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Subcommittee on Environment and the Economy**

**Hearing on
Constitutional Considerations: States vs. Federal Environmental Policy Implementation**

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Mr. Chairman and Members of the Subcommittee: the Congressional Research Service is pleased to assist the subcommittee with its inquiry into the appropriate allocation of responsibilities in federal environmental programs between the federal and state governments. I am an attorney with the American Law Division of CRS, where I specialize in environmental law. As requested, this statement provides an overview of the constraints imposed on Congress in crafting environmental legislation based on the Commerce Clause and Tenth Amendment of the U.S. Constitution.¹ As part of that overview, the statement highlights the measures Congress constitutionally can and cannot adopt when it seeks to enlist state efforts in carrying out federal environmental programs. The statement does not extend to other constitutional provisions pertinent to federal versus state environmental regulation (such as the dormant commerce clause), nor to the myriad of nonconstitutional considerations relevant to a congressional allocation of federal and state responsibilities.

Commerce Clause

Generally

The Commerce Clause of the Constitution bestows upon Congress the power "[t]o regulate Commerce ... among the several States"² As the basis for much of the environmental, social, and economic legislation enacted by Congress, the scope of this power is of more than passing interest.

¹ See also CRS Report No. RL30315, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, by Kenneth R. Thomas.

² Art. I, § 8, cl. 3.

Beginning in the 1930s, the Supreme Court adopted an expansive view of that scope,³ in part reflecting a view that its earlier decisions had “artificially ... constrained the authority of Congress to regulate interstate commerce.”⁴ Indeed, from 1937 until 1995, the Court rebuffed every Commerce Clause challenge to federal statutes.

In 1995, Congress’ winning streak came to a halt. In *United States v. Lopez*,⁵ the Supreme Court voided a conviction under the Gun-Free School Zones Act as beyond Congress’ commerce power. The Court identified three categories of activity reached by the Commerce Clause – the now-canonical test.⁶ First, *Congress may regulate use of the channels of interstate commerce*. Second, *Congress may regulate and protect the instrumentalities of, or persons or things in, interstate commerce*, even though the threat may come only from intrastate activities. And third, *Congress may regulate activities, even intrastate ones, that alone or in the aggregate “substantially affect” interstate commerce*.

The last, “substantial effect” category is the most complex and most manipulable. In *Lopez*, the Court strongly suggested that only *economic* activity may be aggregated to establish a substantial effect.⁷ Also, it helps if there is a jurisdictional element in the statute to ensure that the covered activities affect interstate commerce. And while there need be only a rational basis to support the substantial effect, the link to interstate commerce may not be “attenuated.” On the other hand, “where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.”⁸ Finding that possession of a gun in

³ The key decision ushering in the modern period of expansive Commerce Clause interpretation is *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). There, the Court rejected its previous distinction between “direct” and “indirect” effects on interstate commerce, recasting the Commerce Clause inquiry as whether the intrastate activities “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce” *Id.* at 36-38.

⁴ *United States v. Lopez*, 514 U.S. 549, 556 (1995).

⁵ 514 U.S. 549.

⁶ *Id.* at 558-559.

⁷ *Id.* at 560.

⁸ *Id.* at 558 (other italics omitted).

a schoolyard lay outside the “substantial effect” category (the only one that applied), *Lopez*' conviction was reversed.

In 2000, the Court in *United States v. Morrison*⁹ again held that Congress had exceeded its commerce power—this time in creating the federal civil remedy in the Violence Against Women Act. As in *Lopez*, the Court focused on the noneconomic nature of the federally proscribed activity in refusing to aggregate impacts on interstate commerce under the “substantial effect” category.¹⁰ The Court was not deterred by the numerous statutory findings as to the impact of gender-based violence on interstate commerce, reasoning that allowing aggregation of intrastate noneconomic activities such as violence against women on a “but for” basis would also allow congressional regulation of many other areas (crimes generally, family law) of traditional state regulation.¹¹ After *Morrison*, the Court has construed federal statutes narrowly at least in part to avoid questions as to their possible invasion of intrastate realms beyond Congress' commerce power.¹²

