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THE GREEN ASPECTS OF *PRINTZ*:¹
THE REVIVAL OF FEDERALISM AND ITS IMPLICATIONS
FOR ENVIRONMENTAL LAW

TABLE OF CONTENTS

INTRODUCTION	573
I. BACKGROUND	575
A. <i>The Federal-State Relationship in the Environmental Context</i>	575
B. <i>The Supreme Court's Federalism Jurisprudence</i>	582
II. <i>PRINTZ V. UNITED STATES</i>	589
A. <i>Facts</i>	589
B. <i>Summary of Printz Opinion</i>	591
C. <i>Discussion</i>	604
III. <i>PRINTZ V. UNITED STATES AND THE FUTURE OF FEDERAL ENVIRONMENTAL REGULATION</i>	608
A. <i>Pre-Printz Challenges to Federal Environmental Laws</i> . . .	609
B. <i>Federal Environmental Laws Vulnerable to Challenge Under Printz</i>	613
C. <i>Cooperative Federalism or Coercive Mandates: The Case of the Clean Air Act</i>	616
IV. IMPLICATIONS OF FEDERALIST JURISPRUDENCE ON ENVIRONMENTAL POLICY	625
A. <i>Spillovers</i>	627
B. <i>Economies of Scale</i>	628
C. <i>The "Race-to-the-Bottom"</i>	630
D. <i>What Do People Want?</i>	632
CONCLUSION	633

INTRODUCTION

On November 30, 1993, President William Jefferson Clinton signed legislation to create a five-day waiting period and background check for the purchase of handguns.² The signing ceremony for the so-called Brady bill capped a fierce, seven-year, legislative battle between gun control

¹ With apologies to Shakespeare: "There is, betwixt that smile we would aspire to/ That sweet aspect of princes . . ." WILLIAM SHAKESPEARE, *HENRY VIII* act 3, sc. 2.

² See Thomas L. Friedman, *Clinton Signs Bill on Guns into Law*, N.Y. TIMES, Dec. 1, 1993, at A20. Technically, the waiting period was five government working days.

advocates and grass-roots gun owner groups such as the National Rifle Association. However, no sooner did the Brady bill become law than the fighting moved to a new arena: federal courts. Throughout the country lawsuits were filed as the Brady law's provisions took effect, charging that Congress had overstepped its constitutional bounds.³

While the congressional debate over the Brady Act focused on the wisdom, or lack thereof, of federal gun control laws, and their legitimacy under the Second Amendment,⁴ the court challenges to the Brady Act focused on something altogether different: the proper distribution of power between state and local authorities and the federal government. *Printz v. United States*⁵ was not a case about gun control, it was a case about federal power. On these grounds, the Supreme Court found the Brady Act unconstitutional and the sweep of federal power over state and local governments to be limited.

The *Printz* decision came on the heels of two other important challenges to federal authority, *New York v. United States*⁶ and *United States v. Lopez*.⁷ In all three, a majority on the Court recognized that the Constitution created a federal government of limited powers and reserved a substantial degree of state autonomy. "Dual sovereignty," which ensures a balance of federal and state power, is an essential component of the federalist system. Reports of federalism's death were exaggerated.⁸

The revival of federalism could have profound implications for environmental protection. Because most federal environmental laws rely in some degree upon the states for their implementation, one finds all of the conflicts and cooperative ventures that characterize the federal-state

³ See, e.g., *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994).

⁴ Although the Supreme Court has never invalidated a gun control law on Second Amendment grounds, there is substantial scholarship to suggest that it should. See David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 516-25 (1997); see also STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (2d ed. 1994); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994). But see Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993); Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

⁵ 117 S. Ct. 2365 (1997).

⁶ 505 U.S. 144 (1992).

⁷ 514 U.S. 549 (1995). Several other recent cases reinforce the revival of federalism. See *infra* note 95.

⁸ The *Garcia* dissent began: "[T]his decision substantially alters the federal system embodied in the Constitution. . . ." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (Powell, J., dissenting).

relationship in contemporary environmental policy. Indeed, much of what is considered "federal" environmental protection is administered by the states.⁹ State cooperation, however, is not always willing; federal environmental statutes often include measures to induce state cooperation.¹⁰ Thus, any constitutional jurisprudence that limits the ability of Congress to set national policy for the states will reverberate through environmental policy.

This Comment reviews the *Printz* decision in the context of the Supreme Court's recent federalism jurisprudence and assesses its implications for environmental law. Part I provides a brief historical overview of the federal-state relationship in the environmental context and recent Supreme Court decisions on federalism. Part II discusses and evaluates the *Printz* decision. Part III applies the Supreme Court holdings in *Printz* and related federalism cases to current environmental policies and identifies federal environmental programs that are constitutionally suspect. Finally, Part IV addresses the public policy concern that limiting the federal government's power in the environmental context will inevitably weaken environmental protection.

I. BACKGROUND

*"So much political power has been reallocated to the federal government that, at times, the states could be mistaken for vassals of the federal government."*¹¹

A. *The Federal-State Relationship in the Environmental Context*

The current federal-state environmental framework developed in the 1970s as environmental protection became a national political concern.¹² Prior to that time, environmental protection was largely the responsibility of state and local governments, occasionally augmented by federal common law.¹³ Although federal funding of environmental research and state-

⁹ See *infra* Part I.A.

¹⁰ States and localities have vigorously protested federal impositions. Some have even gone to court challenging federal environmental rules. See *infra* Parts I.A., III.C.

¹¹ John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1185 (1995) (emphasis added).

¹² A brief history of these developments can be found in JONATHAN H. ADLER, ENVIRONMENTALISM AT THE CROSSROADS 21-24 (1995) [hereinafter ADLER, ENVIRONMENTALISM]. For a more detailed discussion of the environmental movement's history, see RILEY E. DUNLAP & ANGELA G. MERTIG, AMERICAN ENVIRONMENTALISM: THE U.S. ENVIRONMENTAL MOVEMENT: 1970-1990 (1992); PHILIP SHABECOFF, A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT (1993).

¹³ See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1148, 1152-60 (1995).

level pollution control efforts began in the late 1940s, such efforts were relatively minor.¹⁴ The federal regulations of that era dealt with federal agencies or uniquely federal concerns, such as keeping navigable waterways free from obstructions.¹⁵

The federal presence in environmental policy exploded in the 1970s. Beginning in 1969, Congress enacted a series of sweeping federal statutes to regulate environmental quality at the national level, including the National Environmental Policy Act (1969),¹⁶ the Clean Air Act (1970),¹⁷ the Clean Water Act (1972),¹⁸ the Endangered Species Act (1973),¹⁹ the Safe Drinking Water Act (1974),²⁰ the Federal Insecticide, Fungicide, and Rodenticide Act (1975),²¹ the Resource Conservation and Recovery Act (1976),²² and the Toxic Substances Control Act (1976),²³ among others. Yet, the federal government does not implement environmental protection on its own. Rather, most major federal environmental statutes establish environmental standards at the national level but encourage a significant degree of enforcement and implementation at the state or local level.²⁴

Most of the early environmental laws seemed to work well. During the 1970s and 1980s, many indicators of environmental quality showed distinct improvement.²⁵ Federal regulations undoubtedly played a role in this improvement, as did other factors.²⁶ In recent years, however, con-

¹⁴ Though minor, financial assistance to local governments for environmental matters was still controversial. In 1956, President Eisenhower vetoed funding for municipal sewage treatment plants because such concerns were "strictly local." Congress then overrode Eisenhower's veto. *See id.* at 1155-56.

¹⁵ "To the extent that federal law was regulatory in character prior to 1970, the primary targets of environmental regulation were federal agencies rather than private industry." *Id.* at 1158. For example, the Fish and Wildlife Coordination Act of 1958 was primarily concerned with ensuring that federal projects did not unduly impact wildlife. *See* Pub. L. No. 85-624, 72 Stat. 563 (1958) (codified as amended at 16 U.S.C. §§ 661-667e (1994)).

¹⁶ 42 U.S.C. §§ 4321-4347 (1994).

¹⁷ 42 U.S.C. §§ 7401-7661f. Note, the first federal clean air legislation was passed in 1955 (Pub. L. No. 80-159), with subsequent amendments in 1963, 1965, 1966, and 1967. However, it is common to speak of the Clean Air Act as a 1970 law since that is when the current federal regulatory structure was put in place.

¹⁸ 33 U.S.C. §§ 1251-1385 (1994). The Clean Water Act is formally known as the Federal Water Pollution Control Act.

¹⁹ 16 U.S.C. §§ 1531-1544 (1994).

²⁰ 42 U.S.C. §§ 300f-300j (1994).

²¹ 7 U.S.C. §§ 136-136y (1994).

²² 42 U.S.C. §§ 6901-6992k (1994).

²³ 15 U.S.C. §§ 2601-2671 (1994).

²⁴ *See* Percival, *supra* note 13, at 1174.

²⁵ *See, e.g.,* Jonathan Adler & Peter Cazamias, *Benchmarks: The Ecological and Economic Trends that Are Shaping the Natural Environment and Human Societies*, in *THE TRUE STATE OF THE PLANET* 393, 438-453 (Ron Bailey ed., 1995); BORIS DEWEIL ET AL., *INDEX OF LEADING ENVIRONMENTAL INDICATORS FOR THE U.S. AND CANADA* (1997).

²⁶ *See* Indur Goklany, *Richer Is Cleaner*, in *TRUE STATE*, *supra* note 25, at 339. According to one prominent environmental analyst, "[t]he fact that at least some measures of air quality were improving

cerns have increased about the ability of a national, centralized regulatory structure to address environmental problems that are largely local and regional in nature. According to the United States Advisory Commission on Intergovernmental Relations, "federal rules and procedures governing decision-making for protecting the environment often are complex, conflicting, difficult to apply, adversarial, costly, inflexible and uncertain."²⁷ In 1995, the National Academy of Public Administration concluded that "EPA and Congress need to hand more responsibility and decision-making authority over to the states."²⁸ Today, it is increasingly recognized that "the system has grown to the point where it amounts to nothing less than a massive effort at Soviet-style planning of the economy to achieve environmental goals."²⁹

In this context, it should be no surprise that "national environmental policy has surged to the forefront of contemporary federalism debates due to the growth of federal environmental regulation."³⁰ Thus, as the Supreme Court breathes new life into regulatory federalism, environmental policy will feel the impact—indeed it already has.³¹

1. Cooperative Federalism

Most major federal environmental laws that do not empower federal agencies to regulate environmental impacts directly follow a model of "cooperative federalism," in which the federal government outlines a regulatory program, and then entices states to implement the program in lieu of the federal government. State implementation is typically subject to federal approval, and may receive limited funding from the national

at an impressive rate before 1970 suggests that other factors in addition to the [Clean Air Act] are behind . . . recent improvements." Paul Portney, *Air Pollution Policy*, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 51 (Paul Portney ed., 1990).

A good example of dramatic environmental improvement that cannot be attributed to federal regulatory programs is the increased rate of wetland restoration and conservation in the late 1980s and 1990s such that by 1997 one could claim that the United States achieved the official policy goal of "no net loss." This trend is primarily the result of private efforts and voluntary, incentive-based programs, such as the North American Waterfowl Management Plan and Partners for Wildlife. See JONATHAN TOLMAN, SWAMPED: HOW AMERICA ACHIEVED 'NO NET LOSS' (CEI 1997).

²⁷ U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTAL DECISIONMAKING FOR ENVIRONMENTAL PROTECTION AND PUBLIC WORKS 1 (1992), cited in Percival, *supra* note 13, at 1165.

²⁸ NATIONAL ACADEMY OF PUB. ADMIN., SETTING PRIORITIES, GETTING RESULTS: A NEW DIRECTION FOR THE ENVIRONMENTAL PROTECTION AGENCY (1995), cited in NATIONAL ACADEMY OF PUB. ADMIN., RESOLVING THE PARADOX OF ENVIRONMENTAL PROTECTION 5 (1997).

²⁹ Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. ENVTL. L. 153, 154 (1988).

³⁰ Percival, *supra* note 13, at 1141.

