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The Clean Air Act Amendments of 1990 and an Unbridled Spending Power: Will They Survive on the Supreme Court's Road to Substantive Federalism

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THE CLEAN AIR ACT AMENDMENTS OF 1990 AND AN
UNBRIDLED SPENDING POWER: WILL THEY SURVIVE ON
THE SUPREME COURT'S ROAD TO SUBSTANTIVE
FEDERALISM?

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It may be said, that . . . [an omnipotent national legislature] would tend to render the government of the Union too powerful, and to enable it to absorb in itself those residuary authorities, which it might be judged proper to leave with the States for local purposes. Allowing the utmost latitude to the love of power, which any reasonable man can require, I confess I am at a loss to discover what temptation the persons entrusted with the administration of the general government could ever feel to divest the States of the authorities of that description.

—Alexander Hamilton¹

I. INTRODUCTION

Historically, the Tenth Amendment² was considered as nothing more than a "truism."³ The "truism" approach to federalism is not the Excalibur sword in the sheath of state sovereignty that the Amendment's language would seem to suggest. Rather, it has been a powerless statement of the obvious. An infirm Tenth Amendment, however, is no longer the prevailing view. Recently, the Supreme Court has shifted, using the Tenth Amendment to limit Congress's interference with the states' legislative⁴ and executive branches.⁵

Various challenges have been filed that will test the Court's new doctrinal approach to the Tenth Amendment. In the field of environmental policy, for instance, certain provisions to the Clean Air Act⁶ ("CAA"), as modified by the 1990 Amendments,⁷ are subject to scrutiny under these emerging standards of federalism.⁸ The CAAA requires that the states create both a State Implementa-

¹THE FEDERALIST NO. 17, at 105 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

²U.S. CONST. amend. X. "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."

³See *United States v. Darby*, 312 U.S. 100, 124 (1941):

The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

⁴See *New York v. United States*, 505 U.S. 144 (1992).

⁵See *Printz v. United States*, 117 S. Ct. 2365 (1997).

⁶42 U.S.C. §§ 7401-7671q (1998).

⁷Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (hereinafter "CAAA" or "Act").

⁸See *infra* note 60.

tion Plan⁹ ("SIP") for complying with the CAA, and a Permit Program for licensing operators of potential pollution-causing facilities.¹⁰ These provisions, along with the recently enacted sanctioning provisions¹¹ for failing to submit a SIP or Permit Program, raise grave Tenth Amendment and Spending Clause¹² dilemmas.

To date, the merits of any Tenth Amendment challenge to the CAAA have been limited to the Spending Clause without considering the Act as a whole.¹³ Consequently, the Spending Clause has given Congress a shield to protect itself from judicial invalidation of its intrusion upon the states. Does an Article I usurpation of the Tenth Amendment provide true protection to the principles of state sovereignty? The answer: not at all. The true test of state sovereignty resides within the Tenth Amendment. By using the Tenth Amendment to question congressional action first, and then turning to the efficacy of an Article I power does the Tenth Amendment substantively prevent an "alienation of state sovereignty. . . ."¹⁴

The question remains as to how far the Supreme Court will go in its refortification of the Tenth Amendment. This Note explores emerging federalism trends and evaluates the CAA in light of a stronger state sovereignty that is appearing on the constitutional horizon. Parts II and III examine the CAAA and the constitutional problems engendered by the Act. Part IV examines current Tenth Amendment and Spending Clause jurisprudence, and illustrates that the CAAA is a classic example of how Congress has been able to circumvent the Tenth Amendment with its Spending power. Part V presents a new view of federalism that is materializing in Commerce Clause¹⁵ and Eleventh Amendment¹⁶ doctrine, and extends that theory to the Tenth Amendment in the hope of finding a substantive bar on Congress's excessive use of the Spending power. Part VI calls for a restructuring of the CAAA to

⁹42 U.S.C. § 7410 (1998).

¹⁰42 U.S.C. § 7661a (1998).

¹¹42 U.S.C. § 7509 (1998).

¹²U.S. CONST. art. I, § 8, cl. 1. "The 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. . . ."

¹³See Petition for Writ of Certiorari at 16, *Virginia v. Browner*, 117 S. Ct. 764 (1996) (No. 96-567).

¹⁴THE FEDERALIST NO. 81, at 549 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

¹⁵U.S. CONST. art. I, § 8, cl. 3. "[The Congress shall have power to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"

¹⁶U.S. CONST. amend. XI. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of a Foreign State."

promote its high objectives, and concludes that unless the Act falls in line with the substantive federalism trend, its objectives will not be fulfilled.

II. THE CLEAN AIR ACT

A. Purposes and Development of the CAA

The problem of clean, breathable air is an issue of national importance. It is estimated that there are as many as 7,000 pollutants in the air people breathe into their lungs every day.¹⁷ The large number of pollutants and related health concerns make it easy to recognize why Congress seeks to regulate the evils of air pollution.

The first attempts at controlling the nation's air quality came in the late Nineteenth Century after cities such as Chicago and Cincinnati passed ordinances to limit factory smoke emissions.¹⁸ The push toward cleaner air continued in the middle of the Twentieth Century after thousands of deaths occurred as the result of heavy fog in Pennsylvania and England.¹⁹ In 1955, the federal government entered the environmental arena, commissioning studies to evaluate the growing problem of air pollutants.²⁰ Congress entered the regulatory field by enacting the first CAA in 1963.²¹

The CAA of 1963 was a bare bones approach to the quest for clean air. The 1963 Act created a legal process by which municipalities, states, and the federal government could institute regulatory actions against polluters.²² The 1963 Act also authorized funding for research projects on specific air pollution problems and on the removal of sulfur from fuels.²³

¹⁷See GARY C. BRYNER, *BLUE SKIES, GREEN POLITICS: THE CLEAN AIR ACT OF 1990* 41 (1993). Air pollutants are the result of various natural and non-natural processes. For instance, pollutants can come from naturally occurring volcanic eruptions, forest fires, and windblown dust. *Id.* Other human-influenced pollution can come from wood-burning stoves, heating units, and industrial sources such as power plants and ore reduction facilities, to name just a few. *Id.* The largest contributor to the pollution problem, however, is the beloved automobile. It is estimated that automobile emissions comprise more than half of the air pollution in the United States. *Id.*

¹⁸*Id.* at 81.

¹⁹*Id.*

²⁰Act of July 14, 1955, Pub. L. No. 84-159, 69 Stat. 322 (1955). The 1955 Act authorized the federal government to spend \$5 million per year for five years to assist state governments with the research, training, and creation of demonstration projects for the control of air pollution. See AMERICAN ENTER. INST. FOR PUB. POLICY RESEARCH, *THE CLEAN AIR ACT: PROPOSALS FOR REVISIONS* 79 n.1 (1981).

²¹Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified at 42 U.S.C. §§ 1857-1857i (1964)).

²²BRYNER, *supra* note 17, at 81.

²³AMERICAN ENTER. INST., *supra* note 20, at 2.

Since 1963, there have been several amendments to the CAA. The 1965 and 1966 amendments required pollution control devices to be placed on automobiles,²⁴ and authorized funding for state air-pollution control programs.²⁵ While the initial CAA and its two subsequent amendments moved closer to establishing stronger pollution control measures, the structural framework that comprises the majority of the present-day CAA was not created until 1970.²⁶

The 1970 Amendments to the CAA were enacted after the Nixon administration called for stronger environmental regulations. Yet, when the 1970 version was passed, it was viewed as a bipartisan miracle.²⁷ The 1970 version was promulgated to achieve rather lofty goals²⁸ and became the nation's toughest air-pollution control measures to date.

The 1970 Amendments required the establishment and publication of National Ambient Air Quality Standards ("NAAQS")²⁹ to limit certain pollutants, and called for an end to the nation's pollution problems within five years.³⁰ The 1970 Amendments also commanded the states' participation by requiring the formulation of State Implementation Plans for the establishment of the Environmental Protection Agency's ("EPA") NAAQS.³¹ If a state failed to create a SIP, or created an inadequate SIP, the 1970 Amendments authorized

²⁴See Clean Air Act Amendments of 1965, Pub. L. No. 89-272, § 202, 79 Stat. 992, 992-93 (1965).

²⁵See Clean Air Act Amendments of 1966, Pub. L. No. 89-675, § 3, 80 Stat. 954, 954 (1966).

²⁶AMERICAN ENTER. INST., *supra* note 20, at 2.

²⁷BRYNER, *supra* note 17, at 82-83.

²⁸See 42 U.S.C. § 7401(b) (1998). The purpose of the [CAA] is—

- (1) 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;
- (2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;
- (3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and
- (4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

²⁹The Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 109, 84 Stat. 1676, 1679-80 (codified at 42 U.S.C. § 7409 (1993)).

³⁰See Pub. L. No. 91-604, § 110(e), 84 Stat. 1676, 1682 (codified at 42 U.S.C. § 7410(e) (1988)), amended and repealed by Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 110(e), 104 Stat. 2399, 2408-10 (codified at 42 U.S.C. § 7410 (1991)).

³¹See Pub. L. No. 91-604, § 110, 84 Stat. 1676, 1680-83 (codified at 42 U.S.C. § 7410 (1991)).

the EPA to either amend the plan or to preempt state involvement and create its own federal implementation plan ("FIP").³²

B. The Clean Air Act Amendments of 1990

While the 1970 Amendments were successful in reducing certain types of air pollution, the CAA's overriding goals remained elusive.³³ Ostensibly for increasing environmental protection and strengthening the CAA, Congress passed, and President Bush signed into law the CAAA.³⁴ The passage of the Act was considered by some "a remarkable political event and a landmark achievement in the making of environmental policy."³⁵

Structurally, the CAAA is similar to the 1970 statutory version. The Act maintained the earlier requirement that states write State Implementation Plans, but added a sanctioning provision for failure to submit a SIP.³⁶ The CAAA also requires the states to create and implement a Permit Program for licensing sources of air pollutants, and imposes sanctions for failing to do so.³⁷ As with prior enactments, the states, under the CAAA, "have [retained the] primary responsibility for assuring air quality within the entire geographic area comprising such State. . . ."³⁸

³²*Id.*

³³BRYNER, *supra* note 17, at 49.

³⁴*Id.* at 114. The CAAA was signed into law on November 15, 1990.

³⁵*Id.* at 79. The CAAA was passed after a series of intense debates over both its provisions, and the economic impact the Act would have on the nation's fisc. For instance, industry calculations estimated the cost of complying with the Act would approach \$104 billion per year, but environmentalists argued that the health costs of air pollution were just as high. See George Hager, *Senate Takes Up Clean Air But Doesn't Get Very Far*, CONG. Q. WKLY. REP., Jan. 27, 1990, at 230. White House officials, industry lobbyists, and Senate critics argued that despite the enormous costs imposed by the CAAA, there were virtually no additional environmental protections born of the Act. BRYNER, *supra* note 17, at 101; see also 139 CONG. REC. S16845-01, S16845 (daily ed. Nov. 20, 1993) (statement of Mr. Baucus) (according to EPA estimates, more than half of all Americans still breathe unsafe air, and some toxic emissions have actually increased since the promulgation of the CAAA).