The overruling of congressional enactments in *Lopez* and *Morrison* aroused the concern of some that the Supreme Court was looking to shrink the commerce power. Yet even at the time of these decisions, it was plain they did not overrule any of the Court's prior Commerce Clause decisions. The Court even cited with approval *Wickard v. Filburn*,¹³ a 1942 decision widely seen as the pinnacle of its expansive Commerce Clause jurisprudence. *Lopez* and *Morrison* are thus best regarded not as a retrenchment, but rather as a clarification of where the line has long been, and a warning that the line will not be shifted further toward federal power.

⁹ 529 U.S. 598 (2000).

¹⁰ “While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity ... , thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” *Id.* at 613.

¹¹ *Id.* at 615-616.

¹² *Jones v. United States*, 529 U.S. 848 (2000) (federal arson statute); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (federal statute creating permit program for discharges into “isolated waters”).

¹³ 317 U.S. 111 (1942).

Following *Lopez* and *Morrison*, the Supreme Court has handed down two additional Commerce Clause decisions that suggest, or at least do not undermine, the view that it is not looking to shrink congressional power. In *Gonzales v. Raich*, the “substantial effect” prong of the commerce power was yet again pivotal.¹⁴ There, the Court sustained the use of the federal Controlled Substances Act to prohibit the intrastate, non-commercial manufacture and possession of marijuana for medicinal purposes in accordance with California law. As with the wheat grown for home consumption in *Wickard*, the marijuana grown for home use in *Raich* was seen by the Court, in the aggregate, to have substantial effects on interstate commerce in marijuana. Said the Court: *Congress “can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity”*¹⁵ More broadly, the Court was explicit that *Lopez* and *Morrison* “[preserved] modern-era Commerce Clause jurisprudence.”¹⁶ The second Commerce Clause decision since *Lopez* and *Morrison* was *National Federation of Independent Business v. Sebelius*,¹⁷ a narrow ruling that the Commerce Clause does not extend to the federal regulation of *inactivity*.

Congressional Findings

Worth highlighting in these decisions are the Court’s assertions as to the role of congressional findings in a statute or its legislative history. On the one hand, the Court is clear that while “Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce ... ,”¹⁸ such findings are “helpful ... particularly when the connection to commerce is not self-evident”¹⁹ On the other hand, congressional findings are not sufficient, by themselves, to

¹⁴ 545 U.S. 1 (2005).

¹⁵ *Id.* at 18.

¹⁶ *Id.* at 23.

¹⁷ 132 S. Ct. 2566 (2012).

¹⁸ *Lopez*, 514 U.S. at 562.

¹⁹ *Raich*, 545 U.S. at 21.

establish Commerce Clause legitimacy. Whether particular activities fall within the Clause is “ultimately a judicial rather than a legislative question.”²⁰

Effect of Necessary and Proper Clause

One might suppose that the enumeration of Congress’ powers in Article I, section 8, reasonably implies that Congress has the power to pass laws effecting those powers. Nonetheless, the Constitution includes a separate clause expressly stating that Congress has the authority to “make all Laws which shall be necessary and proper” for that purpose.²¹ This Necessary and Proper Clause has been integral to courts reaching a broad interpretation of other congressional powers, such as the Commerce Clause.

The fact that the role of the Necessary and Proper Clause may not be mentioned in a given decision, or mentioned only in passing, has obscured its historical significance in Commerce Clause litigation. Justice Scalia noted in his *Raich* concurring opinion that it is more accurate to view the expansive “substantial effects” prong of Commerce Clause analysis as rooted in the Necessary and Proper Clause.²² Indeed he went further, arguing that the Necessary and Proper Clause can go beyond the Commerce Clause framework to regulate even those intrastate activities that do not themselves substantially affect interstate commerce.²³ Perhaps, he suggested, this explains *Raich’s* acceptance of congressional authority over noneconomic, intrastate activities lacking substantial effect on interstate commerce where they are “an essential part of a larger congressional regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”²⁴

²⁰ *Morrison*, 529 U.S. at 614.