³¹ See *infra* Part III.A.

treasury. Typically, states must show they can administer the given program in accordance with federal guidelines. Requirements can range from local pollution control measures and guidelines for consideration of permit applications to criminal enforcement policies and state rules on standing for citizen suits. While each state may tailor its program to particular state needs, to gain federal approval all states must operate within the constraints outlined in federal law or regulation.³² Commentators often refer to cooperative federalism as a "partnership" between the state and federal governments, albeit an unequal one.³³

According to Adam Babich, former editor of the *Environmental Law Reporter*, "[t]he essence of cooperative federalism is that states take primary responsibility for implementing federal standards, while retaining the freedom to apply their own, more stringent standards."³⁴ The alternative for states is federal preemption of their programs and, in some cases, the imposition of federal sanctions, such as a cutoff of federal highway funds or increased regulatory requirements. Statutes which embody this approach include the Clean Air Act,³⁵ the Clean Water Act,³⁶ the Resource Conservation and Recovery Act,³⁷ portions of the Safe Drinking Water Act,³⁸ and the Surface Mining Control and Reclamation Act.³⁹

There are three reasons typically given for adopting the cooperative federalism model.⁴⁰ First, the federal government could not hope to implement all environmental regulatory programs on its own. "The federal government . . . is dependent upon state and local authorities to implement these policies because of the nation's size and geographic diversity, the close interrelation between environmental controls and local land use deci-

³² "In most environmental statutes, Congress has reserved a substantial role for states, particularly in the implementation and enforcement of federal standards, but Congress has kept most of the fundamental policy-making authority for itself or the federal agencies." John Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1184 (1995).

³³ See *id.* at 1190 ("Although the states are by no means equal partners in regulating the environment, they paradoxically remain indispensable partners.").

³⁴ Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1534 (1995). In Babich's model, successful cooperative federalism requires that the federal government observe five principles: "(1) provide for state implementation; (2) set clear standards; (3) reflect respect for state autonomy; (4) provide mechanisms to police the process; and (5) apply the same rules to government and private parties." *Id.*

³⁵ 42 U.S.C. §§ 7401-7661f (1994).

³⁶ 33 U.S.C. §§ 1251-1385 (1994).

³⁷ 42 U.S.C. §§ 6901-6992k (1994).

³⁸ *Id.* §§ 300f-300j.

³⁹ 30 U.S.C. §§ 1201-1328 (1994). See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (holding that the Surface Mining Control and Reclamation Act is a constitutional example of cooperative federalism).

⁴⁰ See Dwyer, *supra* note 32, at 1217; Percival, *supra* note 13, at 1174-75; see generally DENISE SCHEBERLE, *FEDERALISM AND ENVIRONMENTAL POLICY: TRUST AND THE POLITICS OF IMPLEMENTATION* (1997).

sions, and federal officials' limited implementation and enforcement resources."⁴¹ Since the 1970s, analysts have recognized that centralized federal environmental regulation is destined to fail insofar as it fails to enlist support at the state and local level;⁴² "[t]he inadequacy of federal resources in comparison to the magnitude of environmental problems inevitably results in federal dependence on state and local authorities."⁴³

Second, environmental concerns and potential solutions are not the same throughout the United States. To succeed in a given locale, environmental policies must be tailored to local conditions. Due to their familiarity with state and local conditions, state and local officials are apt to have local expertise that is unobtainable by national agencies.⁴⁴ John Dwyer notes that "[t]he knowledge necessary to administer any air pollution control program . . . can be found only at the local level."⁴⁵ The relative sources and composition of urban air pollution varies from place to place. The nature of air pollution concerns in Phoenix, Arizona, differs from that in Atlanta, Georgia.⁴⁶ Much the same can be said for virtually every pollution control issue.⁴⁷

Finally comes politics. Environmental programs, insofar as they seek to regulate land-use, lifestyles and local economic activity, are inevitably controversial. Without local political support, federal environmental officials find implementing environmental programs extremely difficult.⁴⁸ Yet insofar as the federal government enlists state and local officials to cooperate, local concerns about federal intrusions into local matters diminish. Federal officials will also gain the benefit of having state and local

⁴¹ Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1196 (1977).

⁴² Some would argue that it is destined to fail regardless. See Fred L. Smith, Jr., *Markets and the Environment: A Critical Reappraisal*, 13 CONTEMP. ECON. POL'Y 62 (1995) [hereinafter Smith, *A Critical Reappraisal*].

⁴³ See Stewart, *supra* note 41, at 1201.

⁴⁴ This is essentially the Hayekian argument about the impossibility of centralizing information. See generally F.A. Hayek, *The Use of Knowledge in Society*, 35 AMER. ECON. REV. 519 (1945). Of course, Hayek might be skeptical about the ability to centralize information at the state level as well.

⁴⁵ Dwyer, *supra* note 32, at 1218.

⁴⁶ See NATIONAL RES. COUNCIL, *RETHINKING THE OZONE PROBLEM IN URBAN AND REGIONAL AIR POLLUTION* 351 (1991).

⁴⁷ For example, soil composition and hydrology will effect the likelihood of groundwater contamination from runoff or waste disposal; population density and topography will effect the likely public health impact of industrial accidents; weather patterns, such as the frequency of inversions, will effect ambient concentrations of air pollutants, and so on.

⁴⁸ At the extreme, concerns about federal environmental policy have provoked a strong, potentially violent, backlash. One example of the backlash is the so-called "county supremacy" movement, which seeks to assert local control over land-use, particularly in areas dependent upon federal lands, which are necessarily subject to federal regulations. See Stephen Halbrook, *Fear and Loathing Out West*, ENVTL. F., Sept.-Oct. 1995, at 1. For a critique of the county supremacy movement, see Alexander H. Southwell, *The County Supremacy Movement: The Federalism Implications of a 1990s States' Rights Battle*, 32 GONZAGA L. REV. 2 (1996/1997).

intermediaries when policies are ill-conceived or overly burdensome.⁴⁹ By obscuring the lines of accountability, cooperative federalism undermines accountability.

Although cooperative federalism has had its problems, some of which this Comment will discuss, it is generally preferred over the alternatives: direct federal regulation to preempt state efforts or encouragement through financial incentives.⁵⁰ Moreover, unlike federal efforts to directly conscript state officials to assist in federal programs, cooperative federalism has the explicit endorsement of the Supreme Court.⁵¹

2. The Limits of Cooperation

Despite the formal effort to create and maintain a state-federal partnership on environmental issues, there is substantial state and local resistance to federal environmental programs. Observers note that “federal environmental standards have been a chronic source of friction for federal-state relations.”⁵² This is due, in part, to the proliferation of “unfunded mandates”—federal requirements upon state and local governments to administer or comply with federal regulatory programs, unaccompanied by sufficient funds to cover the mandates’ cost. “Few contemporary issues concern state and local policymakers as intensely as unfunded mandates.”⁵³

According to *Governing* magazine, by 1994 “at least 400 separate subsections of the Code of Federal Regulations involving environmental matters apply to local governments; another 400 require local governments to enforce federal environmental requirements.”⁵⁴ The total annual cost of such rules for state and local governments was expected to hit \$50 billion by the end of the decade.⁵⁵ But the effects of unfunded mandates run deeper than their impact on city budgets. As one local health official

⁴⁹ Former Natural Resources Defense Council attorney David Schoenbrod noted that “federal mandates give federal legislators and the president the means to take credit for the benefits of environmental programs while placing the blame for any ensuing costs on state and local officials.” David Schoenbrod, *Why States, Not EPA, Should Set Pollution Standards*, in ENVIRONMENTAL FEDERALISM 264 (Terry Anderson & Peter J. Hill eds., 1997).

⁵⁰ Examples of the former are the Toxic Substances Control Act and federal automobile emission standards. Examples of the latter are the land-use planning provisions of the Coastal Zone Management Act and subtitle D of the Resource Conservation and Recovery Act.

⁵¹ See *Hodel*, 452 U.S. at 289.

⁵² Percival, *supra* note 13, at 1144.

⁵³ Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1356 (1993).

⁵⁴ Tom Arrandale, *A Guide to Environmental Mandates*, GOVERNING, Mar. 1994, at 36. As a result, Arrandale reports, “state and local officials find themselves scouring the Federal Register and conferring with EPA to keep abreast of evolving requirements.” *Id.*

⁵⁵ See *id.*

commented, "[w]hat bothers me is that the new rules coming out of Washington are taking money from decent programs and making me waste them on less important problems. It kills you as a city official to see this kind of money spent for nothing."⁵⁶

In the early 1990s, state and local concerns about the proliferation of unfunded mandates came to the fore.⁵⁷ Whereas there were 150 federal mandates in 1960, there were 498 in 1979.⁵⁸ Federal aid to state and local governments increased substantially over this period as well, from \$7 billion to \$83 billion.⁵⁹ The growth in mandates spurred a ground swell of opposition from state and local governments.⁶⁰ After the congressional elections of 1994, unfunded mandates rose to the top of Congress' legislative agenda,⁶¹ and mandate relief was one of the first elements of the "Contract with America" enacted into law and signed by President Clinton.⁶² However, this law, the Unfunded Mandates Reform Act of 1995, was more symbolic than substantive. The law does nothing to limit or reduce preexisting unfunded mandates. Instead it merely established new reporting and procedural requirements for enactments that would produce substantial *new* unfunded mandates.⁶³ This may limit the proliferation of unfunded mandates in the future, but will not reduce those already in place.

⁵⁶ Keith Schneider, *How a Rebellion Over Environmental Rules Grew from a Patch of Weeds*, N.Y. TIMES, Mar. 24, 1993, at A15 (quoting Michael J. Pompilli, head of the environmental health division, Columbus, Ohio, Health Department).

⁵⁷ See THOMAS J. DILORENZO, UNFUNDED FEDERAL MANDATES: ENVIRONMENTALISM'S ACHILLES HEEL? (1993); Susan E. Leckrone, Note, *Turning Back the Clock: The Unfunded Mandates Reform Act of 1995 and Its Effective Repeal of Environmental Legislation*, 71 IND. L.J. 1029 (1996).

⁵⁸ See Robert H. Freilich & David G. Richardson, *Returning to a General Theory of Federalism: Framing a New Tenth Amendment United States Supreme Court Case*, 26 URB. LAW. 215, 222 (1994).

⁵⁹ See *id.*

⁶⁰ Victor H. Ashe, Mayor of Knoxville, Tennessee, wrote that "[g]one are the days when mayors, city council members, county executives and county commissioners would simply shrug and say, 'Well, Congress says we have to.'" Victor H. Ashe, *A View from the Commission*, INTERGOVERNMENTAL PERSP., Fall 1992, at 2.

⁶¹ An indication of how seriously Congress took this issue is the fact that the Unfunded Mandates Reform Act of 1995 (UMRA) was introduced in the Senate as S.1.

⁶² Pub. L. No. 104-4, 109 Stat. 48 (1995) (to be codified at 2 U.S.C. §§ 658-658d, 1501-1504). It is also worth noting that President Clinton independently sought to quell the rebellion over unfunded federal mandates by issuing an executive order on "Enhancing the Intergovernmental Partnership" barring federal agencies from issuing unnecessary unfunded mandates. Exec. Order No. 12,875, 58 Fed. Reg. 58093 (1993).

⁶³ "By itself, the UMRA will not accomplish real change over the long run because its major enforcement mechanism—a point of order on the floor against any legislation that proposes an unfunded mandate—is waivable by a simple majority vote." Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 99 (1996). For a critical overview of UMRA, see Angela Antonelli, *Promises Unfulfilled: Unfunded Mandates Reform Act of 1995*, REG., 1996 No. 2, at 44. See also U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-9830, UNFUNDED MANDATES: REFORM ACT HAS HAD LITTLE EFFECT ON AGENCIES' RULEMAKING ACTIONS (1998).

State and local officials complain that the federal government is too rigid and means-oriented in its application of environmental law, hampering the ability of the states to enact sensible environmental policies. The Environmental Protection Agency, in particular, "has increasingly overstepped its bounds and usurped the lawmaking responsibilities of Congress and stepped on the state's ability to implement environmental reform," complained Michigan Governor John Engler.⁶⁴ His is not an isolated view. According to one commentator who surveyed state environmental officials, "states resent what they believe to be an overly prescriptive federal orientation toward state programs, especially in light of stable or decreasing grant awards."⁶⁵ Thus, states want more autonomy to implement environmental programs without being forced to kow-tow to the EPA and its assessment of local environmental needs.

Finally, independent polling suggests that the American public has become increasingly sympathetic to the idea of devolving authority over environmental programs to the state and local level. In 1996, national polling of registered voters found that "most Americans support a greater role for state and local governments in environmental policy, and a reduced role for Washington."⁶⁶ Democratic pollster Stanley Greenberg also found that "[f]or ordinary citizens, devolution is a way of making the environmental regime more responsive, more flexible and sensible."⁶⁷

B. *The Supreme Court's Federalism Jurisprudence*

Given the growth in political pressure for a greater sharing of power over regulatory matters, particularly in the environmental context, court decisions which expand the autonomy of state and local governments will encourage the decentralization of authority over environmental programs. Until quite recently, however, it seemed unlikely that the Supreme Court would move in that direction.