Prior to its enactment, the future of the CAAA was uncertain as the Act bounced between various committee meetings and closed-door negotiations. BRYNER, *supra* note 17, at 101-05. Finally, after several all-night sessions of Congress and major changes at the demand of industry lobbyists, the House of Representatives passed the CAAA on October 26, 1990 by a vote of 401-25, and the Senate passed it the next day. *Id.* at 114.

³⁶Pub. L. No. 101-549, § 110, 104 Stat. 2399, 2407-08 (codified at 42 U.S.C. § 7410 (1991)).

³⁷Pub. L. No. 101-549, § 502, 104 Stat. 2399, 2635-41 (codified at 42 U.S.C. § 7661a (1995)).

³⁸42 U.S.C. § 7407(a) (1998).

C. Functioning of the 1990 Amendments

1. State Implementation Plans

Under the CAAA, the federal government requires the states to create the structural underpinnings of the CAA.³⁹ The Act pronounces that, after national ambient air quality standards⁴⁰ are established by the EPA, each state shall within three years, either individually or as part of an interstate compact, provide a plan for implementing, maintaining, and enforcing the NAAQS within the state or region.⁴¹ The SIP is to include, *inter alia*, measures to enact pollution monitoring programs,⁴² assurances from the state to its local governments that adequate funding and personnel will be available to carry out the SIP,⁴³ requirements that potential polluters install and maintain special equipment if so commanded by the EPA Administrator,⁴⁴ and provisions for consultation and participation by local political subdivisions.⁴⁵

After a SIP is submitted, the Act specifies that the EPA Administrator will render a ruling as to whether the state's proposed SIP comports with the CAA's requirements.⁴⁶ The Administrator will then approve the plan or return it to the state for revision.⁴⁷ If two years have passed and the Administrator is not satisfied with the revised SIP, or if the state fails to submit a plan, the Act directs that the Administrator shall promulgate a federal program for the state.⁴⁸ Additionally, any time after the Administrator becomes dissatisfied with the state plan, sanctions are imposed on the state.⁴⁹

³⁹*Id.*

⁴⁰NAAQS are separated into primary and secondary standards. 42 U.S.C. § 7409(a)(1)(A) (1998). Primary standards seek to provide an adequate level of safety necessary to protect the public health. 42 U.S.C. § 7409(b)(1) (1998). Secondary standards specify a level of air quality requisite to protect the public welfare from any known or expected adverse effects associated with air pollutants. 42 U.S.C. § 7409(b)(2) (1998). After an extensive review of expert scientific reports, the EPA established ambient standards for the pollutants ozone, lead, sulfur dioxide, particulates, nitrogen dioxide, and carbon monoxide. S. REP. NO. 101-228, at 5 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3391.

⁴¹42 U.S.C. § 7410(a)(1) (1998).

⁴²42 U.S.C. § 7410(a)(2)(B)(i) (1998).

⁴³42 U.S.C. § 7410(a)(2)(E) (1998).

⁴⁴42 U.S.C. § 7410(a)(2)(F)(i) (1998).

⁴⁵42 U.S.C. § 7410(a)(2)(M) (1998).

⁴⁶42 U.S.C. § 7410(a)(3)(B) (1998).

⁴⁷*Id.*

⁴⁸42 U.S.C. § 7410(c)(1) (1998).

⁴⁹42 U.S.C. §§ 7509(a)(4), 7410(m) (1998); *see also infra* Part II.C.3 (providing a detailed description of the CAAA's sanctioning provisions).

2. Permit Programs

In a second mandate issued by the CAAA, the Governor of each state is required to develop and submit a permit program for licensing potential polluters in designated attainment areas.⁵⁰ Under the mandate, the Administrator would review the plan and either approve or disapprove the Governor's blueprint.⁵¹ If the Administrator disapproved any aspect of the Permit Program, the Governor must make revisions and resubmit the plan.⁵²

If the state's Governor fails to submit a plan, or submits an unacceptable plan, the Administrator may impose sanctions until eighteen months after the required submission period has expired.⁵³ If the eighteen-month period has lapsed and the Governor has still not submitted a plan, or has failed to revise a disapproved plan, the Administrator is statutorily required to impose certain sanctions on that state.⁵⁴ The mandatory sanctions continue for four months, after which the Administrator shall create, administer, and enforce a federal permit program for the state.⁵⁵

3. Sanctions under the CAAA

The CAAA gives the EPA Administrator authority to impose mandatory sanctions on the states for failing to submit SIPs and permit programs.⁵⁶ In an effort to bring the states into compliance, the Administrator is required to cut off all federal highway funding in non-attainment areas.⁵⁷ The Act does exempt from the mandatory sanctions funding for projects which the Secretary of Transportation determines are related to the promotion of safety or to decreases in auto emissions.⁵⁸ As an alternative to highway-funding sanctions, the Administrator is permitted to increase the ratio of emission reductions to increased emissions from new sources by at least a two-to-one margin before a permit can be issued to a source.⁵⁹

⁵⁰42 U.S.C. § 7661a(d)(1) (1998). Along with the permit program, the Governor must submit a legal opinion from the state Attorney General that the laws of the state or locality provide adequate authority to carry out the program. *Id.*

⁵¹*Id.*

⁵²*Id.*

⁵³42 U.S.C. § 7661a(d)(2)(A) (1998).

⁵⁴42 U.S.C. § 7661a(d)(2)(B) (1998); *see also infra* Part II.C.3 (providing a detailed look at the CAAA's sanctioning provisions).

⁵⁵42 U.S.C. § 7661a(d)(3) (1998).

⁵⁶42 U.S.C. §§ 7509(a)(1)-(3)(A)(4) (1998).

⁵⁷42 U.S.C. § 7509(b)(1)(A) (1998).

⁵⁸42 U.S.C. § 7509(b)(1)(B) (1998).

⁵⁹42 U.S.C. § 7509(b)(2) (1998). The offset sanctions require sources seeking to add to, or build new industrial operations in non-attainment areas to designate two tons of volatile organic compounds reductions for every one ton of increased emissions

III. STRUCTURAL PROBLEMS WITH THE CAAA

Recent constitutional challenges to the CAAA have been resolved in favor of the CAA.⁶⁰ The suits against the Act have been concerned primarily with the Spending Clause.⁶¹ In many instances, the courts have "evaded the Tenth Amendment issue . . . by ignoring the mandatory language of [the SIP and Permit Program requirements] by dividing the challenged statutory scheme into discrete provisions, and by examining each [separately] without analyzing the workings of the whole."⁶² Thus, legal examination of the CAAA has been limited to a cursory look at a single tree in a forest of constitutional problems.

Despite judicial support for the CAAA, recent developments in federalism doctrine may cause portions of the Act to be held unconstitutional.⁶³ Both the State Implementation Plan and Permit Program requirements issue direct commands to the states' legislative and executive branches to promulgate and enforce federal regulatory programs.⁶⁴ Standing alone, a federal directive requiring a state to enact specific legislation is not within Congress's empowerment.⁶⁵ Similarly, Congress cannot force a state's executive branch into performing a legislative function or enforcing a federal regulatory program.⁶⁶ To permit the federal government to intrude upon the states in this manner is "fundamentally incompatible with our constitutional system of dual sovereignty."⁶⁷

stemming from the project. 42 U.S.C. § 7511a(b)(5) (1998).

⁶⁰See *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 764 (1996); *Missouri v. United States*, 918 F. Supp. 1320 (E.D. Mo. 1996), *vacated and dismissed for lack of jurisdiction*, 109 F.3d 440 (8th Cir. 1997); see also *Virginia v. United States*, 926 F. Supp. 537 (E.D. Va. 1995) (constitutional challenge dismissed for lack of jurisdiction), *aff'd*, 74 F.3d 517 (4th Cir. 1996).

⁶¹In *Browner*, for example, the Fourth Circuit held that the sanctioning provisions were a mere inducement to get states to fall into compliance with the CAAA, rather than an unconstitutional "outright coercion" used to force a state to enact federal legislation. 80 F.3d at 881 (citing *New York v. United States*, 505 U.S. 144, 166 (1992)). Additionally, the sanctions were held to be a proper condition on "federal funds . . . 'reasonably related to the purpose for which the funds are expended.'" *Browner*, 80 F.3d at 881 (quoting *South Dakota v. Dole*, 483 U.S. 203, 213 (1987) (O'Connor, J., dissenting)).

⁶²Petition for Writ of Certiorari at 16, *Virginia v. Browner*, 117 S. Ct. 764 (1996) (No. 96-567).

⁶³See *infra* Part V.

⁶⁴See *supra* notes 37, 46 and accompanying text.

⁶⁵*New York v. United States*, 505 U.S. 144, 175-76 (1992).

⁶⁶*Printz v. United States*, 117 S. Ct. 2365, 2384 (1997).

⁶⁷*Id.* The notion that Congress should be limited in its exercise of power over the states is an inherent foundation on which our system of government was created. *Id.* The framers sought to allocate governmental power in a manner that maximized the democratic ability of all individuals because "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very

The difficulty with the CAAA is that states are not simply required to enact federal legislation. The states are given the choice—however questionable that choice may be—to either comply with the Act's mandates or surrender all participation in environmental regulation to the federal government.⁶⁸ When a state is given the choice of participating in a federal plan according to certain congressional requirements, or having Congress take over the regulation, the Supreme Court has held the structure to constitute a system of cooperative federalism that is not violative of state sovereignty.⁶⁹ The ghostly appearance of a cooperative choice in the CAAA is the reason Tenth Amendment challenges to the Act have been arrested at federalism's front door.⁷⁰

What differentiates the CAAA from a system of pure cooperative federalism, however, is the presence of the sanctioning provisions. While it is arguable that the sanctioning provisions alone violate the Spending Clause,⁷¹ its interaction with the SIP and Permit Program requirements raise interesting questions. As a starting point, do the SIP and Permit Program requirements truly harmonize with federalism principles after recent Supreme Court decisions? Secondly, does the plenary nature of Congress's Spending power alter the CAAA's constitutional defects? Finally, what does the future hold for the Spending Clause under a theory of substantive federalism?

definition of tyranny." THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

The Constitutional Convention produced several plans for the structure of the new government and, in the end, adopted a form of government that operated on individuals directly rather than one that sought to regulate through coercive measures taken against states. New York, 505 U.S. at 164-65 (citing 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 243-44, 313 (M. Farrand ed., 1911)). The history and debate behind the Constitution seemingly suggest that state sovereignty is a core principle necessary to the proper functioning of government. See Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) ("[T]he States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."); see also Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 525 (1995) (federalism values provide three major benefits of protecting State governments: "decreasing the likelihood of federal tyranny, enhancing democratic rule by providing government that is closer to the people, and allowing states to be laboratories for new ideas.")

