I've only skimmed the opinion (*National Federation of Independent Businesses v. Sebelius)* but so far don't think the Court's holding that the health care law's individual mandate violates the Commerce Clause will have any real effect on environmental law. The Court's decision is concerned with whether Congress can require someone previously unengaged in commerce — the individual who refuses to buy health insurance — to engage in commerce through requiring the purchase of an insurance policy. The Court said no, Congress can't mandate such a purchase. Congress can, on the other hand, tax someone who refuses to buy health insurance under its taxing powers. Environmental laws don't force people into commerce; instead they attempt to regulate the negative consequences of commerce (pollution from driving, say, or from manufacturing goods). Environmental laws can and sometimes do raise Commerce Clause issues — the most notable example is whether Congress can constitutionally regulate things that are wholly within a state's borders, like isolated wetlands. The Court hasn't decided that question on constitutional grounds, though it has cast doubt on whether Congress could do so in *Rapanos v. United States*. And this Court could easily decide a Commerce Clause case that restricts Congressional power to regulate environmental issues (Justice Roberts, as a U.S. Court of Appeals judge indicated that he would do so in an Endangered Species Act case) but it doesn't need the new *Sebelius* case to make such a decision.

On the other hand, the Medicaid portion of the new health care decision could raise some trouble with at least some provisions of federal environmental statutes. As I understand today's *Sebelius* case, the Court struck down the part of the health care law that would withdraw existing Medicaid funding from states that refuse to implement a the law's requirement to expand Medicaid to cover more people. The federal government will initially fund 100 percent of the expansion but eventually will cut the federal share to 90 percent so that states will have to pay 10 percent of the program expansion. Even though the Court acknowledged that Congress may use its Spending power under the Constitution to induce states to engage in federal programs, it found that the Medicaid provision, rather than merely inducing states to participate, essentially coerces them to do so by withdrawing all existing Medicaid funding from states that refuse to expand coverage. That, said 7 members of the Court (including Justices Kagan and Breyer), unconstitutionally commandeers the states into implementing federal law.

So what, if anything, does the Medicaid provision have to do with environmental law? Well, Congress uses the states to implement programs like the Clean Air Act. Each state must, for example, prepare a State Implementation Plan setting forth how the state will cut air pollution to meet CAA standards. States that fail to prepare and implement adequate SIPs, for example, can lose federal highway funds. For all practical purposes this has never

happened because the Environmental Protection Agency and states have negotiated to avoid such consequences. The threat of losing federal highway funds is a pretty huge one that states simply don't want to face. The question now is whether that condition — enact a comprehensive and legitimate SIP or lose highway funds — is constitutional in the wake of the health care case. Jonathan Adler has previously suggested that such conditions may pose constitutional problems. I'm not a scholar of Constitutional law so don't know about how constitutionally problematic this funding condition actually is; I'll leave that analysis to others (Dan?) to debate. I'm just pointing out that the new health care case could matter in deciding whether the CAA provision (and any other environmental provisions that condition federal implementation on funding) has constitutional problems. The new health care case could also be used by states reluctant to implement fully compliant State Implementation Plans to play hardball with the EPA in negotiations over whether a SIP is adequate.

Again, this is all really preliminary. I'd love the thoughts of the Con Law folks on this question.