1. Background

In 1976, the Court sought to outline a test to protect states from

⁶⁴ Governor John Engler, *Speech Before Warren T. Brookes Fellowship Memorial Dinner* (last modified Nov. 19, 1996) <<http://www.cei.org/pubs/1996/Brooks-engler.html>>.

⁶⁵ SCHEBERLE, *supra* note 40, at 186.

⁶⁶ Jonathan H. Adler & Kellyanne Fitzpatrick, *For the Environment, Against Overregulation*, WALL ST. J., July 29, 1996, at A12. This article summarizes the results of THE POLLING CO., A NATIONAL SURVEY OF ATTITUDES ON ENVIRONMENTAL POLICY (CEI 1996).

⁶⁷ STANLEY B. GREENBERG, *AGAINST THE TIDE: IN DEFENSE OF ENVIRONMENTAL QUALITY* 4 (1995).

undue congressional interference. In *National League of Cities v. Usery*,⁶⁸ a closely divided Court held that “Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid” if they infringe upon state sovereignty.⁶⁹ In *National League of Cities*, the Court relied upon the Tenth Amendment to invalidate Congress’ attempt to apply the minimum wage and overtime provisions of the Fair Labor Standard Act (FLSA) to state and local governments.⁷⁰ “We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress,” the Court held.⁷¹ In particular, the majority argued that “insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.”⁷² In dissent, Justice Brennan noted that Court precedent did not support the proposition that otherwise valid federal regulations are voided merely because a state is involved.⁷³

Despite the language of *National League of Cities*, state efforts to challenge federal laws did not fare well in the 1980s. In 1981, the Virginia Surface Mining and Reclamation Association unsuccessfully challenged the Surface Mining Control and Reclamation Act,⁷⁴ *inter alia*, on Tenth Amendment grounds. In *Hodel v. Virginia Surface Mining Association*, the Court held that the law in question did not regulate the “[s]tates as states,” rather it regulated the activities of private mine operators.⁷⁵ It merely gave the states the option of either accepting preemptive federal regulations, or regulating in accordance with federal guidelines. “If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government.”⁷⁶ This form of “cooperative federalism” the Court ruled, was constitutional;⁷⁷ “[t]he denomination of an activity as a ‘local’ or ‘intrastate’ activity does not resolve the question whether Congress may

⁶⁸ 426 U.S. 833 (1976).

⁶⁹ *Id.* at 841.

⁷⁰ The FLSA had applied to private employers since 1938. *See id.* at 836. In 1961 Congress extended the FLSA to cover employees of government “enterprises” that were engaged in commerce, and the FLSA was applied to state hospitals and schools in 1966. *See id.* at 837. Each of these moves was upheld in *Maryland v. Wirtz*, 392 U.S. 183 (1968). *National League of Cities* challenged Congress’ attempt to extend the FLSA to all state employees in 1974.

⁷¹ *Id.* at 845.

⁷² *Id.* at 852.

⁷³ *See id.* at 861 (Brennan, J., dissenting).

⁷⁴ 30 U.S.C. §§ 1201-1328 (1994).

⁷⁵ 452 U.S. 264, 287 (1981).

⁷⁶ *Id.* at 288.

⁷⁷ *Id.* at 289.

regulate it under the Commerce Clause."⁷⁸

The Court considered similar issues in *Federal Energy Regulatory Commission (FERC) v. Mississippi*,⁷⁹ a 1982 challenge to the constitutionality of the Public Utility Regulatory Policies Act (PURPA) of 1978.⁸⁰ In *FERC v. Mississippi*, the Court reaffirmed that federal action is not necessarily invalid if it serves to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important."⁸¹ In the case of PURPA, since Congress had the Commerce Clause power to pre-empt any state regulation of electric utilities, it could adopt a "less intrusive scheme and [allow] States to continue regulating in the area on the condition that they consider the suggested federal standards."⁸² In such instances, the Court ruled, states always retained the ability to opt out of the regulatory endeavor, so there was nothing in the Act "directly compelling" the States to enact a legislative program."⁸³

It was only a matter of time before the Supreme Court officially disavowed the ostensible limits upon federal power contained in *National League of Cities*, for as a practical matter, the *National League of Cities* test was unworkable.⁸⁴ Indeed, "between *National League of Cities* and *Garcia*, the Court failed to find any federal statute unconstitutional under the *National League of Cities* test, a telling sign that *National League of Cities* was not in any way, shape, or form protecting state sovereignty."⁸⁵ Not even the pretense of federalism upheld by *National League of Cities* would last long.

In 1985 the Court explicitly overturned *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.⁸⁶ In *Garcia*, the Court considered a virtually identical case: whether a local government entity, in this case a metropolitan transit authority, was exempt from the minimum wage and overtime provisions of the FLSA. Justice Blackmun, who had concurred in *National League of Cities*, concluded that the "traditional government functions" test was "unworkable" and should be

⁷⁸ *Id.* at 281.

⁷⁹ 456 U.S. 742 (1982).

⁸⁰ Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified at 16 U.S.C. §§ 2601-2643 (1994)).

⁸¹ *FERC*, 456 U.S. at 759 (citing *Hodel*, 452 U.S. at 290).

⁸² *Id.* at 765.

⁸³ *Id.*

⁸⁴ "The Court was led into a path of certain defeat by following an exclusive sphere of authority approach to the relationship of federalism between the federal government and state and local governments." Freilich & Richardson, *supra* note 58, at 217.

⁸⁵ *Id.* at 218. Note, however, that "[s]ince its decision in 1976, *National League of Cities* has been cited or quoted in opinions joined by every Member of the present Court." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 558 (1985) (Powell, J., dissenting).

⁸⁶ *See Garcia*, 469 U.S. at 557.

overruled.⁸⁷ Indeed, the Court disavowed judicial efforts to determine whether particular exercises of the Commerce Clause power ever intrude onto state sovereignty:

State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power [T]he 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 state participation in federal governmental action.⁸⁸

In other words, if state sovereignty needs to be protected, then Congress will protect it, and the courts will not. Justice Powell, in dissent, warned that the Court's "decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause."⁸⁹

The Court reaffirmed the *Garcia* approach to federalism three years later in *South Carolina v. Baker*.⁹⁰ In *Baker* the Court held that "[s]tates must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."⁹¹ According to some commentators, the *Garcia* opinion "appeared to have signaled the end of judicial federalism and the demise of the Tenth Amendment as a constitutional limit on Congress' Commerce Clause powers."⁹² Justice Rehnquist was not so sure. In dissent, he predicted that federalism would "in time again command the support of a majority of this Court."⁹³

⁸⁷ *Id.* at 546.

⁸⁸ *Id.* at 552, 556. The Court endorsed Justice Brennan's argument in dissent in *National League of Cities* that states should simply look after themselves in the political process as "[d]ecisions upon the extent of federal intervention under the Commerce Clause into the affairs of the States are . . . decisions of the States themselves." *National League of Cities v. Usery*, 426 U.S. 833, 876 (1976). It is doubtful that Justice Brennan would adopt a similar approach to the other constitutional guarantees contained in the Bill of Rights merely because the decisions of Congress to intervene into the affairs of the people are, through their representatives, the decisions of the people themselves. Moreover, once the Constitution was amended to provide for the direct election of senators, U.S. CONST. amend. XVII, it was no longer plausible to argue that the interests of states *qua* states were represented in the U.S. Senate.

⁸⁹ *Garcia*, 469 U.S. at 560 (Powell, J., dissenting).

⁹⁰ 485 U.S. 505 (1988).

⁹¹ *Id.* at 512.

⁹² Freilich & Richardson, *supra* note 92, at 215.

⁹³ *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting).

2. Reinvigoration

Justice Rehnquist was right; reports of the Tenth Amendment's demise were exaggerated. In the 1990s, the Supreme Court reversed course and began to reassert the importance of state sovereignty in the federal system. The *Printz* decision is only the most recent of several cases that have reaffirmed the principles of federalism and restricted the power of the federal government over state and local matters, the most important of which are *New York v. United States*⁹⁴ and *United States v. Lopez*.⁹⁵ These three decisions are evidence that the Court is once again taking seriously the concept of "dual sovereignty," and will not leave the protection of state autonomy to the vagaries of the legislative process.

a. *New York v. United States*

In 1992, the Supreme Court voided portions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.⁹⁶ Congress enacted the Waste Policy Amendments to ensure that every state developed adequate disposal for low-level radioactive waste, such as that generated by hospitals, research labs, and nuclear power plants. It did this by: (a) providing monetary incentives in the form of subsidies and surcharges on waste disposal; (b) authorizing states to block the import of waste from other states; and (c) requiring states with inadequate disposal capacity to take title to, and assume liability for, low-level radioactive waste generated within the state. The Court invalidated the last of these policies due to its coercive nature, holding that "while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to *compel* the States to do so."⁹⁷ Despite the Court's prior holdings in *Garcia* and *Baker*, the majority held that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' in-

⁹⁴ 505 U.S. 144 (1992).

⁹⁵ 514 U.S. 549 (1995). Other recent Supreme Court cases reinforcing federalism include: *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (holding that the Supreme Court, not the Congress, determines the scope of Congress' enforcement power under Section Five of the Fourteenth Amendment); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding Congress lacks the authority to abrogate states Eleventh Amendment immunity from liability); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (holding that historic State police powers will not be superseded by federal law without explicit evidence of Congressional intent to do so); *Gregory v. Ashcroft*, 501 U.S. 542 (1991) (upholding state constitution's mandatory retirement age for judges).

⁹⁶ Pub. L. No. 99-240 (1985) (codified at 42 U.S.C. §§ 2021-2021b (1994)).

⁹⁷ *New York*, 505 U.S. at 149 (emphasis added).

structions.”⁹⁸ To hold otherwise would be to reject the idea that the states themselves retain substantial sovereignty within the federal system.

The Court’s holding laid out simple ground rules for federal efforts to enlist state assistance in regulatory programs: “The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States” to adopt Congress’ policy prescriptions.⁹⁹ “Whatever the outer limits of [state] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.”¹⁰⁰

New York did not eviscerate Congress’ ability to regulate interstate commerce or rely upon the states to fulfill national policy goals, it merely proscribed the methods Congress may use. If Congress is unwilling to instruct the federal executive to regulate directly, it still may seek to encourage state participation in a federal scheme.¹⁰¹ The most obvious means of accomplishing this is to offer funds to the states with conditions attached, or to threaten to cut off an existing funding stream if set conditions are not met.¹⁰² Such encouragement has significant force, but it also has limits. The Court held that “[s]uch conditions must . . . bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution’s other grants and limits of federal authority.”¹⁰³ Under *New York*, Congress may also give states the choice of either implementing a program that complies with federal guidelines or accepting federal preemption of the state program by a federally administered one. This latter approach is “cooperative federalism.”¹⁰⁴

Thus, while *New York* did not impose substantive restraints upon Congress’ power, it did place structural impediments to the enactment of laws that would excessively intrude into states’ sovereign realms, and thereby threaten individual liberty. The Court made explicit that “[t]he

⁹⁸ *Id.* at 162. Justice O’Connor found support for her opinion in the language of *Hodel* concluding that Congress cannot “commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” *Id.* at 161 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

⁹⁹ *Id.* at 188.

¹⁰⁰ *Id.*

¹⁰¹ The Court noted that there are “a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.” *Id.* at 167.

¹⁰² “[U]nder Congress’ spending power ‘Congress may attach conditions on the receipt of federal funds.’” *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

¹⁰³ *Id.* at 167 (citations omitted).

¹⁰⁴ *Id.*; see also *supra* Part I.A.1.

Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.”¹⁰⁵

b. *United States v. Lopez*

Constitutional inquiries as to whether given sovereign powers were granted to the federal government under the Constitution or retained by the States are “mirror images” of the same question.¹⁰⁶ “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.”¹⁰⁷ Thus, Supreme Court holdings on the extent of Congress’ Commerce Clause power are central to any federalism inquiry, particularly in those few cases in which they serve to limit Congress’ authority.

In 1995, the Supreme Court explicitly limited Congress’ Commerce Clause power for the first time in over fifty years. In *United States v. Lopez*, the Court held that the Gun-Free Schools Act of 1990 “neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce,” and therefore exceeded Congress’ power “to regulate Commerce.”¹⁰⁸ The Court based its decision on a three-part test to determine whether regulating a given activity falls within Congress’ power to regulate commerce. Under this test, Congress may regulate the “channels of interstate commerce” and their use, the instrumentalities of interstate commerce, and those activities that “substantially affect” interstate commerce.¹⁰⁹ Possession of a gun in a school zone failed to meet this test, even if that gun had traveled in interstate commerce.