²¹ Art. I, § 8, cl. 18.

²² 545 U.S. at 33-39 (Scalia, J., concurring).

²³ *Id.* at 37.

²⁴ *Id.* at 36.

Commerce Clause Challenges to Federal Environmental Statutes

Soon after the *Lopez* decision, concerns were raised that some federal environmental statutes might be on shaky Commerce Clause footing.²⁵ Vulnerabilities were suggested in the Superfund Act, as to cleanup sites where the contamination remains within one state;²⁶ the Clean Water Act, as to the assertion by the Corps of Engineers and EPA of jurisdiction over “isolated waters”;²⁷ the Safe Drinking Water Act, regarding publicly owned drinking water systems providing service within one state;²⁸ and the Endangered Species Act, as applied to species located entirely within one state and affected by noneconomic activity.²⁹

The vast majority of federal environmental provisions seems to be on commerce power *terra firma*—that is, under current Supreme Court interpretation. Either the activity regulated is an economic one that, alone or in the aggregate, has substantial effect on interstate commerce (e.g., industrial activity causing air pollution), or the statute is explicit that it reaches only activities in or affecting interstate commerce,³⁰ or there are plausible congressional findings that the regulated activity affects interstate commerce.³¹ Moreover, case law indicates that the concept of economic activity, the prerequisite for aggregating the interstate impacts of intrastate activity, is to be broadly construed³²—though undeniably

²⁵ See, e.g., *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 ENVTL. L. RPT. 10421 (1995); J. Blanding Holman, Note, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L. J. 139 (1995).

²⁶ More formally, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675.

²⁷ 33 C.F.R. § 328.3(a)(3) (Corps of Engineers); 40 C.F.R. § 230.3(s)(3) (EPA). In these identical regulations, the agencies define their jurisdiction under the Clean Water Act to reach waters that are not traditional navigable waters, are not interstate, are not tributaries of the foregoing, and are not hydrologically connected to navigable or interstate waters, but “the use, degradation, or destruction of which could affect interstate ... commerce” These waters are popularly referred to as “isolated waters,” though the phrase is not used in the Clean Water Act or regulations themselves.

²⁸ 42 U.S.C. §§ 300f through 300j-26.

²⁹ 16 U.S.C. §§ 1531-1544.

³⁰ See, e.g., Federal Hazardous Substances Act, 15 U.S.C. § 1263; Toxic Substances Control Act, 15 U.S.C. § 2602(3)-(4); Migratory Bird Treaty Act, 16 U.S.C. § 705; Clean Air Act, 42 U.S.C. § 7511b(e)(1)(C); Clean Water Act, 33 U.S.C. § 1342(a); Hazardous Materials Transportation Act, 49 U.S.C. § 5102(1).

³¹ See, e.g., Toxic Substances Control Act, 15 U.S.C. § 2601(a)(3); Marine Mammal Protection Act, 16 U.S.C. § 1361(5).

³² See, e.g., *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000) (“The *Lopez* Court’s characterization of the regulation of homegrown wheat in *Wickard* ... as a case involving economic activity makes clear the breadth of this concept.”).

amorphous.³³ Finally, the Court has cautioned that congressional enactments should be judicially invalidated only upon “a plain showing” that Congress exceeded its constitutional bounds.³⁴

Consistent with this reasoning, CRS is aware of only a few successful Commerce Clause challenges to federal environmental statutes following *Lopez*—continuing the pre-*Lopez* pattern.³⁵ Lower courts since *Lopez* have rejected Commerce Clause challenges to the Superfund Act,³⁶ Clean Air Act,³⁷ Clean Water Act,³⁸ Endangered Species Act,³⁹ Migratory Bird Treaty Act,⁴⁰ and Eagle Protection Act. Decisions under the Endangered Species Act (ESA) are the most numerous, each finding that the act is, in the words of *Lopez*, a “general regulatory statute [that] bears a substantial relation to commerce.”⁴¹ Thus, said the most recent decision (quoting *Raich*), even though the ESA might

³³ In his majority opinion in *Lopez*, Chief Justice Rehnquist noted this problem: “Admittedly, a determination whether intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty.” 514 U.S. at 566. *See, e.g.*, *United States v. Gregg*, 226 F.3d 253 (3d Cir. 2000) (majority and dissenting opinions reach opposite conclusions as to whether protesters at abortion clinics are engaged in “economic” activity for purposes of Commerce Clause analysis).