⁶⁸See *supra* notes 48, 55 and accompanying text.

⁶⁹See *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 765 (1982) (*FERC*) (allowing Congress to give States the opportunity to participate in a preemptible federal field according to federal command, or completely surrendering State involvement); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 288-89 (1981) (upholding the steep-slope provisions of the Surface Mining and Control Act as providing a legitimate choice between continued State participation in a federal regulatory plan or surrendering all involvement to the federal government). *But see infra* note 284 (identifying problematic assumptions with the *FERC* model of complete state preemption).

⁷⁰See, e.g., *Virginia v. Browner*, 80 F.3d 869, 882-83 (4th Cir. 1996).

⁷¹See *infra* Part IV.C.2.

IV. THE CURRENT "STATE" OF TENTH AMENDMENT AND SPENDING CLAUSE DOCTRINE

A. The Tenth Amendment

The Tenth Amendment has been on a roller-coaster ride through the Supreme Court during the past twenty years. Recently, the pro-federalism five⁷² have come into the majority and have shifted 180 degrees on the issue of states' rights providing for a stronger Tenth Amendment.

1. The Brethren's War Begins

The furor over state sovereignty began in 1976 when the Supreme Court handed down its decision in *National League of Cities v. Usery*.⁷³ This decision struck down certain provisions in the 1974 Amendments to the Fair Labor Standards Act,⁷⁴ enacted under Congress's Commerce power, as impinging on "the States' freedom to structure integral operations in areas of traditional governmental functions. . . ."⁷⁵

National League of Cities represented a departure from the Court's view of the Commerce Clause.⁷⁶ The majority decision was criticized as "discarding [the] postulate that the Constitution contemplates that restraints upon . . . Congress[s] . . . plenary commerce power lie in the political process and not in the judicial process," a postulate which had been in force for 152 years.⁷⁷ The controversial theories announced in the decision were urged upon the Court five times in the next seven years, with no success.⁷⁸ In two of the decisions, Justice Blackmun, who was in the majority in *National League of Cities*, switched

⁷²The "pro-federalism five" refers to Chief Justice Rehnquist, and Associate Justices O'Connor, Scalia, Kennedy, and Thomas. In several 5-4 decisions, the "five" have strengthened the power of state governments over their federal counterpart.

⁷³426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), *reh'g denied*, 471 U.S. 1049 (1985).

⁷⁴29 U.S.C. § 201 *et seq.* (1998).

⁷⁵*National League of Cities*, 426 U.S. at 852. The Court expressed three criteria that must be proven to uphold a Tenth Amendment challenge against an exercise of the commerce power. First, the challenged statute must regulate the "States as States." *Id.* at 845. Second, the statute must attempt to control matters that are classically "attribute[s] of state sovereignty." *Id.* at 845. Lastly, it must be shown that state compliance would impair the state's ability to structure operations of a traditional government function. *Id.* at 852.

⁷⁶In its decision, the Court expressly overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968), which held that the commerce power is not limited by state sovereignty. *National League of Cities*, 426 U.S. at 855.

⁷⁷*Id.* at 857 (Brennan, J., dissenting) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824)).

⁷⁸See WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* 146 (8th ed. 1996).

sides and was instrumental in the death of the Court's short-lived dance with stronger Tenth Amendment protections.⁷⁹

2. Enter *Garcia*

In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court examined the constitutionality of the minimum wage and overtime provisions of the Fair Labor Standards Act, enacted under Congress's Commerce power, as applied to a public mass-transit authority.⁸⁰ In concluding that federal law did apply to state entities, Justice Blackmun, writing for the majority, expressly rejected the principles set down in *National League of Cities*.⁸¹

The Court had grave doubts about the efficacy of distinguishing between what "traditional" and "non-traditional" government functions would be.⁸² Justice Blackmun argued that differentiating between "traditional" and "non-traditional" governmental functions failed to protect federalism in the constitutional structure because it "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."⁸³ Rather, the appropriate method to protect state sovereignty lies not within the Tenth Amendment, but within the structure of the Constitution itself.⁸⁴ "The Federal Government was designed . . . to protect the States from overreaching by Congress . . . [by giving] the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government."⁸⁵ State sovereignty, therefore, is better "protected by the procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."⁸⁶

⁷⁹*Id.*

⁸⁰469 U.S. 528, 533 (1985).

⁸¹*Id.* at 557.

⁸²*Id.* at 538. What the Court found disturbing was the lower courts' confusion in applying the *National League of Cities* standard. *Id.* at 538-39. There was no consensus in the Circuit and District courts as to what was and was not a "traditional" government function. *Id.*

⁸³*Id.* at 545-46.

⁸⁴*Id.* at 550.

⁸⁵*Garcia*, 469 U.S. at 550-51 (citing JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 174-84 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982)).

⁸⁶*Garcia*, 469 U.S. at 552; see also *South Carolina v. Baker*, 485 U.S. 505, 512 (1988) (holding that Tenth Amendment protections are "structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.") But see Anthony B. Ching, *Travelling Down the Unsteady Path: United States v. Lopez, New York v. United States, and the Tenth Amendment*, 29 LOY. L.A. L. REV. 99, 114 (1995) (the

In discussing Congress's Commerce power, Justice Blackmun stated that while "we . . . recognize that the states occupy a special and specific position in our constitutional system . . . the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through the state participation in the [political process.]"⁸⁷ The political process, in other words, assures that Congress will not use the Commerce Clause to unduly burden the states.⁸⁸

The dissent did not take the denigration of the Tenth Amendment lightly. Justice Powell reasoned that the Court's opinion "effectively reduce[d] the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause."⁸⁹ Justice Powell did not believe that the political process provided adequate protection for state sovereign interests.⁹⁰ Rather, the appropriate defender of federalism is the Tenth Amendment because "[t]he States' role in our system of government is a matter of constitutional law, not of legislative grace."⁹¹

Justice O'Connor expanded on Powell's dissent and argued that the Court failed to address the Constitution's dual interest in federalism and a strong Commerce power.⁹² The Constitution conferred powers upon the federal government that were "few and defined," and did not render the states a pawn in the constitutional structure.⁹³ Justice O'Connor argued that the framers' intent was not to have a federal government of all encompassing powers (such as the Commerce or Spending powers), but to assure that the states "retain their integrity in a system in which the laws of the United States are nevertheless supreme."⁹⁴ State autonomy, therefore, deserves affirmative limits on the

"political process" reasoning of *Garcia* repudiates the doctrine set forth in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the power to interpret the Constitution belongs to the Court, not to Congress; Deborah J. Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1570-71 (1994) (arguing that the "state autonomy model" of federalism from *New York*, which allows courts to intervene in the political process to protect the independence of state governments, is superior to the "political process" reasoning of *Garcia*).

⁸⁷*Garcia*, 469 U.S. at 556.

⁸⁸*Id.*

⁸⁹*Id.* at 560.

⁹⁰*Id.* at 564-65; see also Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995) (arguing that the political process is an insufficient guardian of the principles of federalism).

⁹¹*Garcia*, 469 U.S. at 567.

⁹²*Id.* at 581.

⁹³*Id.* at 582 (quoting THE FEDERALIST NO.45, at 313 (James Madison) (Jacob E. Cooke ed., 1961)).

⁹⁴*Garcia*, 469 U.S. at 585 (citing *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)).

Commerce power:⁹⁵ limits that Justice O'Connor promised would come to fruition in the future.⁹⁶

3. How Toxic Waste Changed the Tenth Amendment—Again

The Supreme Court shifted dramatically when it examined the constitutionality of an enactment designed to achieve the safe disposal of radioactive wastes in *New York v. United States*.⁹⁷ The Act contained three core provisions with the intent of encouraging states to comply with the disposal regulations.⁹⁸ First, the Act provided monetary incentives that permitted states with disposal sites to tax incoming waste from non-sited states.⁹⁹ The Act also provided access incentives that allowed sited states to charge higher disposal fees and denied access to its disposal facilities to any non-sited states which failed to comply with the Act.¹⁰⁰ The final incentive was a "take title" provision commanding any state that failed to comply with the Act to accept possession, title, and assume all liability for the radioactive wastes generated within its borders.¹⁰¹

Justice O'Connor, now in the majority, found the monetary and access incentives constitutionally sound, but was troubled by the "take title" provision.¹⁰² The "take title" provision provided states with the choice of either regulating according to Congress's commands, or accepting radioactive waste as a punishment for non-compliance.¹⁰³ By providing states with this particular "choice," Congress "crossed the line distinguishing encouragement from coercion."¹⁰⁴

The Court viewed Tenth Amendment sovereignty as the "mirror image" of two inquiries.¹⁰⁵ "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; 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."¹⁰⁶ Thus, the Tenth Amendment's power comes not from the

⁹⁵*Garcia*, 469 U.S. at 587.

⁹⁶*Id.* at 589.

⁹⁷505 U.S. 144, 149-51 (1992).

⁹⁸*Id.* at 152.

⁹⁹*Id.* at 152-53.

¹⁰⁰*Id.* at 153.

¹⁰¹*Id.* at 153-54.

¹⁰²*New York*, 505 U.S. at 171-74.

¹⁰³*Id.* at 174-75.

¹⁰⁴*Id.* at 175.

¹⁰⁵*Id.* at 156.

¹⁰⁶*Id.*

Amendment itself, which is basically a "tautology," but rather from whether "an incident of state sovereignty is protected by a limitation on an Article I power."¹⁰⁷

Justice O'Connor noted that the Constitution was never intended to give Congress the ability to require states to govern according to Congress's direction.¹⁰⁸ The Constitutional Convention evidenced this intent by allowing Congress to exercise its power over individuals, not states.¹⁰⁹ Congress, however, may *urge*, by methods falling short of outright coercion, states to adopt legislative programs consistent with federal interests.¹¹⁰ Notably, Congress has the power to offer states the choice of regulating according to federal standards, or having state law preempted by federal regulation.¹¹¹

The rationale behind the legitimacy of the "cooperative federalism" model is that states retain the ultimate decision to comply with the legislation, or to have the federal government take over the field.¹¹² The take title provision, the Court observed, did not give states any real choice.¹¹³ Justice O'Connor held that the "take title" provision, and its forced transfer of radioactive waste, is no different than an unconstitutional, congressionally compelled subsidy from the state to waste producers.¹¹⁴ Similarly, the mere directive that the state regulate according to federal standards is an unconstitutional command.¹¹⁵ "Either type of federal action would 'commandeer' state governments into the service of federal regulatory purposes. . . ."¹¹⁶ The Court stated that Congress cannot offer a state this "choice," because "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all."¹¹⁷

The United States raised the argument that the Constitution's prohibition on federal commands to state governments can be overcome if there is a sufficiently important federal interest.¹¹⁸ The Court rejected this argument, holding that, regardless of even the most exacting federal interest, Congress does not have the constitutional authority to require states to regulate

¹⁰⁷*New York*, 505 U.S. at 156-57.