Insofar as the Court finds limitations on the authority to regulate matters of state or local concern, it reinforces the “dual sovereignty” of the federal system.¹¹⁰ This point was made explicit in Justice Kennedy’s concurrence: “Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of

¹⁰⁵ *Id.* at 181.

¹⁰⁶ *Id.* at 156.

¹⁰⁷ *Id.*

¹⁰⁸ *United States v. Lopez*, 514 U.S. 549, 551 (1995).

¹⁰⁹ *Id.* at 558-59.

¹¹⁰ A federal statute that intrudes into state and local matters “forecloses the States from experimenting and exercising their own judgment.” *Id.* at 583 (Kennedy, J., concurring).

federal and state authority would blur and political responsibility would become illusory.”¹¹¹ The majority also recalled that in *NLRB v. Jones & Laughlin Steel*—at the height of the Court’s expansive Commerce Clause interpretation—the Court had declared that the clause should be interpreted “in the light of our dual system of government.”¹¹² To hold otherwise “would effectively obliterate the distinction between what is national and what is local and create a completely centralized government.”¹¹³ A plenary Commerce Clause power would completely eviscerate the governmental design that the founders sought to create. Thus, the Court recognized that Congress’ Commerce Clause power could not operate without constraint if federalism is to be a meaningful safeguard of liberty.

II. *PRINTZ V. UNITED STATES*

Taken together, *New York* and *Lopez* made clear that state sovereignty is more than an abstract notion—it is a substantive constraint upon federal power that a majority on the Supreme Court will enforce. Congress can neither regulate that which is beyond its power nor coerce states into enacting regulatory programs that Congress would prefer not to enact itself.¹¹⁴ However, neither case *explicitly* addressed the question of whether Congress could commandeer state officials. If so, Congress could evade the limitations imposed by *Lopez* and *New York* and federalism’s revival would end before it had scarcely begun. *Printz* directly addressed this issue.

A. *Facts*

In 1993, Congress amended the Gun Control Act of 1968¹¹⁵ to impose a background check and temporary waiting period on buyers of handguns.¹¹⁶ This measure, called the Brady Act,¹¹⁷ imposes a five-day

¹¹¹ *Id.* at 577 (Kennedy, J., concurring).

¹¹² *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

¹¹³ *Id.* at 37. Justice O’Connor made a similar point dissenting in *Garcia*: “If state autonomy is ignored in assessing the means by which Congress regulates matters affecting commerce, then federalism becomes irrelevant simply because the set of activities remaining beyond the reach of such a commerce power ‘may well be negligible.’” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (O’Connor, J., dissenting).

¹¹⁴ See *supra* Part I.B.2.

¹¹⁵ Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. §§ 921-925 (1994)).

¹¹⁶ See 18 U.S.C. § 922(s).

¹¹⁷ Proponents of a waiting period for handgun purchases named the Act after former White House press secretary James Brady, who was shot and seriously injured when John Hinckley attempted to assassinate President Ronald Reagan in 1981. Proponents argued that had there been a waiting period and/or background check in place, Hinckley would have been unable to purchase the gun with which

waiting period on the purchase of handguns.¹¹⁸ During this period, the local chief law enforcement officer (CLEO) must “make a reasonable effort” to conduct a background check of relevant state, local and national records to determine whether the handgun purchase “would be in violation of the law, including research in whatever state and local record-keeping systems are available and in a national system designated by the Attorney General.”¹¹⁹ If the purchaser may buy the gun, the CLEO must destroy the information gathered for the background check within twenty days.¹²⁰ If the purchaser may not buy the gun, then the CLEO must provide a written explanation to the prospective handgun purchaser.¹²¹ The law also enables individuals wrongfully barred from purchasing a handgun to sue “the State or political subdivision responsible . . . for denying the transfer”¹²² and provides criminal sanctions for violating the Brady Act’s provisions.¹²³

Although the federal government claimed that the Brady Act merely required local officials “to give modest assistance in the implementation of the federal regulation of gun transfers” for a temporary period of time,¹²⁴ the district court, as the finder of fact, concluded that the CLEOs’ obliga-

he shot Reagan and Brady. For example, upon first introducing the Brady bill in the Senate, Senator Howard Metzenbaum quoted James Brady’s wife, Sarah Brady, who argued that “[h]ad a waiting period and background check for purchasers been in effect, John Hinckley could have been stopped.” 133 CONG. REC. S1792 (daily ed. Feb. 4, 1987) (statement of Sen. Metzenbaum).

¹¹⁸ Under the terms of the Act, the waiting period would expire in 1999 at which time an instant computer background check would be required for all gun sales. See 18 U.S.C. § 922(t)(1)(A). A waiting period is not required in states where an instant computer background check is already operational.

¹¹⁹ *Id.* § 922(s)(2). Under 18 U.S.C. § 922(g), a person is prohibited from purchasing or possessing a firearm:

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; (2) who is a fugitive from justice; (3) who is an unlawful user of or addicted to any controlled substance . . . ; (4) who has been adjudicated as a mental defective or who has been committed to a mental institution; (5) who, being an alien, is illegally or unlawfully in the United States; (6) who has been discharged from the Armed Forces under dishonorable conditions; (7) who, having been a citizen of the United States, has renounced his citizenship; or (8) who is subject to a [restraining order in a domestic dispute] . . .

¹²⁰ See *id.* § 922(s)(6)(B)(i).

¹²¹ See *id.* § 922(s)(6)(C).

¹²² *Id.* § 925. Despite its explicit language, this provision would only affect political subdivisions, such as municipalities, as the Supreme Court has held that Congress lacks the power to abrogate States’ immunity from suit under the Eleventh Amendment. See *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). Also note that under § 922(s)(7), CLEOs are not liable for failing to prevent the unlawful purchase of a handgun or the wrongful prevention of a handgun sale.

¹²³ See 18 U.S.C. § 924(a)(5). “[A]lthough the Brady Act establishes criminal penalties for knowing violations of the Act . . . the Department of Justice has concluded that those criminal sanctions do not apply to CLEOs who fail to abide by section 922(s)(2).” Brief for the United States at 6, *Printz v. United States*, 117 S. Ct. 2365 (1997) (Nos. 95-1478 and 95-1503). Despite the Justice Department’s conclusion, the Federal Bureau of Alcohol, Tobacco, and Firearms officials maintained that “the criminal penalties certainly could be applied to CLEOs” who fail to perform background checks. Petitioner’s Brief at 11, *Printz* (No. 95-1478).

¹²⁴ Brief for the United States at 10, *Printz* (Nos. 95-1478 and 95-1503).

tions under the Brady Act were "far from *de minimis*."¹²⁵ According to the court, "[t]he ascertainment/background check is most burdensome."¹²⁶ For a CLEO to check for all of the possible disqualifications for a gun purchase, he would have to examine numerous databases, some by hand.¹²⁷

Due to the burdens imposed by the Brady Act, Jay Printz, sheriff and coroner for Ravalli County, Montana, filed a suit alleging that the law violated the Tenth Amendment by commandeering local officials to implement a federal regulatory program. A similar challenge to the Brady Act was filed in an Arizona federal district court by Graham County Sheriff Richard Mack.¹²⁸

Both district courts held section 922(s) of the Brady Act to be unconstitutional under the Tenth Amendment, enjoined the enforcement of that section, and upheld the remainder of the Act.¹²⁹ On appeal, the two cases were heard together by the Ninth Circuit, which upheld the mandatory background check in a 2-1 opinion.¹³⁰

B. *Summary of Printz Opinion*

The Supreme Court held that the mandatory background check provisions of the Brady Act were unconstitutional infringements upon state sovereignty.¹³¹ Justice Scalia wrote the majority opinion, and was joined by Justices O'Connor, Kennedy, Thomas, and Chief Justice Rehnquist.¹³² Justices Stevens, Breyer, Ginsburg, and Souter dissented. The lineup and opinions echoed those in *New York v. United States*;¹³³ only Justice Souter switched sides. In a separate dissenting opinion, he explicitly argued that

¹²⁵ *Printz v. United States*, 854 F. Supp. 1503, 1517 (D. Mont. 1994).

¹²⁶ *Id.*

¹²⁷ Sheriff Printz provided undisputed evidence at trial that to fulfill the Brady Act a CLEO would have to search the National Crime Information Center database, the Criminal Justice Information Network, state hospital records, county court civil records, veteran's hospital records, misdemeanor court records and medical and drug treatment records. Not all of these records can be searched by computer, and some are stored several hours drive from Ravalli County where Sheriff Printz works. Thus, Printz maintained, "[a] background check might require anywhere between an hour and several days." Petitioner's Brief at 4, *Printz* (No. 95-1478).

¹²⁸ *See Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994). Four other challenges were also filed in federal court around the country, but these were not consolidated for review by the Supreme Court. *See Romero v. United States*, 883 F. Supp. 1076 (W.D. La. 1995); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994); *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994); *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994).

¹²⁹ *See Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994).

¹³⁰ *See Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995).

¹³¹ *See Printz v. United States*, 117 S. Ct. 2365 (1997).

¹³² Justices O'Connor and Thomas joined the majority opinion but also wrote separate concurrences. *See id.* at 2385.

¹³³ 505 U.S. 144 (1992).

the result in *New York* was consistent with upholding the Brady Act background check.¹³⁴

1. Majority Opinion

The issue in *Printz* was an extension of that in *New York*. In *New York*, the Court invalidated the provisions of the Low-Level Radioactive Waste Policy Amendments through which Congress sought to compel the states to implement a federal program through legislative action. With the Brady Act, Congress bypassed the state legislature and sought “to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme.”¹³⁵ The Brady Act used a less direct means of achieving its end than had the Waste Policy Amendments. However, as a practical matter, finding for the federal government in either case would give Congress the ability to conscript state governments for federal causes.

Rather than rest the holding squarely on the shoulders of the *New York* opinion—note that prudentially the cases presented the same fundamental issue—the *Printz* majority sought to expand the rationale for limiting the federal government’s ability to command state governments for federal purposes. “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program,” the Court held,¹³⁶ concluding that “such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”¹³⁷

Justice Scalia’s opinion for the majority was not based upon a close reading of constitutional text; “there is no constitutional text speaking to this precise question.”¹³⁸ Rather, the majority rested its decision on a tripartite analysis of (1) historical understanding of the Constitution; (2) the Constitution’s structure; and (3) prior Supreme Court jurisprudence.¹³⁹

¹³⁴ See *Printz*, 117 S. Ct. at 2401 (Souter, J., dissenting). Justice Breyer also authored a dissent that Stevens joined. See *id.* at 2404 (Breyer, J., dissenting).

¹³⁵ *Id.* at 2369.

¹³⁶ *Id.* at 2384.

¹³⁷ *Id.*

¹³⁸ *Id.* at 2370.

¹³⁹ “Because there is no constitutional text speaking to this precise question, the answer to the CLEO’s challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.” *Id.*

a. Historical Understanding

The majority's first argument is the least compelling. The historical record on the question presented to the Court in the Brady Act is ambiguous, and there is a strong argument that the Founders were unafraid of allowing Congress to conscript state and local magistrates.¹⁴⁰ To identify the historical understanding of the federal-state relationship, Justice Scalia examined sources contemporaneous with the writing of the Constitution, giving particular weight to the character of the enactments of the early Congresses.¹⁴¹ Justice Scalia noted that there were no statutes in the early Congresses explicitly calling upon state executives to implement federal programs. However, there are statutes in which Congress requested states' voluntary acquiescence to federal goals. For example, Justice Scalia pointed out that on September 23, 1789—one day before the enactment of the Tenth Amendment—the very first Congress enacted a law providing for federal prisoners to be held in state jails at federal expense.¹⁴² This law did not command states to acquiesce to federal instruction. Instead, it merely recommended that the legislatures instruct jailkeepers to keep federal prisoners and offered to compensate states for their actions. Not all states complied with Congress' request. Georgia, for one, refused. But rather than compel Georgia to comply with the federal program, Congress instead authorized federal marshals to rent jail space until the federal government constructed or otherwise acquired permanent jails.¹⁴³

The Court concluded that "there is not only an absence of executive-commandeering statutes in the early Congresses, but there is an absence of them in our later history as well."¹⁴⁴ The only exception to this general proposition was a handful of recent statutes identified by the dissent.¹⁴⁵

¹⁴⁰ See *infra* notes 172, 214.

¹⁴¹ Although the actions of early Congresses are not dispositive, "such 'contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions.'" *Printz*, 117 S. Ct. at 2370 (citing *Myers v. United States*, 272 U.S. 52, 175 (1926)).

¹⁴² See *id.* at 2372 (citing Act of Sept. 23, 1789, 1 Stat. 96).