³⁴ *Morrison*, 529 U.S. at 607.

³⁵ Prior to *Lopez*, the Supreme Court itself rejected Commerce Clause attacks on the Surface Mining Control and Reclamation Act, *Hodel v. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264 (1981), and the rails-to-trails program, *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1 (1990). In the former ruling, the Court also noted its agreement with lower-court decisions “that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.” *Hodel*, 452 U.S. at 282 and n.21 (1981). In contrast, and also in the pre-*Lopez* period, EPA’s asserted Clean Water Act jurisdiction over isolated waters was held outside the Commerce Clause in *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310 (7th Cir. 1992), *vacated on other grounds*, 999 F.2d 256 (7th Cir. 1993). *See* note 27 *supra*.

³⁶ *See, e.g.*, *USA v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997); *United States v. NL Industries, Inc.*, 936 F. Supp. 545 (S.D. Ill. 1996).

³⁷ *See, e.g.*, *United States v. Ho*, 311 F.3d 589 (5th Cir. 2002); *Allied Local and Regional Mfrs. Caucus v. US EPA*, 215 F.3d 61 (D.C. Cir. 2000).

³⁸ *United States v. Hartsell*, 127 F.3d 343 (4th Cir. 1997). *See, however, United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), where the court invalidated as unauthorized by Clean Water Act section 404 a Corps of Engineers regulation asserting jurisdiction over wetlands the use of which merely “could,” as opposed to “did,” affect interstate commerce. *See* note 27 *supra*. The court went on to note in dictum that were this regulation a statute, it would exceed Congress’ authority under the Commerce Clause. *See also* text accompanying notes 43-48 *infra*.

³⁹ Five circuits have addressed post-*Lopez* Commerce Clause challenges to the Endangered Species Act; each has rejected the challenge, though with varying rationales of some inter-circuit inconsistency. *San Luis & Delta-Mendota Water Auth.*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *GDF Realty Investment Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

⁴⁰ *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1997).

⁴¹ 514 U.S. at 558. *San Luis & Delta-Mendota Water Auth.* provides a review of why, in the view of circuit courts that have ruled on the issue, the protection of endangered and threatened species implicates interstate commerce, even when the species are purely intrastate and have no commercial value. For example, “[a] species might become threatened or

“ensnare[] some purely intrastate activity, ... we refuse to excise individual components of that larger scheme.”⁴² One may speculate that the center of the Court is not yet ready to take on a body of law such as federal environmental statutes where to do so would open up the federal civil rights laws, many federal criminal statutes, and other federal statutes to Commerce Clause attack.

In 2001, concern as to the Commerce Clause compatibility of some federal environmental laws was stirred anew by the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), a statutory construction decision with Commerce Clause undertones.⁴³ In SWANCC, the Court dealt with the Corps’ definition of the Clean Water Act jurisdictional phrase “waters of the United States” to include intrastate “isolated waters” “the use, degradation, or destruction of which could affect interstate ... commerce.”⁴⁴ The Corps read its definition to bring in isolated waters that are or might be used by migratory birds that cross state lines—the much-debated “migratory bird rule.” Though the case was decided on statutory grounds—the Clean Water Act, the Court held, did not reach so far—the Commerce Clause heavily influenced the Court’s reasoning. Because the migratory bird rule “invokes the outer limits of congressional power,” the Court said, “we expect a clear indication that Congress intended that result”—an indication the Court did not find.⁴⁵ This concern is enhanced, said the Court, where an agency interpretation “permit[s] federal encroachment upon a traditional state power”⁴⁶—citing the states’ “traditional and primary power over land and water use.”⁴⁷

endangered precisely because of overutilization for commercial purposes.” 638 F.3d at 1176. And “[t]he genetic diversity provided by endangered or threatened species improves agriculture and aquaculture, which clearly affect interstate commerce.” *Id.*

⁴² 638 F.3d at 1177 (quoting *Raich*, 545 U.S. at 22).