¹⁰⁸*Id.* at 162.

¹⁰⁹*Id.* at 164-65 (citations omitted).

¹¹⁰*Id.* at 166 (emphasis added).

¹¹¹*Id.* at 167 (citing *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

¹¹²*New York*, 505 U.S. at 167-69.

¹¹³*Id.* at 175.

¹¹⁴*Id.*

¹¹⁵*Id.* at 175-76.

¹¹⁶*Id.* at 175.

¹¹⁷*New York*, 505 U.S. at 176.

¹¹⁸*Id.* at 177.

according to its directives.¹¹⁹ If a "federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."¹²⁰

Justice O'Connor also argued that commandeering state governments to act as agents of Congress violates principles of democratic accountability.¹²¹ According to the Court's previous decision, the Constitution was designed to create two spheres of government—one federal and the other state—each with their own "set of mutual rights and obligations to the people who sustain it and are governed by it."¹²² Moreover, the responsibility of state government is to remain responsive to its local electorate, and accountable to its own citizens.¹²³ The Court reasoned that when Congress compels a state to regulate, it makes the state accountable for federal legislation and subjects local officials to public disapproval that should actually be directed toward Congress.¹²⁴

In addition, Justice O'Connor continued the chastisement of Congress's Commerce power that she began in *Garcia*. While the Commerce Clause was intended to be sufficiently powerful to avoid the problems of interstate trade disputes that were widespread under the Articles of Confederation, the Framers did not intend that the Commerce power could be exercised by forcing states to regulate according to Congress's mandates.¹²⁵ "As Madison and Hamilton explained, 'a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity.'"¹²⁶

1. *PRINTZ v. UNITED STATES*

In 1997, the Supreme Court expanded on the principles of state sovereignty announced in *New York*. In addition to affording the states' legislative branch protection from congressional intrusion, the states' executive branches have been given the same protections.

¹¹⁹*Id.* at 178.

¹²⁰*Id.*

¹²¹*Id.* at 168.

¹²²*U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); *see also* THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961).

¹²³*New York v. United States*, 505 U.S. 144, 168 (1992).

¹²⁴*Id.* at 168-69.

¹²⁵*Id.* at 180.

¹²⁶*New York*, 505 U.S. at 180 (quoting THE FEDERALIST NO. 20, at 138 (James Madison) (Clinton Rossiter ed., 1961)). One might wonder what the ultimate import of this view is for international law, and international legal entities such as the World Court of Justice or the GATT appellate process.

The question in *Printz v. United States* was whether the interim provisions of the Brady Handgun Violence Prevention Act, which commanded state and local law enforcement officers to conduct background checks on prospective handgun purchasers and other related tasks, violated the Constitution.¹²⁷ The Brady Act required the chief law enforcement officer ("CLEO") of the locality where the handgun was being purchased to make a reasonable effort to determine whether the sale or possession of the firearm would be in violation of the Brady Act.¹²⁸ The interim provisions essentially commanded state law enforcement officers to participate in the administration of a federally enacted regulatory plan.¹²⁹ Justice Scalia held the Act unconstitutional for several reasons.¹³⁰

First, the Court's opinion dispensed with the federal government's argument that enlisting state executive officers to implement federal law was an acceptable action dating back to the framing of the Constitution.¹³¹ Earlier laws enlisting the state judiciary in enforcing federal proscriptions that were appropriate for the judicial power were deemed acceptable under the Supremacy Clause.¹³² The Court identified several earlier statutes that imposed requirements upon state judges, but found no statutes imposing on the states' executive branches.¹³³ This legislative void, the Court found, indicates that early federal legislators assumed the absence of power to command states' executives.¹³⁴ This is an absence the Court was loathe to overturn.

¹²⁷117 S. Ct. 2365, 2368 (1997).

¹²⁸*Id.* at 2369.

¹²⁹*Id.*

¹³⁰*Id.* at 2384.

¹³¹*Printz*, 117 S. Ct. at 2370.

¹³²*Id.* at 2371.

¹³³*Id.*

¹³⁴*Id.* The early statutes did not direct the states' judiciary to perform functions that could be characterized as executive rather than judicial. *Id.* at 2371 n.2. The commanded actions fell within the separate sphere of the judicial power. *Id.* But see Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993). Prakash argues that the constitutional Framers intended that Congress could compel state executive officials to administer federal law because they could not easily defy federal authority. *Id.* at 2035. This argument focuses on solely historical theories underlying the state executive's role in the constitutional structure as a basis for federal commandeering of state executives. *Id.* at 1990-2007. While *Printz* did examine the Framers' intent, 117 S. Ct. at 2378, it examined this intent with a more functional analysis of early laws and how they were applied to the states. *Id.* at 2370-71. Whereas *Field Office Federalism* looked at static theories, *Printz* looked at those same theories in the dynamic of early congressional enactments and concluded that the Framers' intent was not to have the federal government conscript state executives. The *Printz* Court, then, may be viewed as furthering the "organic document" concept by recognizing that "[l]aw reaches past formalism." *Lee v. Weisman*, 505 U.S. 577, 595 (1992); see also Erwin Chemerinsky,

The Court held that modern doctrine, similar to historical laws, does not extend congressional control to state executives.¹³⁵ Justice Scalia believed that the statutes cited by the government were better characterized as conditions upon the grant of federal funds rather than a direct mandate to the states.¹³⁶ The essential issue in *Printz* was not conditional grants, but rather the "forced participation of the States' executive in the actual administration of a federal program."¹³⁷

The second reason why the Brady Act was constitutionally infirm was that it circumvented the Constitution's executive structure. Justice Scalia argued that the Constitution "does not leave to speculation who is to administer the laws enacted by Congress; [it is to be] the President, . . . personally and through officers whom he appoints. . . ."¹³⁸ Allowing Congress to require that CLEOs enforce the Brady Act without meaningful presidential control, would shatter the unity—insisted by the Framers to ensure "vigor and accountability" in enforcing laws—and the constitutional power of the President to act under the enumerated Article II powers.¹³⁹

Justice Scalia then focused on the dissent and its argument that the Brady Act is a justifiable exercise of the Commerce power by virtue of the Necessary and Proper Clause.¹⁴⁰

Formalism and Functionalism in Federalism Analysis, 13 GA. ST. U. L. REV. 959 (1997) (stating that a functional analysis of federalism issues is superior to formalistic methods because functionalism makes better use of actual public needs and what methods provide for the best governance).

¹³⁵*Printz*, 117 S. Ct. at 2375.

¹³⁶*Id.* at 2376.

¹³⁷*Id.* Of interest in this section of the opinion, Justice Scalia alludes that the conditional granting of federal funds for purposes of encouraging states to enact federal programs may not be a proper exercise of Congress's power under the Spending Clause. *Id.* As Justice O'Connor promised in the *Garcia* dissent, Justice Scalia stated the time will come to scrutinize that power when the issue is properly before the Court. *Id.*

¹³⁸*Id.* at 2378 (citing U.S. CONST. art. II, § 2).

¹³⁹*Printz*, 117 S. Ct. at 2378 (citing THE FEDERALIST NO. 70 (Alexander Hamilton)); see also Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58-70 (1995) (addressing why the President and his subordinates, to a national constituency, are the only proper enforcers of federal law); Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 CARDOZO L. REV. 201, 204-06 (1993) (discussing presidential control under differing unitary executive theories).

¹⁴⁰*Printz*, 117 S. Ct. at 2378-79. The Necessary and Proper Clause declares that Congress shall have Power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. The Necessary and Proper Clause is believed to be the source of the federal preemption power (such as the one present in the CAAA). Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 801 (1996). Professor Gardbaum argues that the preemption power should be affirmatively limited by federalism values. *Id.* at 826. The import of this argument in relation to the substantive

The dissent . . . resorts to the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause. It reasons that the power to regulate the sale of handguns under the Commerce Clause, coupled with the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," conclusively establishes the Brady Act's constitutional validity, because the Tenth Amendment imposes no limitations on the exercise of delegated powers but merely prohibits the exercise of powers "not delegated to the United States." What destroys the dissent's . . . argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself. When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a "la[w] . . . proper for carrying into Execution the Commerce Clause," and thus, in the words of the Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."¹⁴¹

The dissent's argument, in other words, fails because the Commerce Clause authorizes direct congressional control over interstate commerce—it does not authorize Congress to "regulate state governments' regulation of interstate commerce."¹⁴²

In its attempt to validate the Brady Act, the government tried to distinguish *New York*, by arguing that, unlike the "take title" provisions in *New York*, the Brady Act did not require state legislative or executive officials to make policy, but required only the implementation of a federal directive.¹⁴³ The Court disagreed, underscoring the language in the Brady Act that requires CLEOs to exert reasonable efforts in determining who is eligible to purchase a handgun.¹⁴⁴

In its fifth reason for holding the Brady Act unconstitutional, the Court stated that the decision to apply maximal reasonable efforts, or minimal reasonable

federalism theory is similar. Before Congress can take legislative action it must look to principles of state sovereignty first.

¹⁴¹*Printz*, 117 S. Ct. at 2378-79 (citation omitted) (emphasis original).

¹⁴²*Id.* at 2379 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)). In a concurring opinion, Justice Thomas argued for the devolution of the herculean Commerce power. In what he termed a "revisionist" view, Justice Thomas urged that the Constitution places whole areas of regulation outside the reach of Congress's enumerated powers. *Printz*, 117 S. Ct. at 2385-86 (citing U.S. CONST. amend. I (the Establishment Clause); U.S. CONST. amend. II ("the right of the people to keep and bear Arms.")). Similar to the theory of substantive federalism, *see infra* Part V.C., Justice Thomas seems to imply that Article I powers cannot be exercised in such a manner as to transgress upon other constitutional provisions.

¹⁴³*Printz*, 117 S. Ct. at 2380.