¹⁴³ See *id.* The dissent argues correctly that the mere fact that Congress never exercised a duty is no reason to presume that the duty does not exist. However, long-standing historical practice should inform congressional interpretation. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Frankfurter, J., concurring). "Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them." *Id.* at 610.

¹⁴⁴ *Printz*, 117 S. Ct. at 2375.

¹⁴⁵ See *id.* at 2394 (Stevens, J., dissenting). The statutes include 40 Stat. 80-1 (registration of young adults for the draft), 42 U.S.C. §§ 11001, 11003 (1994) (creation of response commissions for release of hazardous substances), 42 U.S.C. § 6991a (data collection and reporting on underground storage tanks), 23 U.S.C. § 402(a) (1994) (reporting traffic fatalities), and 42 U.S.C. § 5779(a) (reporting missing children). The decision's impact on the two environmental programs on this list is

Other courts have independently arrived at the same conclusion when faced with a similar question.¹⁴⁶

Justice Scalia readily acknowledged that in the founding period Congress instructed state courts to perform a variety of functions, such as recording applications of citizenship and registering aliens.¹⁴⁷ However, Justice Scalia argued that “[t]hese early laws establish, at most” that Congress could impose obligations on state judges “related to matters appropriate for the judicial power.”¹⁴⁸ Justice Scalia explicitly rejected the argument that “early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service,”¹⁴⁹ noting that while there are many statutes imposing duties on the judiciary, there is an “utter lack of statutes” imposing similar duties on state executives.¹⁵⁰

The majority also questioned the federal government’s (and the dissent’s) reliance on *The Federalist Papers* to support the claim that the Framers intended to allow the federal government to coerce state and local officials to fulfill federal policies.¹⁵¹ To the majority, discussions by Alexander Hamilton or others about the use of state officials as tax collectors or other federal servants “appear to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government . . . ,”¹⁵² recalling that the early Congresses did not conscript state officials, and instead relied upon their cooperation or goodwill.¹⁵³ Hamilton may have called for the use of state and government officials in seeking

discussed *infra* Part III.B.

¹⁴⁶ See *Brown v. EPA*, 521 F.2d 827, 841 (9th Cir. 1975) (“Federal law often says to the states, ‘Don’t do any of these things,’ leaving outside the scope of its prohibition a wide range of alternative courses of action. But it is illuminating to observe how rarely it says, ‘Do This thing,’ leaving no choice but to go ahead and do it.”).

¹⁴⁷ See *Printz*, 117 S. Ct. at 2370. Justice Scalia also cited evidence suggesting that this requirement may have “applied only in States that authorized their courts to conduct naturalization proceedings.” *Id.*

¹⁴⁸ *Id.* at 2371.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ For example, Alexander Hamilton wrote in *THE FEDERALIST* that the federal government “must stand in need of no intermediate legislations, but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions.” *THE FEDERALIST* NO. 16, at 154 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Also, in *THE FEDERALIST* NO. 27, Hamilton wrote that the Constitution would “enable the [federal] government to employ the ordinary magistracy of each [state] in the execution of its laws.” *THE FEDERALIST* NO. 27, at 203 (Alexander Hamilton) (Isaac Kramnick ed., 1987). However, Hamilton also noted that there were those who feared this would “tend to the destruction of the State governments.” *Id.* at 204 n.37.

¹⁵² *Printz*, 117 S. Ct. at 2372.

¹⁵³ See *id.* at 2373. The majority also points out that the language in *THE FEDERALIST* NO. 27 relied upon by Justice Souter in his dissent would seem to include state legislatures, and not just executives, thereby undermining Souter and the majority’s support for the holding of *New York*. See *id.* at 2373 & n.5.

to ensure the Constitution's ratification by New York, but that did not mean that the rest of the Framers concurred. In sum, the historical evidence is suggestive, but "not conclusive."¹⁵⁴

b. Constitutional Structure

A more compelling justification for the *Printz* decision is that "the Constitution established a system of 'dual sovereignty,'"¹⁵⁵ that "is reflected throughout the Constitution's text."¹⁵⁶ The federal government has power over the states in particular realms, but states nonetheless maintain a sphere of sovereignty that is "inviolable."¹⁵⁷ This residual sovereignty is "implicit" in the Constitution's delegation of "discrete, enumerated" powers in Article I, Section 8 of the Constitution and the Tenth Amendment's explicit charge that "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."¹⁵⁸ As the Court held in *New York*, while the language of the Amendment is tautological, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."¹⁵⁹

Accepting the states as sovereign units within the federal system compels the conclusion that there must be some limits upon the federal government's power over state matters.¹⁶⁰ "The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50

¹⁵⁴ *Id.* at 2376.

¹⁵⁵ *Id.* (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

¹⁵⁶ *Id.* Among the examples identified by Justice Scalia are "the prohibition on any involuntary reduction or combination of a State's territory" contained in Article IV, § 3, and the Amendment process contained in Article V. *Id.*

¹⁵⁷ THE FEDERALIST NO. 39, at 258 (James Madison) (Isaac Kramnick ed., 1987). For Madison, the country has "a *federal* and not a *national* constitution" in that "[e]ach State, in ratifying the Constitution, is considered as a sovereign body." *Id.* at 257 (emphasis in original).

¹⁵⁸ *Printz*, 117 S. Ct. at 2376-77.

¹⁵⁹ *New York v. United States*, 505 U.S. 144, 157 (1992). The opinion continues: "The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." *Id.*

¹⁶⁰ Historically such limits may have been explicitly contained in Article I, § 8 of the Constitution. However, the expansion of congressional powers under the Commerce Clause has undermined Article I, § 8 as an independent limitation on federal intrusions upon state sovereignty, the Court's recent *Lopez* decision notwithstanding:

The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities.

Id. at 157.

states.”¹⁶¹ This would fundamentally disrupt the system of dual sovereignty that the Founders sought to create, and compromise the “double security”¹⁶² that it is intended to preserve. As the Court held previously, “[t]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.”¹⁶³

Justice Scalia’s majority opinion drew upon the historical discussion of the Constitution’s structure that was central to Justice O’Connor’s opinion in *New York*.¹⁶⁴ O’Connor pointed out that during the debate over the Constitution, the Framers considered two models of federal power. Under the first, proposed by the New Jersey delegation, the federal government would have the power to command the states and act through them to achieve national goals. It could not, however, act directly upon the people. An alternative plan was put forward by Edmund Randolph that would empower the federal government to authorize “national Legislation over individuals.”¹⁶⁵ Under O’Connor’s reading, these two options—authorizing legislative power over states or individuals—were two separate options, and the Founders opted for the latter.¹⁶⁶ The alternative of “a sovereignty over sovereigns” was, to James Madison, “a solecism in theory” and “in practice . . . subversive of the order and ends of [a] civil polity.”¹⁶⁷

Whereas the dissent argued that the power to commandeer state officials for federal purposes is a “necessary and proper” exercise of the Commerce Clause power under Article I, Section 8, the majority relied upon *New York*’s holding that “even where the Congress has the authority

¹⁶¹ *Printz*, 117 S. Ct. at 2378.

¹⁶² THE FEDERALIST NO. 51, at 321 (James Madison) (Isaac Kramnick ed., 1987). “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Gregory*, 501 U.S. at 458.

¹⁶³ *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869).

¹⁶⁴ See *New York*, 505 U.S. at 164-65.

¹⁶⁵ 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 255-56 (Max Farrand ed., 1911).

¹⁶⁶ “The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.” *New York*, 505 U.S. at 166. O’Connor notes that in making the case for the Virginia Plan, Randolph argued that “[t]here are but two modes, by which the end of a General Government can be attained,” suggesting a dichotomy of two discrete options. *Id.* at 164. Massachusetts delegate Rufus King also explained his support for a new Constitution by stating, “[I]aws, to be effective, therefore, must *not* be laid on states, but upon individuals.” *Id.* at 165 (citing 2 JONATHAN ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 56 (2d ed. 1863) (emphasis added)). The dissent argues that the two plans were not dichotomous and that the debate was instead over whether to give the federal government *additional* power, as opposed to power of a different sort. “The basic change in the character of the government that the Framers conceived was designed to enhance the power of the national government, not to provide some new, unmentioned immunity for state officers.” *Printz*, 117 S. Ct. at 2389 (Stevens, J., dissenting).

¹⁶⁷ THE FEDERALIST NO. 20, at 172 (James Madison) (Isaac Kramnick ed., 1987).

under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."¹⁶⁸ Thus, while the majority accepted Congress' ability to regulate the sale and transfer of handguns, it rejected Congress' ability to require that states impose the same regulations.¹⁶⁹

A final structural argument made by the majority is that the Brady Act effectively transfers the Executive's power to execute the nation's laws to municipal officers in the various states, and thereby undermines the "unity in the Federal Executive."¹⁷⁰ The Constitution explicitly vests "*the executive Power*" in the President and states the President "shall take Care that the Laws be faithfully executed."¹⁷¹ Executing and enforcing federal law is the obligation of the executive branch, not that of the states.

c. Prior Court Holdings

The last and most conclusive element in the majority opinion is its reliance on prior Supreme Court jurisprudence. However much the dissent takes issue with the majority's historical interpretations or structural arguments—some of which are certainly open to debate¹⁷²—it is difficult to argue against the outcome of *Printz* given the holdings of *New York* and other recent federalism cases.¹⁷³ Upholding the background check provision of the Brady Act would effectively nullify the Court's ruling in *New*

¹⁶⁸ *New York*, 505 U.S. at 166.

¹⁶⁹ This claim is distinguished from the holdings in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-88 (1981) and *FERC v. Mississippi*, 456 U.S. 742, 759 (1982). See *supra* notes 75-83 and accompanying text.

It should also be noted that while the majority opinion accepted Congress' power to regulate the intrastate transfer of firearms, Justice Thomas, in his concurrence, expressed his self-described "revisionist" view that Congress' powers under the Commerce Clause are far more circumscribed than recent Court decisions would suggest. *Printz*, 117 S. Ct. at 2385 (Thomas, J., concurring):

Even if we construe Congress' authority to regulate interstate commerce to encompass those intrastate transactions that "substantially affect" interstate commerce, I question whether Congress can regulate the particular transactions at issue here. The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority.

Thomas goes on to raise the possibility that a "colorable argument exists" that the Brady Act also infringes upon the Second Amendment to the Constitution. *Id.* at 2386.

¹⁷⁰ *Id.* at 2378. Concern for the unitary executive is a common theme in Justice Scalia's opinions. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

¹⁷¹ U.S. CONST. art. II, §§ 1, 3 (emphasis added).

¹⁷² See, e.g., Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993) (arguing that Congress may commandeer state judicial and executive officials, but not legislatures).

¹⁷³ Indeed, only Justice Souter argued that the Court could uphold the Brady Act background check without disturbing the holding in *New York*. See *Printz*, 117 S. Ct. at 2402 (Souter, J., dissenting).

York, reducing the constitutional protection of state sovereignty from congressional overreach to an empty, formalistic doctrine.

Justice Scalia notes that the first cases directly addressing the question as to whether the federal government could commandeer state officers arose in the 1970s, when several states and the District of Columbia challenged the Environmental Protection Agency's implementation of the Clean Air Act. The EPA lost in three of four circuit courts.¹⁷⁴ One court remarked that the idea that the federal government could command states to implement specific regulations was "clearly inconsistent with the history of our federal structure."¹⁷⁵ The Supreme Court never ruled on this question because the EPA withdrew the affected regulations after the Court had granted certiorari, rendering the case moot.¹⁷⁶

When the Supreme Court finally had the opportunity to address the question of whether Congress could commandeer the states to implement federal programs, it answered in the negative. "Where 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."¹⁷⁷ Not only do such actions compromise the federal structure inherent in the Constitution, they also undermine accountability of government at *both* the state and local level; "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."¹⁷⁸ Whereas the *New York* opinion overturned a congressional attempt to conscript state legislatures to enact specific programs, the *Printz* majority simply extended the argument of *New York* to cover federal efforts to conscript state-level executive power.¹⁷⁹ This was contemplated in the *New York* opinion: "The Federal Government may not compel the States to enact *or administer* a federal regulatory program."¹⁸⁰

The ruling in *New York*, although the first to address directly the

¹⁷⁴ The EPA's regulations were invalidated on constitutional and statutory grounds by the D.C. Circuit. See *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975). The Fourth and Ninth Circuits raised doubts about the constitutionality of the EPA's regulations, but opted to invalidate them on statutory grounds. *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975). Similar regulations were upheld by the Third Circuit. *Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974). See *infra* Part III.C. Of course, unreviewed precedents of circuit courts would in no way bind the Supreme Court to follow suit.

¹⁷⁵ *Brown*, 521 F.2d at 838.