⁴³ 531 U.S. 159 (2001).

⁴⁴ See note 27 *supra*.

⁴⁵ 531 at 172. *Accord*, *Rapanos v. United States*, 547 U.S. 715, 737-738 (2006) (Scalia, J., plurality opinion).

⁴⁶ *Id.* at 173. *Accord*, *Rapanos*, 547 U.S. at 737-738.

⁴⁷ *Id.* at 174.

Speaking directly to the Commerce Clause, *SWANCC* suggested that the activities that can be aggregated to satisfy the “substantial effect” prong have a tight circumference.⁴⁸ There was a tension, the Court said, between the Corps’ assertion of jurisdiction over the land in this case based on migratory bird habitat and its later argument during litigation that the regulated activity is the municipal landfill sought to be built there, which is plainly commercial. These dicta cast doubt on whether the economic activity relied on by some lower court Commerce Clause decisions is sufficiently linked to the goals of those statutes to allow aggregation under the “substantial effect” prong. However, no Commerce Clause decision of the Court since *SWANCC* has amplified on these concerns.

Tenth Amendment

Generally

The Tenth Amendment states: “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.” Once dismissed by the Supreme Court as “but a truism,”⁴⁹ the Court today discerns in these words a bulwark of states’ rights in our federal-state system of government. On other occasions, the Court has derived the same protection for states’ rights by inquiring whether an act of Congress is authorized by one of the powers delegated to Congress in Article I, such as the commerce power. “[T]he two inquiries are mirror images of each other,” says the Court.⁵⁰

The invigoration of the Tenth Amendment has played out in cases dealing with Congress’ ability to regulate the states *directly* – instances where a federal law mandates an action by a state or state official.⁵¹ Initially, the context was whether Congress could subject states to the same restrictions, such

⁴⁸ *Id.* at 173.

⁴⁹ *United States v. Darby*, 312 U.S. 100, 124 (1941).

⁵⁰ *New York v. United States*, 505 U.S. 144, 156 (1992).

⁵¹ Nothing in this new generation of Tenth Amendment decisions seems to undermine the long-established principle that the amendment does not bar Congress from displacing state police powers regulating private activity. See *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 292 (1981) (asserting principle).

as employee wage and hour limits, that it applies to private parties. In 1985, the Court concluded that its earlier effort to immunize the “traditional governmental functions” of the states from such federal mandates was “both impractical and doctrinally barren.”⁵² For the most part, it indicated, states must seek protection from such federal regulation in the political process, not in any limitations imposed by the Tenth Amendment or the Commerce Clause

In contrast, states’ rights were unequivocally affirmed when the Court returned to the issue in the 1990s—in a related, but different, context. The new decisions held that *Congress cannot compel actions of state legislatures or state executive-branch officials as part of a Commerce Clause-based federal program. A state cannot be compelled to exercise its authority as sovereign.*⁵³ The first ruling was in *New York v. United States*,⁵⁴ invalidating a federal law requiring that any state failing to provide for permanent disposal of low-level radioactive waste generated within its borders must take title to the waste. The Court famously held that Congress may not “commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”⁵⁵ In the second decision, *Printz v. United States*,⁵⁶ the Supreme Court voided a provision of the Brady Handgun Violence Protection Act requiring the chief law enforcement officer of a local jurisdiction to do a background check on would-be purchasers of handguns. The Brady Act thus commanded such officers to participate in administering a federal regulatory scheme. The Court concluded again, this time in the *executive* branch context, that the United States may not compel state involvement in a federal program. “Congress,” said the Court, “cannot circumvent [*New York’s* prohibition on compelling sovereign acts]

⁵² *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 557 (1985), *overruling* *National League of Cities v. Usery*, 426 U.S. 833 (1976) .