¹⁴⁴*Id.* at 2381.

efforts was preeminently a matter of policy.¹⁴⁵ Justice Scalia argued that the absence of a policymaking function in an executive is rare, and that even if the Brady Act does not require policymaking, the intrusion on state sovereignty is still significant.¹⁴⁶ "Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than . . . by 'reduc[ing] [them] to puppets of a ventriloquist Congress.'" ¹⁴⁷ Nevertheless, the Court stated that congressional commandeering of a state's executive officer is never constitutionally acceptable.¹⁴⁸

Next, Justice Scalia argued that the interim provisions of the Brady Act also failed Tenth Amendment scrutiny because of the diminished accountability of Congress.¹⁴⁹ The Court believed that requiring state governments to absorb the financial burden of implementing a federal program allowed Congress to take credit for the success of the Act without having to ask its constituents to pay higher taxes.¹⁵⁰ Even if higher costs are not incurred by the state, it is the CLEO, and not federal officials, that will be blamed for the Act's burdens and defects.¹⁵¹

Furthermore, the Court deemed insignificant the fact that the Brady Act enlisted individual state officers, and not the Executive branch as a whole. "While the Brady Act is directed to 'individuals,' it is directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as agents of the State."¹⁵² According to Justice Scalia, to grant Tenth Amendment immunity from direct congressional interference with the state, but allow indirect control over state officers, is nothing more than "empty formalistic reasoning of the highest order."¹⁵³

Finally, Justice Scalia addressed the argument that the temporary and minimal nature of the interim provisions, and the important interests it serves, justifies congressional intrusion on the states' executive officials.¹⁵⁴ The Court held that a balancing test may be appropriate in certain circumstances, but

¹⁴⁵*Id.*

¹⁴⁶*Id.*

¹⁴⁷*Id.* (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975)).

¹⁴⁸*Printz*, 117 S. Ct. at 2381.

¹⁴⁹*Id.* at 2382; *see also supra* notes 121-24 and accompanying text (discussing *New York's* democratic accountability concerns).

¹⁵⁰*Printz*, 117 S. Ct. at 2382.

¹⁵¹*Id.*

¹⁵²*Id.*; *cf. Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) (holding that, for purposes of Eleventh Amendment immunity, a suit against a state officer acting in an official state capacity is no different than a suit against the state).

¹⁵³*Printz*, 117 S. Ct. at 2382 (citation omitted).

¹⁵⁴*Id.* at 2383.

where the purpose of a law is to direct the functioning of the state's executive and to compromise the structural framework of dual sovereignty, a balancing test is never suitable.¹⁵⁵

B. The Spending Clause

The courts have dispatched federalism challenges to the CAAA by looking to the Spending Clause as opposed to the Tenth Amendment.¹⁵⁶ As a result, the Spending power has been used to transform otherwise unconstitutional commands into permissible actions. When used in this manner, the Spending Clause gives Congress a superhero's power to reach areas that are normally—in more Clark Kent-like circumstances—beyond its legitimate grasp.

The Court articulated its current view of the Spending Clause in *South Dakota v. Dole*.¹⁵⁷ *Dole* addressed the question of whether Congress could withhold federal highway funds if a state refused to raise its minimum drinking age to twenty-one years of age.¹⁵⁸ It was argued that setting a minimum drinking age was a power reserved exclusively for the states under the Twenty-first Amendment.¹⁵⁹ The state also argued that Congress could not intrude upon this power by using the Spending Clause.¹⁶⁰ Despite the federalism question presented by the parties, the Court focused on the Spending Clause and Congress's power to condition funding even in areas that it could not regulate otherwise.¹⁶¹

Chief Justice Rehnquist reasoned that, under the Spending Clause, Congress may attach conditions on the receipt of federal funds in order to achieve state compliance with broad federal policy objectives and commands.¹⁶² "[T]his power . . . 'is not limited by the direct grants of legislative power found in the Constitution.' Thus, objectives not thought to be within Article I's 'enumerated

¹⁵⁵*Id.*

¹⁵⁶*See supra* notes 60-61.

¹⁵⁷483 U.S. 203 (1987).

¹⁵⁸*Id.* at 205.

¹⁵⁹*Id.* The Twenty-first Amendment states that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

¹⁶⁰*Dole*, 483 U.S. at 205.

¹⁶¹*Id.* at 206.

¹⁶²*Id.*; *see also* *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) (attaching condition that state employees refrain from partisan political activities if they are paid with federal funds); *Helvering v. Davis*, 301 U.S. 619 (1937) (providing federal funds to states that assist in establishment of certain provisions of the Social Security Act); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (requiring states to aid in the administration of provisions within the Social Security Act in order to receive federal funds); *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (granting federal monies to states to help reduce maternal and infant mortality rates).

legislative fields,' may nevertheless be attained through the use of [conditional grants under] the spending power. . . ."163

The Court, however, did place limitations on the Spending power. The first limitation, from the language of the Spending Clause, dictates that any use of the Spending power must be in pursuit of the general welfare.¹⁶⁴ The general welfare in safe interstate highway travel was impeded by having differing minimum drinking ages in different states.¹⁶⁵ Unsafe driving conditions were aggravated when underage drivers were encouraged to drive into other states with lower minimum drinking ages.¹⁶⁶ By conditioning federal funds on states raising the minimum drinking age, Congress was acting in a manner "reasonably calculated to advance the general welfare."¹⁶⁷

Next, "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"168 Under this restriction, it is conceivable that an inducement to comply with the federal interest may become so coercive as to "pass the point at which 'pressure turns

¹⁶³*Dole*, 483 U.S. at 207 (quoting *United States v. Butler*, 297 U.S. 1, 66 (1936)).

¹⁶⁴*Dole*, 483 U.S. at 207. What constitutes "for . . . the general welfare" is a question that the courts should grant considerable deference to Congress's interpretation. *Id.* In essence, this is similar to the "political process" reasoning of *Garcia*. See Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 123-25. Although beyond the scope of this Note, this aspect of the *Dole* test is problematic. Professors McCoy and Friedman argue that the "political process" reasoning, if applicable at all, makes more sense in a *Garcia*-like situation. *Id.* at 124. Commerce-based regulation, where Congress regulates directly, is more likely to alert the electorate to congressional abuses. *Id.* Conditional spending, on the other hand, is less likely to tip-off the body politic because the state bears the ultimate responsibility whether to comply with the condition. *Id.* at 124-25. Much like *New York* impliedly abandoned *Garcia's* "political process" rationale by placing judicial limits on national interference with state governments, the time may come when the Court abandons this approach in its Spending Clause cases. See generally Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1962-63 (1995) (proposing that the courts alter the current *Dole* test in favor of a test which will presuppose as invalid any attempt to regulate states in a manner that Congress could not directly mandate).

¹⁶⁵*Id.* at 209.

¹⁶⁶*Id.* at 209.

¹⁶⁷*Id.* What the Court did not address was the required degree of connection between the conditional grant and the general-welfare interest. A second limitation on the Spending power holds that a conditional grant may be illegitimate if unrelated to the federal interest. *Id.* at 207. Amici urged the Court to adopt a direct-relationship test to question the validity of an exercise of Spending power. *Id.* at 209 n.3. Since the issue was not raised by either of the parties, the Court left the indirect/direct relationship inquiry for another day. *Id.*

¹⁶⁸*Dole*, 483 U.S. at 207 (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

into compulsion."¹⁶⁹ Because South Dakota stood to lose only five percent of its highway funding, however, the Court reasoned that, in this instance, coercion was more rhetoric than fact.¹⁷⁰

The last restriction articulated by the Court was that the conditional grant of federal funds may be limited by other constitutional provisions.¹⁷¹ Chief Justice Rehnquist stated that although the Tenth Amendment bars interference with state affairs, it does not place limits on the range of conditions placed *legitimately* on federal grants.¹⁷² In other words, the Spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional."¹⁷³ The Court viewed the minimum drinking age issue as, essentially, cooperative federalism—providing the state with a legitimate, non-discriminatory choice.¹⁷⁴

In a dissenting opinion, Justice O'Connor argued that Congress was attempting to cross a line of state sovereignty drawn by the Twenty-first Amendment.¹⁷⁵ O'Connor viewed the Spending power as a means to regulate commerce in a way which is prohibited by the Twenty-first Amendment.¹⁷⁶

This is a situation which would lie directly within the "other constitutional" limitations imposed on the Spending Clause.¹⁷⁷ Furthermore, Justice O'Connor could not find a sufficient connection between minimum drinking ages and highway construction.¹⁷⁸ The connection between the two was both over, and under-inclusive.¹⁷⁹ It reached minors who did not intend to drive, and did not reach people in excess of the minimum age who contributed greatly to the drunk driving problem.¹⁸⁰ While Congress did have the power to grant funds in order to attain safe highways, changing the social structure of the state did nothing to further this interest.¹⁸¹

According to the dissent, the appropriate test would be whether the "spending requirement or prohibition is a condition on a grant, or if it is a

¹⁶⁹*Dole*, 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

¹⁷⁰*Dole*, 483 U.S. at 211.

¹⁷¹*Id.* at 208.

¹⁷²*Id.* at 210 (emphasis added); see also *infra* Part V.C.

¹⁷³*Id.*

¹⁷⁴*Id.* at 211.

¹⁷⁵*Dole*, 483 U.S. at 212.

¹⁷⁶*Id.*

¹⁷⁷*Id.* at 218.

¹⁷⁸*Id.* at 213-14.

¹⁷⁹*Id.* at 214-15.

¹⁸⁰*Dole*, 483 U.S. at 214-15.

¹⁸¹*Id.* at 215.

regulation."¹⁸² Congress should only have the power to condition a grant on how funds are spent.¹⁸³ Otherwise, it is a regulation and not a grant.¹⁸⁴ Justice O'Connor reasoned that if Congress is allowed to use the Spending power to regulate rather than to provide grants, the truth, "given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self imposed.'"¹⁸⁵ Congress remains an instrument of enumerated powers, and the Spending Clause is impliedly limited by the extent of these powers.¹⁸⁶

C. The Constitutionality of the CAAA

In enacting the CAAA, Congress may be viewed as having protected its mandates from Tenth Amendment invalidation by using the Spending Clause's shield. Defenders of constitutional-federalism values should not view this situation apprehensively. The Spending power has been abused in recent years and needs some adjustment to fortify the other constitutional principles that it threatens.

1. The CAAA's Tenth Amendment Difficulties

The CAAA is the perfect vehicle for examining how the Spending Clause has validated an otherwise unconstitutional intrusion upon state sovereignty. Assuming, in a vacuum, that the CAAA presents no Spending Clause question, the Act's Tenth Amendment legitimacy is, in itself, questionable.

The easiest starting point for examining the Tenth Amendment infirmities inherent within the CAAA is the Act's Permit Program. The Permit Program requires the Governor of each state to submit a licensing plan to the CAA Administrator.¹⁸⁷ This is a direct congressional command to a state's executive branch to administer and promulgate a federal regulatory plan. It should sound familiar, for *Printz v. United States* addressed an analogous issue in the context of the Brady Act.¹⁸⁸ Because the requirements of the Permit Program are

¹⁸²*Id.* at 216 (citation omitted).

¹⁸³*Id.*

¹⁸⁴*Id.*

¹⁸⁵*Dole*, 483 U.S. at 217 (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

¹⁸⁶*Dole*, 483 U.S. at 218. While Justice O'Connor did not expressly invoke the Tenth Amendment, the last paragraph of her dissent alludes that the Tenth Amendment may bar the Spending power. See John R. Vile, *Truism, Tautology or Vital Principle? The Tenth Amendment Since United States v. Darby*, 27 CUMB. L. REV. 445, 514-15 (1997); see also Baker, *supra* note 164, at 1962-63.