¹⁷⁶ See *EPA v. Brown*, 431 U.S. 99 (1977).

¹⁷⁷ *New York v. United States*, 505 U.S. 144, 177 (1992).

¹⁷⁸ *Id.* at 169.

¹⁷⁹ Had the Court held otherwise, it would have effectively emasculated the power of the *New York* holding as Congress would simply conscript state officials directly in every instance, and bypass the legislature. See *infra* Part II.C.

¹⁸⁰ *New York*, 505 U.S. at 188 (emphasis added).

question of federal commandeering of state governments, had been foreshadowed in the Court's prior cases. For instance, in *Hodel*, the Court ruled that the federal government may not "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."¹⁸¹ Similarly, in *FERC v. Mississippi* the Court noted that it "never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations."¹⁸² While both *Hodel* and *FERC v. Mississippi* upheld the statutes in question, this was because neither law directly compelled state regulatory action.¹⁸³ Thus, Justice Scalia wrote, the opinion in *New York* "should have come as no surprise."¹⁸⁴

Justice Scalia was also careful to distinguish the ruling in *Garcia* from that in *Printz*. The challenge to the Brady Act did not call upon the Court to determine "whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments" because "it is the whole object of the law to direct the functioning of the state executive."¹⁸⁵ The primary distinction is between a federal law that seeks to direct the actions of states *qua* states and that which imposes upon states because it directs all entities—public and private—to adhere to a federally determined standard, such as a minimum wage.¹⁸⁶ Thus, *Printz* and *Garcia* implicate two different aspects of federalism, and the invalidation of a federal enactment in the former need not interfere with the holding in the latter.¹⁸⁷

2. The Dissents

Whereas the majority explicitly relied upon the Court's holding in *New York*, the dissent penned by Justice Stevens ("dissent"), claimed that the challenges to the Brady Act did not "implicate the more difficult questions . . . addressed in *New York*."¹⁸⁸ Rather, the dissent posited that the case presented the more narrow question "whether Congress, acting on

¹⁸¹ *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981).

¹⁸² *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982).

¹⁸³ See *Printz*, 117 S. Ct. at 2380.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 2383.

¹⁸⁶ This distinction was noted in *New York*, 505 U.S. at 160.

¹⁸⁷ Justice Stevens acknowledges the distinction, and its grounding in precedent, although he finds it unpersuasive. See *Printz*, 117 S. Ct. at 2397 (Stevens, J., dissenting) ("[T]he Court does not disturb the conclusion that flows directly from our prior holdings that the burden on police officers would be permissible if a similar burden were also imposed on private parties with access to relevant data A structural problem that vanishes when the statute affects private individuals as well as public officials is not much of a structural problem.")

¹⁸⁸ *Id.* at 2386 (Stevens, J., dissenting).

behalf of the people . . . may require local law enforcement officers to perform certain duties during the interim needed for the development of a federal gun control program.”¹⁸⁹ Playing off the majority’s admission that the constitutional text was insufficient to render the Brady Act unconstitutional, the dissent declared, “[t]here is not a clause, sentence, or paragraph in the entire text of the Constitution . . . that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I.”¹⁹⁰ Furthermore, the dissent noted that Congress merely imposed temporary burdens on CLEOs to address an “epidemic of gun violence.”¹⁹¹

Whereas the majority did not explicitly rely upon the Constitution’s text to resolve the issue, the dissent held that the Constitution’s text “provides a sufficient basis for a correct disposition of this case.”¹⁹² Because Article I, Section 8 grants Congress the power to regulate the sale and transfer of handguns through the Commerce Clause, and because the Constitution further grants Congress the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers,”¹⁹³ Congress has “ample authority” to conscript CLEOs to enforce the Brady Act’s background check provisions.¹⁹⁴ The dissent explicitly rejected the argument that the Tenth Amendment imposes any limitations on congressional power not already implicit in Article I,¹⁹⁵ and argued that, if anything, “federal law may impose greater duties on state officials than on private citizens” because all government officials must take an oath to support the Constitution.¹⁹⁶

The dissent also responded to each prong of the majority opinion’s tripartite analysis. Whereas Justice O’Connor held in *New York* that the Framers sought to give the federal government the power to directly regulate individuals *instead of* the federal power to regulate states under the Articles of Confederation, Justice Stevens argued this power was given to

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 2389.

¹⁹¹ *Id.* at 2387 (citing H.R. REP. NO. 103-344, at 8 (1993)). The dissent also notes that, in its estimation, the mandatory background check has been a “remarkable success.” *Id.* Of course, the utilitarian value of mandated background checks, even if accepted, does not speak to the constitutionality of requiring CLEOs to administer them, even if only for a brief time.

¹⁹² *Id.*

¹⁹³ U.S. CONST. art. I, § 8.

¹⁹⁴ *Printz*, 117 S. Ct. at 2387 (Stevens, J., dissenting).

¹⁹⁵ Indeed, the dissent quotes from *New York* that “in a case . . . involving the division of authority between federal and state governments, the two inquiries are mirror images of each other” to suggest there is no substantive content to the Tenth Amendment. *Id.* at 2388 (citing *New York v. United States*, 505 U.S. 144, 156 (1992)). Of course, this view implies that the Tenth Amendment was a waste of ink and parchment.

¹⁹⁶ *Id.* (citing U.S. CONST. art. VI, cl. 3). The dissent also notes that the Supremacy Clause in Article VI establishes federal law as “the supreme law of the land.” *Id.*

the federal government *in addition to* the power to regulate states.¹⁹⁷ In support of this claim, Justice Stevens cited Alexander Hamilton, who wrote that the Constitution, "by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each, in the execution of its laws."¹⁹⁸ In particular, Hamilton argued that the federal government would rely upon state officers and state regulations for the collection of taxes.¹⁹⁹

That early Congresses rarely, if ever, exercised their authority to commandeer state officials is no "argument against its existence," the dissent noted.²⁰⁰ For instance, simply because President Woodrow Wilson requested state action to implement the draft during World War I, rather than demanding it, does not mean Wilson could not have issued the command had he wanted to do so.²⁰¹ Justice Stevens also relied upon the research of Evan Caminker²⁰² to argue that the federal government did impose duties upon state judges and clerks, if not executive officers themselves, and that some of the functions state judges performed could arguably be characterized as executive in nature.²⁰³

On the matter of constitutional structure, the dissent sought to resurrect the *Garcia* Court's argument that the structural safeguards preventing federal infringements upon state sovereignty are purely political and do not require judicial review of congressional enactments. In *Garcia*, the Court held that "[t]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."²⁰⁴ In other words, because the states have political clout, it should be presumed that Congress adequately considered the concerns of

¹⁹⁷ "The basic change in the character of the government that the Framers conceived was designed to enhance the power of the national government, not to provide some new, unmentioned immunity for state officers." *Id.* at 2389.

¹⁹⁸ THE FEDERALIST NO. 27, at 203 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Hamilton then proceeds to explain that this power "will give the federal government the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State." *Id.*

¹⁹⁹ See THE FEDERALIST NO. 36, at 238 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Though it is unclear whether the federal government ever availed itself of this power.

²⁰⁰ *Printz*, 117 S. Ct. at 2391 (Stevens, J., dissenting). Of course it should be noted that this argument suggests that there is nothing inherently suspect about an unprecedented exercise of federal power, a presumption that the majority opinion clearly does not share.

²⁰¹ See *id.* at 2393.

²⁰² See Caminker, *supra* note 172.

²⁰³ See *Printz*, 117 S. Ct. at 2392 (Stevens, J., dissenting). The majority maintained that the conscription of the state judiciaries is a wholly separate matter from the conscription of executive officials and legislatures, and that the actions performed by state judges pursuant to federal law were "quintessentially adjudicative tasks." *Id.* at 2372 n.2. The dissent responded that this is a "functional," as opposed to "formalistic," assessment of the judges' actions which suggests the federal government was commandeering state officers for executive functions even if it was not commandeering executive officials. *Id.* at 2392.

²⁰⁴ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985).

states before imposing obligations upon them,²⁰⁵ even if senators are no longer directly elected by their respective state legislatures. The dissent cited the recent passage of the Unfunded Mandates Reform Act of 1995²⁰⁶ in support of this view, though as discussed above, it is difficult to argue that passage of this law significantly advanced state concerns about the proliferation of unfunded mandates.²⁰⁷ As a final structural argument, the dissent suggested that to curtail the federal government's ability to conscript states is to invite direct federal intervention into all sorts of local matters.²⁰⁸

Faced with the precedent in *New York*, the dissent argued that the issue presented by the Brady Act is significantly narrower than that presented by the Low-Level Radioactive Waste Policy Amendments of 1985, and that the majority has chosen to rest its decision on dicta from the case.²⁰⁹ Moreover, Stevens argued that the other Supreme Court cases the majority cited favorably, such as *Hodel* and *FERC v. Mississippi*, authorized significantly greater intrusions upon state sovereignty than did the Brady Act.²¹⁰ Finally, the dissent suggested that the Court's 1947 decision in *Testa v. Katz*²¹¹ requiring state courts to adjudicate claims brought under federal law should demonstrate the federal government's ability to commandeer state officials. Despite these assertions, it is clear from the dissent's historical and structural arguments that its real complaint is not with the holding in *Printz*, but that in *New York*.

²⁰⁵ The dissent reasoned that "[i]t is far more reasonable to presume that [Congress'] decisions to impose modest burdens on state officials from time to time reflect a considered judgment that the people in each of the States will benefit therefrom." *Printz*, 117 S. Ct. at 2394 (Stevens, J., dissenting). For a review of environmental policies that are designed to advance narrow interests, as opposed to those of the nation as a whole, see Jonathan H. Adler, *Rent-Seeking Behind the Green Curtain*, REG., 1996 No. 4, at 26 [hereinafter Adler, *Rent-Seeking*]. See also ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (Michael Greve & Fred L. Smith, Jr., eds., 1992).

²⁰⁶ Pub. L. No. 104-4, 109 Stat. 48 (to be codified at 2 U.S.C. §§ 658-658d, 1501-1504).

²⁰⁷ See *Printz*, 117 S. Ct. at 2395 (Stevens, J., dissenting). Indeed, Stevens' claim that UMRA "meaningfully addressed" the problems caused by unfunded mandates suggests his unfamiliarity of the issue, if for no other reason than that UMRA was not retroactive and did nothing to relieve the burden of preexisting mandates, and imposes minimal burdens for the imposition of new ones. See *supra* Part I.A.2.

²⁰⁸ See *Printz*, 117 S. Ct. at 2396 (Stevens, J., dissenting). Given contemporary budget restraints and political resistance to new expansions of federal power, this argument rings hollow. More likely, the federal government would simply seek to regulate less, or enforce certain regulations more selectively. And even were the majority's decision to invite a swarm of federal officials to descend upon states and localities, there would be little doubt as to which level of government was responsible for the new generation of impositions, thereby addressing the concern with accountability that lies at the heart of both the *Printz* and *New York* opinions.

²⁰⁹ See *id.* at 2398.

²¹⁰ See *id.* at 2399. While this may be true, in these two cases the federal government offered to preempt the states. The Brady Act did not provide for the federal government to assume the CLEOs' roles if they did not comply.

²¹¹ 330 U.S. 386 (1947).

Justice Souter both joined the Stevens dissent and penned another seeking to uphold both the Brady Act and the *New York* ruling, which he had joined.²¹² His opinion highlights the closeness of the *Printz* decision,²¹³ as well as the tension between a functional and formalistic view of federal power. For instance, Souter noted that the early history is ambiguous, and sided with the dissent based upon his reading of *The Federalist Papers*.²¹⁴

Congress may not require a state legislature to enact a regulatory scheme But insofar as national law would require nothing from a state officer inconsistent with the power proper to his branch of tripartite state government . . . I suppose that the reach of federal law as Hamilton described it would not be exceeded.²¹⁵

While Souter's argument has some historical basis,²¹⁶ it creates a distinction that collapses in practice—at least when applied in a legal context which recognizes few substantive limits on congressional power. If a state enacts a regulatory scheme for one purpose, there is nothing to stop Congress from commandeering the state personnel hired for that purpose to administer some federal scheme. As far as the state is concerned, Congress might as well have conscripted the legislature in the first place, for it is left with no more sovereign ability to make policy and allocate resources than if it were a mere field office for the federal government. Perhaps recognizing this conundrum, Souter would limit Congress' power in this regard somewhat, by requiring that the federal government "pay fair value" for the state's efforts on the federal government's behalf.²¹⁷

²¹² Justice Breyer also wrote a dissenting opinion, joined by Justice Stevens, that provided a brief comparative analysis of federalism with other nations.