⁵³ The Court had flirted with the question of compelled state participation earlier, in 1981, and hinted in dictum at its unconstitutionality. *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981).

⁵⁴ 505 U.S. 144 (1992).

⁵⁵ *Id.* at 161.

⁵⁶ 521 U.S. 898 (1997).

by conscripting the State's officers directly."⁵⁷ Importantly, *New York* and *Printz* each make clear that *simply preempting a state law as contrary to federal proscription is permissible—that is, is not to be regarded as direct regulation of the states.*⁵⁸

While barring Congress from “commandeer[ing]” state legislative process, *New York* explicitly blessed as inoffensive to the Tenth Amendment two techniques used in federal environmental statutes and elsewhere to promote, without legally compelling, state participation in federal programs. These techniques, said the Court, allow “the residents of the State [to] retain the ultimate decision as to whether or not the State will comply” with the federal policy preference.⁵⁹

First, *New York* said that *Congress may attach conditions to the receipt of federal funds*,⁶⁰ citing the leading Spending Power decision in *South Dakota v. Dole*.⁶¹ This technique comes with a few conditions, however. The conditions “must ... bear some relationship to the purpose of the federal spending,” though the Court has not defined how close a relationship is required.⁶² Also, the conditions may not be “so coercive as to pass the point at which pressure turns into compulsion,”⁶³ which would suggest a violation of the Tenth Amendment. The *National Federation of Independent Business v. Sebelius* decision, involving a Spending Power issue under the Affordable Care Act, arguably deals with a specialized case that does not affect *South Dakota v. Dole*.⁶⁴

⁵⁷ *Id.* at 935. In contrast with the state’s legislative and executive branches, *Printz* made clear that it is permissible for Congress to impose an obligation on state judges to enforce federal prescriptions. *Id.* at 905-907.

⁵⁸ *New York*, 505 U.S. at 162; *Printz*, 521 U.S. at 913.

⁵⁹ *New York*, 505 U.S. at 168.

⁶⁰ *Id.* at 167.

⁶¹ 483 U.S. 203 (1987).

⁶² *New York*, 505 U.S. at 167. In *South Dakota v. Dole*, for example, the grant condition on the receipt of highway funds was that the state impose a minimum drinking age of 21. This condition was upheld because it was seen by the Court as related to the national concern of safe interstate travel, which was one of the main purposes for expending federal highway funds.

⁶³ *South Dakota*, 483 U.S. at 211. Stated the Court: “When we consider ... that all South Dakota would lose if she adheres to [a minimum drinking age less than the congressionally desired one] is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact.” *Id.*

⁶⁴ *Sebelius*, 132 S. Ct. 2566 (2012). Justice Roberts’ controlling opinion in *Sebelius* held that in the special case where the funding of an existing program is conditioned on state adoption of a new and independent program, the amount of federal funds at issue cannot be a significant portion of a state’s budget such that their withdrawal would be unconstitutionally

Second, *New York* asserted that *Congress may offer states the choice between regulating an activity according to federal standards or having state law preempted by federal regulation*. The Court specifically noted the Clean Water Act, Resource Conservation and Recovery Act, and Alaska National Interest Lands Conservation Act as examples of the preemption route.⁶⁵ The Court likely also intended to cover the Clean Air Act, where states are encouraged to develop their own programs chiefly through the device of authorizing EPA to promulgate and enforce a program for the state if the state fails to timely submit one meeting federal standards.⁶⁶

Environmental Cases Following *New York* and *Printz*

Since the *New York* decision in 1992, research reveals only one successful Tenth Amendment challenge to a federal environmental statute. *ACORN v. Edwards*⁶⁷ addressed a Safe Drinking Water Act (SDWA) provision that required each state to establish a program, meeting federal standards, to assist schools in remedying potential lead contamination in their drinking water systems. Failure to do so subjected the states to federal civil enforcement. Such "[c]ongressional conscription of state legislative functions," said the Fifth Circuit, "is clearly prohibited under [*New York*]"⁶⁸ Congress is free to regulate drinking water coolers in interstate commerce directly, but not through the states as conduits to the people. The SDWA provision, it concluded, deprives the state of the option of declining to regulate drinking water systems, and is therefore unconstitutional.

