12,944, 12,945/1 (Mar. 7, 2014). EPA, however, never claimed authority to carry out such measures itself through a federal plan. See *id.* at 12,951/2 (noting that the preexisting FIP “does not restrict capacity utilization”). Such reductions would also have to be accompanied by other state regulatory action that is not within EPA’s purview, such as changes to dispatch and utility regulation.

77 Contrast with *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264 (1981), which concluded that the Surface Mining Control and Reclamation Act of 1977 did not present a commandeering problem because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field. See also *Printz*, 521 U.S. at 926.

78 The Clean Air Act provides EPA authority to withhold federal highway funding from states that fail to make certain approvable SIP submissions or fail to enforce their SIPs. 42 U.S.C. § 7509. This penalty is discussed further below.

79 Compare to *New York*, 505 U.S. at 176 (“Either way, ‘the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”) (quoting *Hodel*, 452 U.S. at 288).

80 485 U.S. 505 (1988)

81 528 U.S. 141 (2000)

82 485 U.S. at 514–15.

83 528 U.S. at 143–44, 151.

84 *Id.* at 150 (alterations omitted) (emphasis added) (quoting *Baker*, 485 U.S. at 514–15).

85 *Id.* at 151. See also *Baker*, 485 U.S. at 514 (explaining that statute “does not...seek to control or influence the manner in which States regulate private parties”).

86 The Proposed Rule asserts that each of its four building blocks is severable. 79 Fed. Reg. at 34,892/2. This claim is discussed and rejected in § III.A.

87 *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J.). Chief Justice Roberts’s opinion, being the “position taken by those Members who concurred in the judgments on the narrowest grounds,” is controlling. *Marks v. United States*, 430 U.S. 188, 193–94 (1977) (quotation marks omitted). Subsequent citations to *NFIB* refer to the Chief Justice’s controlling opinion, unless otherwise noted.

88 U.S. CONST. art. I, § 8, cl. 1.

89 *Dole*, 483 U.S. at 206.

90 *NFIB*, 132 S. Ct. at 2604 (quotation marks omitted) (quoting *Dole*, 483 U.S. at 211).

91 *Id.* at 2606–07.

92 *Id.* at 2604.

93 *Id.* at 2605.

94 *Id.* at 2606 (quoting *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981)).

95 *Id.* at 2607 (alteration omitted) (quoting *FERC*, 456 U.S. at 775 (O’Connor, J., concurring in judgment in part and dissenting in part)). The joint *NFIB* dissent of Justices Scalia, Kennedy, Thomas, and Alito reaches the same conclusion based on arguably broader reasoning. See *id.* at 2661, 2666 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

96 *Id.* at 2607.

97 Samuel Bagenstos, *The Anti-leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 871 (2013) [hereinafter Bagenstos].

98 42 U.S.C. § 7509.

99 Bagenstos, *supra* note 97, at 917.

100 Jonathan Adler, *Could the Health Care Decision Hobble the Clean Air Act?*, July 23, 2012, <http://perc.org/blog/could-health-care-decision-hobble-clean-air-act>. See also Jonathan Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 449–52 (2005) (pre-*NFIB* analysis finding that “[i]t is not clear that threatening federal highway moneys falls squarely within *Dole*’s holding”).

101 Bagenstos, *supra* note 97, at 918–19 (“Insofar as they address stationary sources of pollution, the CAA’s requirements would appear, on the same analysis, to be separate and independent from the highway-grant program. Those requirements do not govern how states should construct and maintain highways. Nor do they govern the processes by which states should choose *which* highways to construct and maintain. And they do not even govern the *use* of the highways constructed or maintained with federal funds.”) (footnotes omitted).

102 See *id.* at 919 (“The average state receives more than three-quarters of a billion dollars a year in federal transportation funds,” accounting for nearly 8 percent of its budget.).

103 *NFIB*, 132 S. Ct. at 2604 (quotation marks omitted).

104 *Id.* at 2607.

105 42 U.S.C. § 7615.

106 79 Fed. Reg. at 34,892/2.

107 MD/DC/DE Broadcasters Ass’n v. FCC, 236 F.3d 13, 22 (D.C. Cir. 2001) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)).

108 *Id.*

109 *Id.*

110 *E.g.*, 79 Fed. Reg. at 34,837/2 (explaining that interim goals depend on such flexibilities); *id.* at 34,864/2 (accomplishing “necessary” infrastructure improvements depends on “state flexibilities”); *id.* at 34,898/1 (flexibilities “ensure that states will be able to achieve their final CO<sub>2</sub> emission performance goals”).