²¹³ Indeed, it is interesting to note that Souter found the case "closer than I had anticipated." *Printz*, 117 S. Ct. at 2402 (Souter, J., dissenting). Souter did "not find anything dispositive in the paucity of early examples of federal employment of state officers for executive purposes," nor would he "dissent with no more to go on than those few early instances in the administration of naturalization laws, for example, or such later instances as state support for federal emergency action." *Id.* at 2401.

²¹⁴ See *id.* at 2402. A strong originalist argument for Congress' ability to conscript state executive officials but not legislatures is laid out in Prakash, *supra* note 172. See also Caminker, *supra* note 172; H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 652-681 (1993).

²¹⁵ *Printz*, 117 S. Ct. at 2404 (Souter, J., dissenting). On this point Souter is at odds with Stevens, and his separate dissent explicitly outlines the qualifications that he would add to Stevens' opinion.

²¹⁶ See generally Prakash, *supra* note 172.

²¹⁷ *Printz*, 117 S. Ct. at 2404 (Souter, J., dissenting) (citing THE FEDERALIST No. 36). Souter would turn the unfunded mandate of the Brady Act into a funded one and remand the case due to Congress' failure to pay for the CLEOs' efforts. The issue Souter did not address is what occurs when state legislatures explicitly bar executive personnel from engaging in particular functions, such as a background check, but Congress would call upon them to perform it. Such a situation, more likely to occur if Souter's view were the majority, would pit the autonomy of the state legislature squarely against the authority of Congress.

C. Discussion

The essential holding of *Printz* was compelled by that of *New York*. A formalistic distinction between conscription of legislative and executive functions breaks down in practice, and would have emptied *New York* of its substance. To hire state troopers or any other officials, states must raise funds and pass authorizing legislation. This power is an essential element of the state legislature's independence. Insofar as the federal government commandeers these state employees for other functions, it prevents them from fulfilling the aims that the state legislature has set for them.²¹⁸ Because the resources at any state or local government's disposal are limited, it can be no other way.

The power of the purse, an inherently legislative function, cannot be separated from other aspects of legislative power. To allocate resources to a given priority is to make policy. Even advocates of federal power must concede that "[r]equiring local and state officials to implement federal controls represents a serious interference with local political self-determination."²¹⁹ When a legislature elects to spend more tax dollars on guns than butter (or vice-versa), it is making a policy judgment about the needs of its constituents. To commandeer the resources of a state or local government is to make policy for the conscripted government by denying the legislature the ability to make trade-offs. This is particularly true in the case of the Brady Act which imposed far more than mere "ministerial" burdens on CLEOs.²²⁰

Federal efforts that conscript state or local officials for all but the most menial and insubstantial tasks force the legislature to reallocate resources and/or redefine its policy-making priorities.²²¹ It enables the federal government to say, in effect, "it's swell, County X, that you think you need 50 police officers to keep your homes and streets safe, but we're going to take half of the available person-hours to fulfill things that we, the Congress, feel are more important. (P.S. If you don't like it, get your citizens to vote us out of office.)" As Briffault explains, "[b]y crowding state agendas with federal programs, and pressuring states to commit their personnel, treasure,

²¹⁸ Imposing mandates on state and local governments "greatly reduce[s] the discretionary authority of local governments to make decisions and formulate policies, thus making the local governments less responsive to their citizens' needs." Freilich & Richardson, *supra* note 58, at 222.

²¹⁹ Stewart, *supra* note 41, at 1210.

²²⁰ See *Printz v. United States*, 854 F. Supp. 1503, 1517 (D. Mont. 1994). However, the outcome of the case likely would have been no different, even if the impositions on Sheriff Printz were relatively minor.

²²¹ In her concurrence, Justice O'Connor notes that the Court "appropriately refrain[ed] from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local governments . . . are similarly invalid." *Printz*, 117 S. Ct. at 2385 (O'Connor, J., concurring).

and authority to federal concerns, these measures can limit the capacity of the states to pursue their own state-initiated programs.²²² The end result is, in the words of the dissent, to “provide Congress the authority to require states to enact legislation—a power that affects States far closer to the core of their sovereign authority.”²²³ In the majority’s words: “to say that the Federal government cannot control the State, but can control all of its officers is to say nothing of significance.”²²⁴ Insofar as the federal government can conscript state officers in their official capacity as agents of the state, it can effectively conscript the state itself.²²⁵

In defending the Brady Act background check, the federal government had sought to ground the legislative-executive distinction in the idea that “the Brady Act does not require state legislative or executive officials to make policy, but instead issues a final directive to state CLEOs.”²²⁶ Yet this argument is no more successful at distinguishing the issues in *Printz* from those in *New York*. The Brady Act required that CLEOs make a “reasonable effort” to conduct the background checks.²²⁷ According to the federal government, “since CLEOs themselves are in the ‘best position to determine’ what constitutes a ‘reasonable effort,’” they will determine what level of law enforcement resources to devote to checking the records of prospective gun purchasers.²²⁸ Thus, the very language of the Brady Act, and the government’s own description of the duties it imposed, imply a “policymaking” component to the actions of CLEOs: Should ten person-hours-per-day be devoted to background checks or only three? Should officers be sent to the State Capitol to search relevant records or not? And so on. As the Court concluded, “[i]t is quite impossible . . . to draw the Government’s proposed line at ‘no policymaking,’ and we would have to fall back upon a line of ‘not too much policymaking.’”²²⁹ “Executive action that has utterly no policymaking component is rare, particularly at an executive level as high as a jurisdiction’s chief law-enforcement offi-

²²² Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concepts in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1352 (1994).

²²³ *Printz*, 117 S. Ct. at 2388 n.2 (Stevens, J., dissenting).

²²⁴ *Id.* at 2382.

²²⁵ In the extreme, one can conceive of a federal law requiring the implementation of a massive federal scheme by state officers such that no state resources or personnel are available for state-mandated functions. It may be extremely unlikely that Congress would enact federal mandates that severe, but putting the issue in such stark terms illustrates that allowing the conscription of state officers with impunity would effectively overrule the holding of *New York*. Moreover, the direct election of senators does significantly reduce the political barriers to imposing federal mandates at all.

²²⁶ *Printz*, 117 S. Ct. at 2380.

²²⁷ 18 U.S.C. § 922(s)(2) (1994).

²²⁸ Brief for the United States at 6-7, *Printz*, 117 S. Ct. 2365 (No. 95-1478).

²²⁹ *Printz*, 117 S. Ct. at 2381. “How much is too much is not likely to be answered precisely; and an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one.” *Id.*

cer.²³⁰

The political accountability problems identified by the majority in *Printz* are identical to those raised in *New York*: "By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."²³¹ State and local governments must absorb the costs *and* face whatever backlash results from implementing a burdensome or otherwise locally unpopular program.²³² This, too, undermines the structural balance the Framers sought to create: "The theory that two governments accord more liberty than one requires for its realization two distinct and discernible lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States."²³³

To argue that the *Printz* holding rests on *New York* only begs the question as to whether *New York* itself was properly decided.²³⁴ The majority and dissent present sharply divergent interpretations of constitutional history and evidence of the Framers' intent, neither of which is dispositive.

In the absence of a clear winner in the historical debate, the most viable argument for the *Printz* decision—and, by extension, the decision in *New York*—is that such limits on Congress' power are inherent within, or at least compelled by, the structure of the Constitution. For the Framers, the federal government was to have very limited power. In such circumstances, whether those limited powers are used to enlist the states in various projects would be relatively immaterial, as the federal government could only do so much. Occasional commandeering, like the Commerce Clause itself, would pose little threat to the sovereignty of states.

The limited federal government that the Framers thought they had

²³⁰ *Id.* The Court further noted:

[A]ssuming . . . that the Brady Act leaves no "policymaking" discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty. 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."

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

²³¹ *Id.* at 2382.

²³² Compare this argument with that in *New York v. United States*, 505 U.S. 144, 168-69 (1992) (arguing that federal mandates diminish accountability at both the state and federal level).

²³³ *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring).

²³⁴ There is of course another alternative: *New York* reached the right result through the wrong means. For example, the Court could arguably have held that the take title provisions under challenge violated the guarantee clause of the Constitution due to their imposition on state legislatures, thereby avoiding the thicket of jurisprudence on federal-state relationships. Of course, the distinction between federal efforts to conscript legislative and executive personnel is purely formalistic. To allow one and not the other is to make the initial prohibition a meaningless constraint on federal power.

created eventually gave way to a bloated regulatory-welfare state, as O'Connor noted:

The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities.²³⁵

Even if one accepts the argument that the Framers intended for Congress to have the power to conscript executive officials, this power operated within a constitutional scheme which truly limited the scope of federal power.²³⁶ Thus, the power to commandeer state officials would not have posed a significant threat to state sovereignty.²³⁷

Over the past six decades, the expansion of Commerce Clause power has eroded state sovereignty, threatening to undermine the entire federal structure.²³⁸ If the enumeration of powers in Article I, Section 8 no longer serves to limit the scope of congressional power, the Court is faced with two choices: unearth enforceable limits on federal power from within the Constitution's structure, or acknowledge that the federal system envisioned by the Framers is gone. "[T]he core of federalism is the formal legal position of the states in the federal structure;"²³⁹ if that position is not protected, the structure disintegrates.

The Court has long recognized this dilemma. Even as the Court aggrandized federal power during the New Deal, it recognized that an all-powerful federal government "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."²⁴⁰ Therefore, the reinvigoration of substantive Tenth Amendment jurisprudence is necessary if the vestiges of federal structure are to be maintained.²⁴¹ As Briffault notes, "[t]he role of the courts is to

²³⁵ *New York*, 505 U.S. at 157.

²³⁶ Moreover, until enactment of the Seventeenth Amendment in 1913, senators were elected by the state legislatures, and were therefore more likely to defend the interests of states as states, rather than the broader political preferences of the state's citizens.

²³⁷ However, Hamilton acknowledged in *THE FEDERALIST* No. 27 that some Framers did envision such a threat. See *THE FEDERALIST* No. 27, at 204 n.37 (Alexander Hamilton) (Isaac Kravnick ed., 1987).

²³⁸ "The Constitution does not protect the states from federal displacement even with respect to matters that historically were primarily fields of state competence, as recent Supreme Court decisions sustaining federal legislation in such traditional state fields as land use regulation, public utility regulation, and alcoholic beverage consumption demonstrate." Briffault, *supra* note 222, at 1341 (citations omitted).

²³⁹ *Id.* at 1352.

²⁴⁰ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

²⁴¹ The only alternative would be for the Court to resurrect pre-New Deal interpretations of the Commerce Clause. Yet, as shown in *Lopez*, there is only one justice that will even consider such a

protect the formal features of the federal structure—the states' fixed boundaries, territorial integrity, inherent law-making power, and status as basic units for the organization of the national government"²⁴² The courts fail to fulfill this function insofar as they stand idly by while federal power usurps all that was once in the states' domain.

The *Garcia* argument, that the courts need not police the federal state relationship, seconded by the dissent, is a passive endorsement of congressional supremacy over state governments. It should be surprising that Justices Brennan and Blackmun, above all others, would be so eager to put protections contained in the Bill of Rights at the mercy of the political process. As Justice Powell noted in his *Garcia* dissent, "[o]ne can hardly imagine this court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today [in *Garcia*] is indistinguishable in principle."²⁴³ After all, as Powell noted, the Tenth Amendment is no less a part of the Bill of Rights than the other nine,²⁴⁴ and eight states made the Tenth Amendment or an equivalent measure a condition of their ratification of the Constitution.²⁴⁵ Clearly, it is no more an empty admonition or ink blot than any other item in the Bill of Rights.

In *Printz* the Court resoundingly rejects this view, for placing the protection of state sovereignty in the hands of the Congress inherently undermines the federalist architecture at the heart of the constitutional system. This holding sits well with *Lopez* and *New York*, and demonstrates that a majority on the present Court takes federalism seriously.

III. *PRINTZ V. UNITED STATES* AND THE FUTURE OF FEDERAL ENVIRONMENTAL REGULATION

With its recent federalist trilogy, the Supreme Court has reinvigorated the notion of dual sovereignty, and set limits—albeit minor ones—on the

step, and some otherwise "conservative" justices are openly disdainful of any such effort. See *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (arguing that the Court's Commerce Clause jurisprudence should be "more faithful to the original understanding of that clause"); *id.* at 574 (Kennedy, J., concurring) (noting that *stare decisis* "forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy").

²⁴² Briffault, *supra* note 222, at 1306.

²⁴³ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 565 n.8 (1985) (Powell, J., dissenting).