coercive under the Tenth Amendment. He did not offer a standard to determine what amount of funds would be coercive, but did conclude that withdrawal of federal funds making up 10% of an average state's budget represented a "gun to the head." 132 S. Ct. at 2604-2605. As a point of comparison, the highway funds at issue in *Dole* were less than one-half of one per cent of the state's budget. *Id.*

⁶⁵ 505 U.S. at 167-168. The Court did not cite the specific provisions of these statutes it had in mind.

⁶⁶ See, e.g., Clean Air Act § 110(c), 42 U.S.C. § 7410(c); Clean Air Act § 111(d)(2), 42 U.S.C. § 7411(d)(2); Clean Air Act § 502(d)(3), 42 U.S.C. § 7661a(d)(3). The second-cited provision, Clean Air Act section 111(d)(2), has received much attention lately. In the event that EPA finalizes its recently proposed regulations limiting carbon dioxide emissions from existing fossil fuel-fired power plants, section 111(d)(2) authorizes EPA to promulgate and enforce a plan in any state that fails to timely submit a satisfactory plan of its own.

⁶⁷ 81 F.3d 1387 (5th Cir. 1996).

⁶⁸ *Id.* at 1394.

ACORN was an easy case for the challenger. In another post-*New York* decision, the Fourth Circuit in *Virginia v. Browner*⁶⁹ failed to find the direct compulsion of state action that the Supreme Court prohibited. *Virginia* was a state challenge to EPA's use of sanctions against the state, required under the Clean Air Act when a state submits an inadequate stationary source permitting scheme. In sustaining EPA's cut-off of certain federal highway funds to the state, the decision echoes the settled view that reasonable conditions on the grant of federal funds are not legally equivalent to compulsion, even when they have significant consequences for a state.⁷⁰

A second federal-environmental-statute technique blessed by *Virginia* is that *Congress may authorize sanctions triggered by state inaction, but applying solely to private activity*. EPA had imposed on the state the Clean Air Act's "offset sanction," under which the quantity of existing emissions that has to be eliminated for every ton of new emissions (from a new factory or modified existing one) was set at 2:1—greater than the ratio that otherwise would apply. While this sanction may burden the state's citizens (individuals proposing to build or modify a factory), the court held that it did not burden the state *as a government*, and thus did not offend the Tenth Amendment.⁷¹

Third and finally, *Virginia* made explicit what was implicit in *New York*: *Congress may authorize federal implementation of a federally desired program within a state when the state fails to act*.⁷² As above, the state is not compelled to regulate. For the same reason, the mirror image of this arrangement is also constitutional: *Congress may provide that a federal program within a state terminates if the state adopts its own program meeting federal criteria*.⁷³

⁶⁹ 80 F.3d 869 (4th Cir. 1996).

⁷⁰ *Id.* at 881-882.

⁷¹ The highway fund cutoff sanction and the emission offset sanction in the Clean Air Act were also upheld against Tenth Amendment and Spending Clause challenge in *State of Missouri v. United States*, 918 F. Supp. 1320 (E.D. Mo. 1996), *vacated on other grounds*, 109 F.3d 440 (8th Cir. 1997).

⁷² 80 F.3d at 882-883 (Clean Air Act federal permit program implementation).

⁷³ *Id.*, noting approval of this technique in the Surface Mining Control and Reclamation Act by *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). Another example is Clean Water Act section 402(b), 33 U.S.C. § 1342(b), authorizing the substitution of federally approved state discharge permitting programs for the existing federal program.