¹⁸⁷42 U.S.C. § 7661a(d)(1) (1998).

¹⁸⁸117 S. Ct. 2365, 2369 (1997). Recall that the issue in *Printz* was whether Congress could require the states' executive officers to determine if potential handgun purchasers

virtually identical in functioning to the Brady Act,¹⁸⁹ it is likely that a challenge brought under the *Printz* doctrine would be sustained.

Printz articulates a bright-line rule against congressional enlistment of the states' executive branches. Whether Congress commandeers the executive branch as a whole, or its individual officers, it has crossed the line of dual sovereignty, and its actions are constitutionally infirm.¹⁹⁰ This analysis does not change regardless of the utter lack, or cognizable presence of a policymaking function.¹⁹¹ In either case, Congress has sought to make an end run around the President and his appointed officers who are the only proper administrators of federal law.¹⁹² To hold otherwise would allow Congress to have the states "dancing on its fingers like marionettes."¹⁹³

Standing alone, the CAAA's Permit Program fails Tenth Amendment scrutiny on the premise that it orders the state's executive branch to create and submit a licensing program for federal approval.¹⁹⁴ The potential problem is whether Congress, by withholding state highway funding,¹⁹⁵ has fixed the Permit Program's constitutional defect with the Spending Clause. The same problem arises with the CAAA's State Implementation Plan requirement. Without the sanctioning provisions, the SIP represents a classic example of cooperative federalism. It seeks the aid of the states in creating and implementing the CAA, and if the state chooses not to cooperate, the federal government takes over.¹⁹⁶ What complicates the matter is that before the federal government creates its own plan, the Spending Clause flexes its plenary authority and imposes sanctions on the state in the form of reduced highway funding.¹⁹⁷

If the CAAA was merely a sanction imposed on a state for failing to comply with a legislative mandate, the constitutionality of the Act would be easy to

met the requirements of a federal licensing program. *Id.*

¹⁸⁹Both the Permit Program and the Brady Act enlist the aid of the states' executive branch (CLEOs and Governors) to come up with the method of licensing different individuals. The Brady Act requires a CLEO to determine whether an individual is eligible to purchase a handgun, *id.*, and the Permit Program requires the state Governor to determine what polluter is eligible for a license under the 1990 Amendments. 42 U.S.C. § 7661a(d)(1) (1998).

¹⁹⁰*Printz*, 117 S. Ct. at 2382-83.

¹⁹¹*Id.* at 2381.

¹⁹²*Id.* at 2378 (citing U.S. CONST. art. II, § 2).

¹⁹³Petitioner's Argument Before the Supreme Court, at 29, *Printz v. United States*, 117 S. Ct. 2365 (1997) (No. 95-1478).

¹⁹⁴See *Printz*, 117 S. Ct. at 2382-83.

¹⁹⁵See 42 U.S.C. § 7509 (1998).

¹⁹⁶42 U.S.C. § 7410(c)(1) (1998); see also *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 288-89 (1981).

¹⁹⁷See 42 U.S.C. §§ 7509(a)(4), 7410(m) (1998).

ascertain. Recall *New York v. United States*, which held a "take title" provision unconstitutional because Congress crossed the line separating encouragement from coercion.¹⁹⁸ By imposing a sanction for not complying with the federal program, the states were left with a choice between a rock and a hard place.¹⁹⁹

Unlike the "take title" provision in *New York*, however, the CAAA appears to offer the states a choice between legislating in accordance with federal policies, or suffering the loss of a federal grant.²⁰⁰ This is a typical example of the Spending Clause being used to place conditions on the receipt of federal funds. The current problem that has halted federalism challenges to the CAAA is that the Supreme Court has never invalidated the conditional granting of federal funds.²⁰¹ Holding the CAAA constitutionally defective is further complicated by commingling the Act's conditional grant with a system of cooperative federalism.

The combination of conditional grants and conditional preemption is a merger of two valid constitutional principles.²⁰² This combined model becomes: if the State wishes to receive federal funds for project X it must regulate area Y according to certain congressional commands; if the State does not wish to participate in area Y according to federal directives, the funds for project X will not be granted and the federal government will take over regulation of area Y. The CAAA, however, does not fit within this model because the amorphous presence of cooperative federalism is merely window dressing, and the conditional grant is more of a penalty than an inducement.

The difference between the CAAA and a pure system of cooperative federalism is the timing of the sanctions in relation to the federal government's preemption of state activity. The Federal Implementation Plan becomes active only after the sanctions are imposed.²⁰³ There is no way for a state that does not wish to comply with the CAAA to jump immediately to the federal preemption stage—it must subject itself to the Act's sanctions.²⁰⁴ In this man-

¹⁹⁸505 U.S. 144, 175 (1992).

¹⁹⁹*Id.* at 175-76.

²⁰⁰See 42 U.S.C. §§ 7509(a)(4), 7410(m) (1998).

²⁰¹See Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1141, 1168 (1987).

²⁰²See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (conditional grants); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 288-89 (1981) (conditional preemption).

²⁰³See 42 U.S.C. § 7410(c)(1) (1998). The FIP is enacted two years after the designated time period in which a state is required to submit a SIP. Sanctions, on the other hand, are to be imposed at any time the Administrator becomes dissatisfied with the state's proposal. 42 U.S.C. § 7410(m) (1998).

²⁰⁴See 42 U.S.C. § 7509(a) (1998).

ner, the CAAA closely parallels the federal command or penalty model which was held to be unconstitutional in *New York*.²⁰⁵

Additionally, a sanction, by definition, is a "penalty for non-compliance. . . ." ²⁰⁶ In attaching the loss of highway funding to the failure to submit a SIP, Congress has imposed a penalty on the states to coerce compliance with the CAA. The Tenth Amendment forbids federal directives to state governments to legislate in a particular way.²⁰⁷ The imposition of penalties on the states for failing to comply with the CAAA is also constitutionally unacceptable because it " 'commandeer[s]' state governments into the service of the federal regulatory service. . . ." ²⁰⁸ Furthermore, the fact that the sanctions are only temporary until the FIP activates is inconsequential. Whether a Spending power intrusion upon state sovereignty is minimal or temporary should not be relevant because there is still an untenable penalty assessed against the state for non-compliance.²⁰⁹

2. Spending Clause Analysis

Where the CAAA waters become murky is in the depths of the Spending Clause. Analyzing the Act in—once again—a vacuum, leads to the facile conclusion that the CAAA could be a valid exercise of the Spending power. This presupposition, however, disintegrates when the CAAA is examined as a whole under the substantive federalism theory.²¹⁰

Under *Dole*, the Spending power is legitimate where: (1) the conditional grant is for the general welfare; (2) a reasonable relationship exists between the governmental purpose and the condition; (3) Congress has provided an unambiguous statement that it intends to condition the federal grant on the performance of some action; and (4) there is no violation of an independent constitutional prohibition.²¹¹ The CAAA easily meets the first three of *Dole*'s requirements.

Efforts to clean up air pollution and reduce health hazards certainly fit within the "general welfare."²¹² Although it is questionable whether highway-funding

²⁰⁵See *New York v. United States*, 505 U.S. 144, 175-76 (1992).

²⁰⁶AMERICAN HERITAGE DICTIONARY 1088 (2d college ed. 1985).

²⁰⁷*New York*, 505 U.S. at 175.

²⁰⁸*Id.*

²⁰⁹See *Printz v. United States*, 117 S. Ct. 2365, 2383 (1997). *But see* *Virginia v. Browner*, 80 F.3d 869, 881-82 (4th Cir. 1996) (citing *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989)). Because the loss of highway funds, subject to several exceptions, occurs only in non-attainment areas, the courts have been recalcitrant to find that the sanctions amount to coercive penalties when more severe funding restrictions have been upheld. *Id.*

²¹⁰See *infra* Part V.C.

²¹¹*South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

²¹²See *Browner*, 80 F.3d at 881. The *Browner* court also held that the CAAA's sanctions do not cross the line where pressure turns into compulsion. *Id.* While this may be true,

sanctions are reasonably related to the federal interest in cleaning up air pollution, the CAAA's conditions are no more attenuated than the conditional grants in *Dole*.²¹³ Furthermore, the relationship between conditional attachments and the federal interest, is a question on which the courts will defer to Congress.²¹⁴ Finally, Congress has unambiguously stated its intention to condition highway funding on state compliance with the CAAA.²¹⁵

The final part of the *Dole* test—that there be no independent constitutional prohibition present²¹⁶—is the most perplexing element of the test, and perhaps the key to extracting Excalibur. The "independent constitutional bar" limitation stands for the proposition that the Spending power may not be used to achieve ends which would be inherently unconstitutional.²¹⁷ The question remains, then, whether the Tenth Amendment is a sufficiently strong constitutional bar that will limit Congress in its abuse of the Spending power.

V. SUBSTANTIVE FEDERALISM

The days of the "truism"²¹⁸ have passed and the Supreme Court is examining state sovereignty with renewed vigor. Over the last few years, the Court has tightened the reigns on congressional authority that was believed to be absolute. It is this narrowing of Article I powers—through other constitutional limitations—that supports this Author's theory that the Tenth Amendment will be used as a substantive restraint on Congress's legislative strength.

by failing to recognize the federalism problems with the Act, *Browner* has allowed an unconstitutional infringement upon state sovereignty to remain viable.

²¹³In *Dole*, highway funding was linked to raising the minimum drinking age to twenty-one years of age. 483 U.S. at 205. While there is certainly not a direct relationship between highway funding and either minimum-drinking ages or air pollution, the requirement is just that the connection be reasonably related to the federal interest. *Id.* at 207. *But see* Jeffrey Geiger, Note, *Canary in a Coal Mine? Federalism and the Failure of the Clean Air Act Amendments of 1990*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 81, 102 (1995) (arguing that sanctions which decrease funding for highway improvement programs are not reasonably related to the encouragement of improved air quality standards); William J. Klein, Note, *Pressure or Compulsion? Federal Highway Fund Sanctions of the Clean Air Act Amendments of 1990*, 26 RUTGERS L.J. 855, 867-68 (1995) (arguing a higher degree of connection between the conditions in *Dole* than with the conditions under the CAAA).

²¹⁴*Dole*, 483 U.S. at 207.

²¹⁵*See* 42 U.S.C. §§ 7410(m), 7661a(d)(2)(A-B).

²¹⁶*Dole*, 483 U.S. at 208.

²¹⁷*Id.* at 210. As an example, the Court proffered the hypothetical that Congress could not grant federal funds to states in return for the states inflicting cruel and unusual punishment on people. *Id.*

²¹⁸*United States v. Darby*, 312 U.S. 100, 124 (1941).