111 In addition, it is not apparent that the Proposed Rule’s “building blocks” are the appropriate subjects of severability analysis, given that EPA uses them to calculate overall emissions reductions and purports not to mandate that states achieve specific emissions reductions with respect to each building block. See *id.* at 34,837. In other words, the building blocks themselves are not requirements, but inputs to EPA’s state-specific target calculations, and it is the requirement to achieve the targets that causes the rule to be unconstitutional.

112 See Jean Chemnick, *Agency won’t withhold highway funds for Clean Power*

Plan—McCarthy, E&E NEWS PM, Mar. 30, 2015.

113 See *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

114 *NFIB*, 132 S. Ct. at 2603 (alteration omitted) (quoting *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 586 (1937)).

115 *Id.* at 2606–07 (quoting *FERC*, 456 U.S. at 775 (O’Connor, J., concurring in judgment in part and dissenting in part)).

116 *Id.* at 2603 (quotation marks omitted).

117 *Id.* at 2602, 2604–05 (quoting *Dole*, 483 U.S. at 211–12).

118 79 Fed. Reg. at 34,951/2. See also Timothy Cama, *EPA delays landmark climate rule*, THE HILL, Jan. 7, 2015, <http://thehill.com/policy/energy-environment/228783-epa-delays-climate-rule> (quoting EPA official’s statement that the agency intends “to have a federal plan available, should there be states that don’t submit plans”).

119 See *supra* § II; William Yeatman, *What Would a Clean Power Plan FIP Look Like?*, Jan. 14, 2015, <http://www.globalwarming.org/2015/01/14/what-would-a-clean-power-plan-fip-look-like/>; Comments of Hon. Charles W. Pickering, Sr. & Hon. Thomas Scott, EPA-HQ-OAR-2013-0602-33150, Dec. 1, 2014 (“Pickering & Scott Comments”).

120 Pickering & Scott Comments at 43–44.

121 *NFIB*, 132 S. Ct. at 2604 (alteration omitted) (quoting *Dole*, 483 U.S. at 211).

122 *Id.*

123 The holding of *New York v. United States*, 505 U.S. 144, 173–74 (1992), regarding the “access incentive” of the Low-Level Radioactive Waste Policy Amendments Act of 1985, is not to the contrary. That provision provided that “[s]tates may either regulate the disposal of radioactive waste according to federal standards..., or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites.” *Id.* at 174. The Court held that this was a permissible “conditional exercise of Congress’ commerce power” that “does not intrude on the sovereignty reserved to the States by the Tenth Amendment.” *Id.* First, by contrast, a federal plan implementing the Proposed Rule would invade state sovereignty by inhibiting states’ exercise of their traditional police powers, which depend on a reliable electric system. Second, the state would not have the “the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation,” *id.* at 173–74, in light of EPA’s inability to directly impose most of the regulatory activities targeted by the Proposed Rule. And third, it follows that a state would not be free to “continue to regulate...in any manner its citizens see fit,” *id.* at 174, given the necessity of state action to mitigate the impact of federal action in the absence of complete preemption. In this respect, the Proposed Rule is much more like the “take title” provision that the Court rejected. As it explained, “[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all.” *Id.* at 176. *Nevada v. Skinner*, 884 F.2d 445, 453 (9th Cir. 1989), is inapt for the same reasons, fails to anticipate the anti-commandeering and anti-coercion doctrines of *New York* and *NFIB*, and has been (at least in part) abrogated by *New York*.

124 *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

125 *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

126 79 Fed. Reg. at 34,836/1. See also *id.* at 34,888/3–89/1 (discussing objections to this definition).

127 *Hancock v. Train*, 426 U.S. 167, 193 (1976). See also *PPG Indus., Inc. v. Harrison*, 660 F.2d 628, 636 (5th Cir. 1981) (“Setting standards which in effect require a use of a certain type of fuel, without regard to other types of emission control, appears to be a work practice or operation standard beyond the statutory authority of the EPA.”); *Bethlehem Steel Corp. v. EPA*, 651 F.2d 861, 869 (3d Cir. 1981) (“system” is something that a source can “install”).

128 73 Fed. Reg. 34,072, 34,073/2 (June 16, 2008).

129 *District of Columbia v. Train*, 521 F.2d 971, 990 (1975), *vacated on other grounds by EPA v. Brown*, 431 U.S. 99 (1977).

130 *Id.* at 994; *Maryland v. EPA*, 530 F.2d 215, 226 (4th Cir. 1975); *Brown v. EPA*, 521 F.2d 827, 838–42 (9th Cir. 1975).

131 *Printz*, 521 U.S. at 925.