When the State Itself Engages in the Regulated Activity

Congress may regulate a state or political subdivision directly when the state or local authority itself engages in an activity that Congress legitimately may regulate. This may occur, for example, when a county operates a fleet of waste-collection trucks, with their attendant emissions, or a solid waste landfill.⁷⁴ Here, federal regulation burdens the state not as a sovereign government, but solely in its "enterprise" capacity. Such burdens do not implicate the federalism concerns raised by federal encroachments on state sovereignty.⁷⁵

A Supreme Court ruling in 2000 affirms this sovereign/enterprise distinction. In *Reno v. Condon*,⁷⁶ the Court was faced with a federal statute regulating the disclosure of personal information contained in the records of state motor vehicle departments. Many states sell such information, generating significant revenues. The statute was inoffensive to Tenth Amendment federalism principles, held the Court; it regulates states as *owners* of databases, rather than requiring states in their sovereign capacity to regulate their own citizens.⁷⁷ It does not compel states to enact any laws, unconstitutional under *New York*, or require state officials to assist in administering a federal program, unconstitutional under *Printz*. The Court, however, reserved the question of whether Congress may only regulate the states through generally applicable laws that apply to non-state entities as well as states, since the challenged law did not apply solely to states.⁷⁸

⁷⁴ Whether current Tenth Amendment jurisprudence applies to *political subdivisions* of states, as well as to the states themselves, appears not to have been directly addressed by the Supreme Court. However, the plaintiffs in *Printz* were *county* sheriffs.

⁷⁵ This state-as-polluter exemption raises serious constitutional questions, however, if broadly construed to embrace state actions or inactions that cause pollution only indirectly, such as building highways. *Brown v. EPA*, 566 F.2d 665, 672 (9th Cir. 1977).

⁷⁶ 528 U.S. 141 (2000).

⁷⁷ *Id.* at 151.

⁷⁸ *Id.*

Things blur a bit when the act that constitutes the regulated activity is an act of the state government in its sovereign capacity. In *Strahan v. Coxe*,⁷⁹ a state's regulation of commercial fishing was held likely to be a "taking" of Northern Right Whales prohibited under the Endangered Species Act. Here, said the court, it is proper to conclude that the state's scheme cannot continue insofar as it is inconsistent with the preemptive federal act. As long as the court's order does not command specific regulatory action by the state, it will be held not to have "commandeered" the state government—as forbidden by *New York*. Thus, the court could order the state to consider means by which fishing practices might be modified to avoid authorizing takings in state waters, but could not order the state to adopt specific modifications.

Summary

Based on Supreme Court decisions adjudicating the reach of the Commerce Clause of the Constitution, Congress may address environmental problems by regulating use of the channels on interstate commerce; the instrumentalities of, or persons or things in, interstate commerce; and (most debated) activities, even intrastate ones, that alone or in the aggregate "substantially affect" interstate commerce. Currently, only economic activity may be aggregated to establish a substantial effect. Also, Congress can regulate purely intrastate activities, even if not commercial and lacking substantial effect on interstate commerce, if not doing so would undercut regulation of interstate commerce. This expansive reading of Congress' commerce power may in part be based on the Necessary and Proper Clause. Given this broad reading, the overwhelming majority of Commerce Clause challenges to federal environmental programs have been rebuffed by the courts; research reveals successful suits only in response to federal assertions of Clean Water Act jurisdiction over "isolated waters."

⁷⁹ 127 F.3d 155 (1st Cir. 1997).

Based on Supreme Court decisions adjudicating the meaning of the Tenth Amendment, Congress may not seek to enlist the participation of states in federal environmental programs by mandating actions of state legislatures or state executive-branch officials in their sovereign capacity—the "anti-commandeering" principle. However, Congress may enlist the participation of states by attaching conditions to the receipt of federal funds (with some constraints), and by offering states a choice between regulating an activity according to federal standards or having state law preempted by federal regulation. This last option includes authorizing federal creation and implementation of a program within a state when the state fails to act. A circuit court also holds that Congress may authorize sanctions triggered by state inaction if applied solely to private activity, since state sovereignty is not thereby infringed. Nor is state sovereignty implicated when Congress regulates state or local government activities that Congress may legitimately regulate if conducted by a private entity. Only one federal environmental program, imposing penalties on states failing to adopt certain drinking water programs, is known to have been struck down on Tenth Amendment grounds.