A. The Commerce Power Shrinks

Prior to 1995, an exercise of the Commerce power had not been invalidated for nearly sixty years.²¹⁹ That changed when the Supreme Court handed down its decision in *United States v. Lopez*,²²⁰ which struck down the Gun-Free School Zones Act of 1990.²²¹

In *Lopez*, Chief Justice Rehnquist identified three valid types of commerce regulation: (1) regulation over channels of commerce; (2) regulation over instrumentalities of commerce; and (3) regulation over economic activities that substantially affect interstate commerce.²²² The Gun-Free School Zones Act failed constitutional scrutiny because it was not an economic activity that might "substantially affect any sort of interstate commerce."²²³ In order to find a substantial effect, the Court's precedent since 1937 has asked whether Congress's determination that an activity affects interstate commerce is rational.²²⁴ In *Lopez*, Congress did not make concrete findings with respect to the substantial effect that guns in schools may have on interstate commerce.²²⁵ Instead, Congress presupposed that interstate commerce was impacted through a theory of decreased "national productivity."²²⁶ The Court reasoned that allowing Congress to act under this tenuous auspice would give the legislative branch overreaching powers.²²⁷

²¹⁹The last case striking down Commerce legislation was decided in 1936 when the Court held that the Commerce Clause did not give Congress the power to regulate working hours and wages of local mine workers under the Bituminous Coal Act. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Subsequent to *Carter*, President Franklin D. Roosevelt, upset with the Court for hindering his New Deal program for economic recovery, threatened a "court-packing plan" in an effort to sway the Court's position on the Commerce Clause. LOCKHART, *supra* note 78, at 85-86. The plan worked, *id.*, and beginning the next year with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court began a sixty-year expansion of federal power under the Commerce Clause. See also *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963); *United States v. Sullivan*, 332 U.S. 689 (1948); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Fainblatt*, 306 U.S. 601 (1939); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937).

²²⁰514 U.S. 549 (1995).

²²¹18 U.S.C. § 922(q)(2)(A) (1998). The Act prohibited the carrying of firearms within 1000 feet of a school zone.

²²²*Id.* at 558-59.

²²³*Lopez*, 514 U.S. at 567.

²²⁴See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 277 (1981).

²²⁵*Lopez*, 514 U.S. at 562.

²²⁶*Id.* at 564.

²²⁷*Id.* at 565.

While the Court retained the rational-basis analysis, the level of scrutiny within the test, and the limits on the Commerce power have become more stringent.²²⁸ Federalism principles also formed the basis for the Court's decision. If Congress has unfettered power under the Commerce Clause, it will encourage intrusion into areas of traditional state control such as criminal law enforcement, education, and child custody.²²⁹ To grant Congress this power, the Court would "have to pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."²³⁰ Furthermore, the Court was unwilling to conclude "that the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that there will never be a distinction between what is truly national and what is truly local. . . ."²³¹

B. The Eleventh Amendment and the Commerce Clause

In addition to finding limits on an Article I power within the power itself, the Supreme Court has also turned to other constitutional embodiments of federalism to constrain Congress's legislative excesses. The Eleventh Amendment was originally enacted to protect a state's sovereign immunity from civil suits filed by citizens in federal courts.²³² Recently, the Court held that this sovereign immunity cannot be invalidated through the Commerce Clause.²³³

Seminole Tribe of Fla. v. Florida examined the Indian Gaming Regulatory Act ("IGRA") and its provision authorizing Indian tribes to bring federal suits against the state to force compliance with the Act.²³⁴ The issue presented was

²²⁸See Julian Epstein, *Evolving Spheres of Federalism After U.S. v. Lopez and Other Cases*, 34 HARV. J. ON LEGIS. 525, 535-36 (1997). The rational basis test is no longer highly deferential to Congress or hypothetical justifications. *Id.* at 535 (citing Deborah Jones Merritt, *Reflections on United States v. Lopez*, 94 MICH. L. REV. 674, 682 (1995)). The standard of review appears to be a more substantive analysis of "whether the regulated activity *does in fact* substantially affect interstate commerce." *Id.* at 536 (emphasis added).

²²⁹*Lopez*, 514 U.S. at 564.

²³⁰*Id.* at 567.

²³¹*Id.* at 567-68 (citations omitted).

²³²See ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 7.2, at 369-72 (2d ed. 1994) (CHERMERINSKY I). In the words of Alexander Hamilton:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity . . . it will remain with the State.

Id. at 371-72 (quoting THE FEDERALIST NO. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original)).

²³³See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

²³⁴*Id.* at 47.

whether the Eleventh Amendment prohibits Congress from subjecting states to suits in federal court to enforce Article I legislation.²³⁵ The majority held that IGRA violated the Eleventh Amendment because Congress is incapable of abrogating a state's immunity through an Article I power.²³⁶

The Court applied a two-part test to determine if IGRA passed constitutional muster under the Eleventh Amendment. First, Congress's intention to override state immunity must be obvious from an unambiguous legislative statement.²³⁷ IGRA easily passed this test given the numerous references to the "State" in the Act.²³⁸ Second, Congress must have acted pursuant to a legitimate exercise of legislative power.²³⁹ When Congress passed IGRA, it failed to satisfy this prong.

The petitioner's argument relied upon the holding of *Pennsylvania v. Union Gas Company*,²⁴⁰ which allowed Congress to abrogate state immunity through the Interstate Commerce Clause.²⁴¹ The Court agreed that the reasoning in *Union Gas* was applicable to the Indian Commerce Clause, which "accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause."²⁴² Notwithstanding the petitioner's argument, *Union Gas* "deviated sharply from [the Court's] established federalism jurisprudence"²⁴³ and was expressly overruled.²⁴⁴

Before the decision in *Union Gas*, the Court never held that Article III jurisdiction²⁴⁵ could be expanded by any constitutional provision other than the Fourteenth Amendment.²⁴⁶ By overruling *Union Gas*, the Court reiterated that the Eleventh Amendment, and the principles of federalism which it

²³⁵*Id.* at 53. The Article I power at issue was the Indian Commerce Clause, which provides that Congress shall have the power "[t]o regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The Indian Commerce Clause is located in the same provision with the Interstate Commerce Clause.

²³⁶*Seminole Tribe*, 517 U.S. at 76.

²³⁷*Id.* at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

²³⁸*Seminole Tribe*, 517 U.S. at 57.

²³⁹*Id.* at 55 (quoting *Green*, 474 U.S. at 68).

²⁴⁰491 U.S. 1 (1989), overruled by *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

²⁴¹*Seminole Tribe*, 517 U.S. at 61.

²⁴²*Id.*

²⁴³*Id.* at 63.

²⁴⁴*Id.* at 65.

²⁴⁵See U.S. CONST. art. III, § 2.

²⁴⁶*Seminole Tribe*, 517 U.S. at 65; see also U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.")

protects, are not subject to Article I control.²⁴⁷ State sovereignty remains intact regardless of Congress's seemingly complete lawmaking authority under Article I.²⁴⁸

C. *The Emergence of Substantive Federalism*

This Note posits a theory to curb the abuse of Congress's legislative authority. By embracing substantive federalism, Article I powers will be limited by the Tenth Amendment and will not enjoy a presupposition of validity.

The history of the Tenth Amendment is an appropriate starting point in the development of substantive federalism. For a long period of time, the Tenth Amendment operated as nothing more than a plain statement of the obvious that afforded little protection to the states.²⁴⁹ In the aftermath of *Garcia*, state sovereignty was left to the political processes.²⁵⁰ Tenth Amendment power was reborn in *New York v. United States* when the Court held that Congress could not commandeer the states' legislative function.²⁵¹ This protection is decreed no matter how strong the federal interest in the legislation may be.²⁵² Protections over state sovereignty were expanded again in the 1996 Term when the Court invalidated certain portions of the Brady Act.²⁵³ According to *Printz*, Congress cannot force the states' executive branches to enact federal regulatory programs regardless of the federal interest involved.²⁵⁴ Whenever the structural framework of dual sovereignty is compromised, the Tenth Amendment steps in to prevent a usurpation of federalism.²⁵⁵

Printz and *New York* held that Congress was incapable of commanding the states to take a course of action that it could not undertake directly.²⁵⁶ But what happens if Congress breaches the Tenth Amendment through an Article I power like the Spending Clause? Do the Court's enunciated protections extend to Article I? These are the questions that the theory of substantive federalism answers.

The restraint on Article I began, to large extent, in *Garcia* when Justice O'Connor predicted that the Commerce power would be affirmatively limited

²⁴⁷*Seminole Tribe*, 517 U.S. at 72.

²⁴⁸*Id.*

²⁴⁹See *United States v. Darby*, 312 U.S. 100, 124 (1941).

²⁵⁰*Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985); see also *South Carolina v. Baker*, 485 U.S. 505, 512 (1988).

²⁵¹*New York v. United States*, 505 U.S. 144, 175-76 (1992).

²⁵²*Id.* at 178.

²⁵³*Printz v. United States*, 117 S. Ct. 2365, 2384 (1997).

²⁵⁴*Id.* at 2383-84.

²⁵⁵*Id.*

²⁵⁶See *Printz*, 117 S. Ct. at 2382; *New York*, 505 U.S. at 178.

by state autonomy.²⁵⁷ The door was further opened in *New York* when the plenary nature of the Commerce Clause was labeled as "subversive" to the interests of state sovereignty.²⁵⁸ *United States v. Lopez* put the first nail in the coffin when it struck down an exercise of the Commerce power as going so far as to approach a "police power of the sort retained by the States."²⁵⁹ The Commerce Clause, in other words, authorizes control over interstate commerce, but does not authorize regulation of the states.²⁶⁰

Seminole Tribe, however, lends the greatest support to the substantive federalism theory. The Eleventh Amendment—a core guardian of state sovereign interests²⁶¹—withstands any attempt by Congress to pierce the shield of federalism with Article I.²⁶² Similar to the Tenth Amendment, the Eleventh Amendment once provided little protection to the states when Congress flexed its Article I muscle.²⁶³ Along with the strengthening of the Eleventh Amendment, *New York* and *Printz* add to the growth of federalism and the devolution of unrestricted congressional power. The same 5-4 majority²⁶⁴ has written the opinions in *New York*, *Lopez*, *Seminole Tribe*, and *Printz*, and it is only a matter of time before the rationale in *Seminole Tribe* is extended to the Tenth Amendment as a limit on the Spending Clause.²⁶⁵

Substantive federalism presents the argument that the Tenth Amendment will be used in much the same manner as the Eleventh Amendment was used in *Seminole Tribe*. If a core principle of state sovereignty will be encroached upon by an Article I power, the Tenth Amendment prohibits the intrusion.²⁶⁶ On the other side of the coin, Congress must look to the Tenth Amendment and ask whether its proposed legislation will impinge upon principles of federalism. If substantive federalism can operate to block congressional action under the Commerce Clause, then it can also curtail the Spending power.²⁶⁷

²⁵⁷*Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 587, 589 (1985).

²⁵⁸505 U.S. at 180 (quoting THE FEDERALIST NO. 20, at 138 (James Madison) (Clinton Rossiter ed., 1961)).

²⁵⁹514 U.S. 549, 567 (1995).

²⁶⁰*Printz*, 117 S. Ct. at 2379 (quoting *New York*, 505 U.S. at 166).

²⁶¹See CHEMERINSKY I, *supra* note 232, at 369-72.

²⁶²*Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

²⁶³See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19-20 (1989).

²⁶⁴See *supra* note 72.

²⁶⁵Interestingly, the last case to strike down Spending Clause legislation limited the Spending power by applying federalism principles. See *United States v. Butler*, 297 U.S. 1 (1936). The *Butler* decision would allow federal spending programs that benefit the general welfare as long as state interests are not involved. *Id.* at 70.

²⁶⁶*Cf. Seminole Tribe*, 517 U.S. at 72.

²⁶⁷See generally Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism Based Constitutional Challenge* 9 STAN. L. & POLY REV. 115, 121-22 (1998) (arguing that the Supreme Court's recent Tenth Amendment

The four-part test in *Dole* also supports this Note's theory that the Supreme Court would be willing to use the Tenth Amendment to control conditional spending.²⁶⁸ The independent constitutional limitation prong²⁶⁹ seems readily acceptable to the notion of stronger Tenth Amendment sovereignty. Recall that *Seminole Tribe* asked whether Congress exercised a valid constitutional power.²⁷⁰ By enacting IGRA, Congress used an Article I power to infringe upon state sovereign interests.²⁷¹ This was unconstitutional regardless of the comprehensive nature of the power granted to Congress.²⁷² According to substantive federalism, and the independent constitutional bar prong of the Spending Clause, if Congress conditions funds on the commandeering of state governmental functions, then Congress has acted in an *ultra vires* manner and the legislation must be nullified. Under the Tenth Amendment, Congress cannot issue a mandate directly to the states. Under substantive federalism, the plenary nature of the Spending power does not alter the constitutional infirmity of a congressional action.²⁷³

In addition to preventing Congress from sneaking unconstitutional commands to the states through the Spending Clause, limiting the Spending power also protects other federalism values. A broad Spending power appears to transfer political accountability from the federal government to the states.²⁷⁴

decisions, and the Court's "openness" to limiting congressional legislative power lends credence to reevaluating Spending Clause precedent); cf. Baker, *supra* note 164, at 1962-63; Candice Hoke, *Constitutional Impediments to National Health Care Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L.Q. 489, 567 (1994) (arguing that the coercive potential of conditional grants under the Spending Clause and conditional preemption under the Commerce Clause destroys the federalism doctrine of *New York*).

²⁶⁸See generally *supra* notes 171-74, 217; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.4.3, at 204 (1997) (CHEMERINSKY II) ("[A]s the Supreme Court revives the Tenth Amendment as a limit on Congress's powers, the Court might impose greater restrictions on conditional spending.")

²⁶⁹*South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

²⁷⁰517 U.S. at 55.

²⁷¹*Id.* at 72.

²⁷²*Id.*

²⁷³Remember that *Seminole Tribe* held that the Indian Commerce Clause, which is a greater grant of federal power than the Interstate Commerce Clause, did not alter the protections granted to the States under the Eleventh Amendment. 517 U.S. at 61, 72. While, arguably, Congress should possess a strong Spending power, see Baker, *supra* note 164, at 1916, having the impenetrable ability to reach any aspect of state government "render[s] the government of the Union too powerful, and . . . enable[s] it to absorb in itself those . . . authorities, which it might be judged proper to leave with the States. . . ." THE FEDERALIST NO. 17, at 105 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

²⁷⁴See Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law*, 95 COLUM. L. REV. 1001, 1071 (1995); Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1431-32 (1994).

Using the theory of substantive federalism curbs this transfer and enforces the underlying principle that the different spheres of the government are to remain accountable to their respective electorates.²⁷⁵

Professor Caminker argues that (similar to the federal command or penalty model of *New York*) conditional grants pose the same risk of misblame and political liability that federal commandeering does.²⁷⁶ Essentially, state officials must make the choice between accepting Congress's condition or refusing federal funds.²⁷⁷ Either choice is likely to be unfavorable to some portion of their constituency who will see the state official as the only person who took action.²⁷⁸ The federal government, therefore, has removed itself from the local constituency's view.²⁷⁹

The principles of political accountability that formed a basis for the *New York* decision²⁸⁰ apply with equal force to the Spending Clause. This Note argues that the Spending power is not unlimited. A federalism principle that has been used to affirmatively limit Congress's power is the doctrine of political accountability.²⁸¹ When principles of state sovereignty are threatened—whether by direct congressional action or indirect conditions on federal grants—the Tenth Amendment activates to prevent a usurpation of federalism values. Thus, if an exercise of the Spending power subjects the states to a constitutionally infirm regulation, or transfers political accountability from the federal government to the states, it is illegitimate and, pursuant to the theory of substantive federalism, needs to be reevaluated.

VI. RESTRUCTURING THE CAAA

With substantive federalism being only a stone's throw away from becoming reality, what does the future hold for the CAAA? The Act is fraught with constitutional questions, and unless its functioning is altered, it is unlikely that the evils of air pollution will be controlled through the CAAA.

Currently, the CAAA's State Implementation Plan, Permit Program, and sanctioning provision offer states a choice between regulating according to federal directive, or losing highway funding. Through the use of the Spending Clause, the CAAA seeks to punish states that refuse to regulate according to Congress's command. *New York v. United States* holds that the combination of direct federal mandates and punishment for non-compliance represents a

²⁷⁵See *New York v. United States*, 505 U.S. 144, 168 (1992).

²⁷⁶Caminker, *supra* note 274, at 1071.

²⁷⁷*Id.*

²⁷⁸*Id.*

²⁷⁹*Id.*

²⁸⁰See *supra* notes 121-24 and accompanying text.

²⁸¹*Id.*

Hobson's choice between two equally unconstitutional actions.²⁸² The CAAA seeks to use the Spending Clause's broad reach to constitutionalize an action directly contrary to the Tenth Amendment. Substantive federalism rejects this contingency.²⁸³

The solution is to sever the sanctioning provision from the CAAA. Once the sanctioning provision is removed, the state has a choice between enacting federal regulatory programs, or surrendering control over air pollution to the federal government. This is the type of cooperative federalism model held to be constitutional in *FERC* and *Hodel*.²⁸⁴ With a firm system of cooperative federalism in place, the principles of the Tenth Amendment are being fulfilled, and the CAA is unlikely to suffer any adverse effects.²⁸⁵

In general, the states will find ways to correct air pollution problems that extend beyond the CAA's directives.²⁸⁶ Given that only Virginia and Missouri

²⁸²505 U.S. 144, 176 (1992); accord *Printz v. United States*, 117 S. Ct. 2365, 2381 (1997) (holding that direct commands to the States' executive officers are equally unconstitutional).

²⁸³See *supra* notes 249-73 and accompanying text.

²⁸⁴See *supra* note 69 and accompanying text. Although not the focus of this Note, *FERC*'s conditional preemption model is troublesome. Whereas *Hodel* allows for continued state involvement and participation in formulating a federal regulatory plan, or submitting to total federal preemption (which is analogous to the CAAA minus the sanctioning provision), 452 U.S. 264, 289 (1981), *FERC* requires the States to regulate according to direct congressional command without any participation in developing the underlying policies. 456 U.S. 742, 764-65 (1982). As pointed out in *FERC* by Justice O'Connor's partial dissent, this type of federal mandate may violate democratic accountability concerns. *Id.* at 787.

In the wake of *New York* and its progeny, it is possible that the *FERC* model of cooperative federalism may be overturned. One of the primary reasons for holding *New York*'s "take title" provision unconstitutional was the transfer of democratic accountability from the federal government to the State. 505 U.S. at 168-69. In addition, *New York*'s condemnation of directives that require the State to regulate according to federal standards, *id.* at 175-76, is likely to render the *FERC* model a choice between a rock and a hard place. In the words of Justice O'Connor, "there is nothing 'cooperative' about a federal program that compels state agencies either to function as bureaucratic puppets of the Federal government or to abandon regulation of an entire field traditionally reserved to the state authority." *FERC*, 456 U.S. at 783; cf. Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 270-73 (1997) (arguing that cooperative federalism is, in itself, unconstitutional because it effectively delegates federal legislative power, and accountability to the States).

²⁸⁵See Geiger, *supra* note 213, at 113 n.206 (noting that the majority of governmental expenditures are made at the State and local level, and that the goals of the CAA are best served by a "true partnership effort" between Congress, the EPA and the States) (citations omitted).

²⁸⁶See BRYNER, *supra* note 17, at 183. Allowing the States to act as laboratories for experimentation is one of the benefits of federalism values. CHEMERINSKY II, *supra* note 268, § 3.8, at 224. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* at 225 (quoting

have challenged the 1990 Amendments, it is likely that a majority of the states would not have a problem with a system of cooperative federalism.²⁸⁷ While there is certainly a national interest in clean air, Congress cannot step beyond the Constitution and precepts of state sovereignty to meet those interests—the federalism doctrine forbids such an action.²⁸⁸

VII. CONCLUSION

The CAAA raises complex questions over the interplay between the Tenth Amendment and Congress's Article I powers. Given the broad powers granted to Congress under the Spending Clause, it is easy to see why principles of state sovereignty have been limited by the Spending power. The argument presented by this Note, however, is just the opposite. The course the Supreme Court is taking—as supported by key decisions in the areas of the Commerce Clause, and the Tenth and Eleventh Amendments—suggests that the Spending Clause and other Article I powers may not be used to circumvent the constraints of federalism. This is the principle behind substantive federalism. Substantive federalism is a doctrinal approach to the Tenth Amendment that acts as a hand to extract a constitutional Excalibur from the stone of state sovereignty to assure that Congress keeps a mindful watch of the "powers . . . reserved to the States."²⁸⁹

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New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); see also Chemerinsky, *supra* note 67, at 528-30.

²⁸⁷Cf. Geiger, *supra* note 213, at 113 n.206 (citing Paul R. Portney, *The EPA at "Thirtysomething,"* 21 ENVTL. L. 1461, 1473 (1991)). According to Mr. Geiger:

[M]any states are not only regulating, but are also breaking new ground. . . . State environmentalism has also led to more active state legislatures and increasingly sophisticated environmental agencies. [T]he locus of environmental activity has increasingly shifted toward the state level with the rise in grass roots organizations and decentralization of national environmental advocacy groups.

Id. (citations omitted).

²⁸⁸See, e.g., *New York*, 505 U.S. at 178.

²⁸⁹U.S. CONST. amend. X.

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