²⁴⁴ "The Tenth Amendment also is an essential part of the Bill of Rights." *Id.* Powell expressed incredulity that the Court took the unprecedented step of "abdica[ing] responsibility for assessing the constitutionality of challenged action on the ground that affected parties theoretically are able to look out for their own interests through the electoral process." *Id.* at 567 n.12.

²⁴⁵ *Id.* at 569 (citing 1-4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot, 2d. ed. 1876)).

scope of congressional power. As noted at the outset, due to the intricate federal-state relationships in environmental policy, these decisions could force a reorientation of environmental policy, particularly insofar as the federal government relies upon states to do its bidding. In the past few years, there have been several federalist challenges to environmental laws, and more are certain to follow.²⁴⁶

A. *Pre-Printz Challenges to Federal Environmental Laws*

In the wake of *New York v. United States*, several state and local governments initiated challenges to federal environmental mandates, seeking to show that the Court's prohibition on federal efforts to commandeer state governments had been violated.²⁴⁷ Even without the Court's reaffirmation and extension of the *New York* doctrine in *Printz*, federal courts recognized that not all federal environmental programs could truly be considered "cooperative" in their design, and invalidated some of the more egregious examples of federal conscription of state governments.

1. *Board of Natural Resources v. Brown*

In 1990, Congress enacted the Forest Resources Conservation and Shortage Relief Act (FRCSRA).²⁴⁸ Ostensibly a conservation measure, as written the FRCSRA was clearly designed to protect domestic lumber mills by restricting the export of unprocessed logs harvested from either federal or state forests in the Western United States.²⁴⁹ Such a policy would effectively mandate that timber from Western federal and state lands be processed in local lumber mills.

The FRCSRA prohibited all raw log exports from Western states that

²⁴⁶ Since the Supreme Court's decision in *Lopez*, there have been several Commerce Clause challenges to environmental laws, including federal wetlands regulations, Superfund, and the Endangered Species Act. *See Cargill v. United States*, 116 S. Ct. 407 (1995) (denial of certiorari) (Thomas, J., dissenting); *United States v. Wilson*, No. 96-4498, 1997 U.S. App. LEXIS 35971 (4th Cir. Dec. 23, 1997); *Nat'l Ass'n of Home Builders v. Babbitt*, No. 96-5354, 1997 U.S. App. LEXIS 34143 (D.C. Cir. Dec. 5, 1997); *United States v. Olin*, 107 F.3d 1506 (11th Cir. 1997). However, as of this writing only one federal appeals court has looked favorably on such a challenge. *See Wilson*, 1997 U.S. App. LEXIS at *15 (holding that federal regulations limiting development of wetlands that "could affect" interstate commerce exceed the scope of the Commerce Clause power).

²⁴⁷ *See, e.g., ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996); *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996); *Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993); *Missouri v. United States*, 918 F. Supp. 1320 (E.D. Mo. 1996).

²⁴⁸ 16 U.S.C. §§ 620-620j (1994).

²⁴⁹ *See id.* § 620 (b). The law's export restrictions only applied to government lands in the continental United States west of the 100th meridian. *See id.* § 620c.

sell 400 million board feet or less per year.²⁵⁰ States that sell more than 400 million board feet were initially only prohibited from exporting 75 percent of their annual sales.²⁵¹ At the time the FRCSRA was enacted, only Washington State had annual timber sales in excess of 400 million board feet.²⁵² In October 1992, the Secretary of Commerce, pursuant to the Act, extended the export prohibition to *all* timber from Western government lands irrespective of timber volume.²⁵³ Yet, rather than prohibit the timber exports directly, the FRCSRA required states to issue their own regulations to implement the export bans.²⁵⁴

The FRCSRA significantly impacted Western states. Prior to its passage, Washington State sold a majority of the timber harvested off of state lands overseas due to more favorable market conditions. The revenues from state timber sales were largely used to finance public education and county governments. It was estimated that the FRCSRA would result in over \$500 million in lost revenues.²⁵⁵ Faced with this possibility, the Washington State Board of Natural Resources and Board of Education filed suit arguing, *inter alia*, the FRCSRA violated the Tenth Amendment.²⁵⁶

In 1993, the Ninth Circuit Court of Appeals held unconstitutional those provisions of the FRCSRA that called upon states to implement regulations to prohibit the export of unprocessed timber.²⁵⁷ Explicitly relying upon the Supreme Court's decision in *New York*, the Ninth Circuit found that the challenged portions of the FRCSRA were "direct commands to the states to regulate according to Congress' instructions, and thus violate the principle that the 'Federal Government may not compel the States to enact or administer a federal regulatory program."²⁵⁸

The federal government sought to defend the FRCSRA by arguing that (a) Washington State could avoid having to implement the export ban by ending timber sales from state lands, and (b) the Act's directives to the states constituted precatory admonitions rather than legally enforceable commands. The Ninth Circuit found neither of these arguments persuasive.

²⁵⁰ See *id.* § 620c(b)(1).

²⁵¹ See *id.* § 620c(b)(2).

²⁵² See *Brown*, 992 F.2d at 941.

²⁵³ See *id.*

²⁵⁴ See 16 U.S.C. § 620c(d). Under this section of the Act, "[e]ach State shall determine the species, grade, and geographic origin of unprocessed timber to be prohibited from export . . . and shall administer such prohibitions consistent with the intent [of the Act] . . ." and "the Governor of each state to which [the Act] applies . . . shall . . . issue regulations to carry out the purposes of this section . . ." By directing the governor to issue regulations, these regulations parallel those of the Brady Act struck down in *Printz*.

²⁵⁵ See *Brown*, 992 F.2d at 941.

²⁵⁶ The suits also alleged that the FRCSRA violates the Fifth Amendment's due process clause and federal obligations to land grant trusts. See *id.* at 942.

²⁵⁷ See *id.* at 946. The Court upheld the FRCSRA as against the other challenges.

²⁵⁸ *Id.* at 947.

In the first instance, the Ninth Circuit held that forcing states to choose between implementing export controls and ceasing all timber sales from state lands was the sort of "Hobson's choice" that *New York* explicitly invalidated.²⁵⁹ The Ninth Circuit held that the FRCRSRA "represents an alternative, halting all timber sales, that Congress has no authority to command."²⁶⁰ In the second instance, the court recalled that there is a "long line of Supreme Court decisions upholding 'the power of federal courts to order State officials to comply with federal law.'"²⁶¹ The FRCRSRA's lack of its own independent enforcement mechanism did not change the mandatory character of the challenged provisions.²⁶²

2. *ACORN v. Edwards*

In 1996, as the various Brady Act cases were winding their way through the federal court system, the Fifth Circuit Court of Appeals struck down another environmental statute for infringing upon state sovereignty. The case, *ACORN v. Edwards*,²⁶³ arose when the Association of Community Organizations for Reform Now (ACORN) and two parents in Louisiana sought to enjoin state executive officials to comply with the Lead Contamination Control Act (LCCA) of 1988.²⁶⁴ The case was initially dismissed as moot, but the plaintiffs sought and obtained attorney's fees, a decision from which the Louisiana state officials appealed. On appeal, the Fifth Circuit reversed the district court's fee award on the grounds that "the Plaintiffs failed to allege a violation of a lawful requirement of the Act" because the relevant portion of the LCCA was unconstitutional.²⁶⁵

Congress enacted the LCCA to reduce the perceived risks of childhood lead poisoning from lead-lined water tanks or water coolers containing lead solder.²⁶⁶ Two provisions of the LCCA imposed requirements upon states. The first ordered each state to disseminate information on models of water coolers that may contain lead solder or lead-lined tanks to schools and other

²⁵⁹ *Id.*

²⁶⁰ *Id.* The Court may well have stepped beyond *New York* with this argument, as it is unclear that Congress could not shut down timber sales on state lands if it so desired.

²⁶¹ *Id.* (citing *New York v. United States*, 505 U.S. 144, 179 (1992)).

²⁶² In response to the court's decision, Congress amended the FRCRSRA, instructing the Secretary of Commerce to issue federal regulations directly proscribing the export of unprocessed timber. See 16 U.S.C. §§ 620c-620d.

²⁶³ 81 F.3d 1387 (5th Cir. 1996).

²⁶⁴ 42 U.S.C. §§ 300j-21-26 (1994).

²⁶⁵ *ACORN*, 81 F.3d at 1388.

²⁶⁶ While there is little debate that high-level lead exposure poses a health threat, particularly to children, there is some debate as to how serious the threat is at low exposure levels. See, e.g., CASSANDRA CHRONES MOORE, *HAUNTED HOUSING: HOW TOXIC SCARE STORIES ARE SPOOKING THE PUBLIC OUT OF HOUSE AND HOME* 79-158 (1997).

educational institutions.²⁶⁷ The second mandated that each state “shall establish a program . . . to assist local educational agencies in testing for, and remedying, lead contamination in drinking water”²⁶⁸ The court only considered the constitutionality of the second requirement, holding that the state had effectively complied with the first provision and that the court should “avoid unnecessary resolution of constitutional questions.”²⁶⁹ Nevertheless, had both provisions been challenged it is likely that both would have met the same fate.

ACORN argued that insofar as Congress acted under its delegated powers in Article I, there is no Tenth Amendment obstacle to imposing burdens on states. Relying on *New York*, the Fifth Circuit held otherwise, noting that “[t]he Tenth Amendment . . . incorporates extra-textual limitations upon Congress’ exercise of its Article I powers.”²⁷⁰ That Congress has the power to regulate lead-contaminated water coolers was immaterial, as the challenged portion of the LCCA fell “squarely within the ambit of *New York*.”²⁷¹ The court held that “[b]ecause § 300j-24(d) deprives States of the option to decline regulating non-lead free drinking water coolers, we . . . conclude that § 300j-24(d) is an unconstitutional intrusion upon the States’ sovereign prerogative to legislate as it sees fit.”²⁷²

Section 300j-24(c) escaped the Fifth Circuit’s scrutiny because Louisiana officials had effectively complied with its requirement that they distribute information on lead-contaminated water coolers to educational institutions. Under *Printz*, however, this provision would be struck down as an unconstitutional infringement upon state sovereignty, even if a court ruled that the information distribution requirement did not require any legislative action by the state. In simple terms, if the federal government wants educational institutions to receive information about lead-contamination, it is free to either (a) provide states with an incentive to undertake the distribution voluntarily (which Louisiana effectively did), or (b) distribute the information itself. It cannot call upon executive officers to meet its ends.

²⁶⁷ See 42 U.S.C. § 300j-24(c).

²⁶⁸ *Id.* § 300j-24(d).

²⁶⁹ *ACORN*, 81 F.3d at 1392.

²⁷⁰ *Id.* at 1393.

²⁷¹ *Id.* at 1394. The Court explained that “Congress is free, pursuant to its Commerce Clause power, to combat lead contamination in drinking water by regulating drinking water coolers that move in interstate commerce. Such regulation, however, must operate directly upon the people, and not the States as conduits to the people.” *Id.*

²⁷² *Id.*

B. *Federal Environmental Laws Vulnerable to Challenge Under Printz*

Justice Stevens' dissent in *Printz* explicitly acknowledged that in striking down the Brady Act's background check, the Court would also be effectively declaring other federal laws which impose ministerial requirements on state executives to be unconstitutional.²⁷³ Justice Stevens cited several federal laws fitting this description.²⁷⁴ Two of these, sections of the Emergency Planning and Community Right-to-Know Act (EPCRA) and the federal statute requiring the collection of data on Underground Storage Tanks, are environmental. Insofar as these environmental programs mandate state participation, they are as constitutionally suspect as the FRCSRA and LCCA.

1. The Emergency Planning and Community Right-to-Know Act

The Emergency Planning and Community Right-to-Know Act (EPCRA) was enacted in 1986 as Title III of the Superfund Amendments and Reauthorization Act.²⁷⁵ The purpose of EPCRA is to ensure that local communities are informed about potential environmental threats from hazardous materials and that local governments develop emergency plans in case such threats materialize. Among other things, it requires businesses and governmental entities to inform local authorities of releases from their facilities.²⁷⁶

EPCRA poses some difficulty for cooperative federalism because it also imposes concrete obligations on the governor of each state. In particular, EPCRA requires that "the Governor of each State *shall appoint* a State emergency response commission."²⁷⁷ If the governor fails to take such action, then "the Governor *shall operate* as the State emergency response commission until the Governor makes such designation."²⁷⁸ The commission, which may simply consist of the governor herself, "*shall designate*

²⁷³ The possibility that numerous federal statutes may be invalidated should not determine the outcome of a Supreme Court ruling. See *INS v. Chadha*, 462 U.S. 919 (1983) (holding unicameral legislative veto is unconstitutional, despite its frequent enactment).

²⁷⁴ See *Printz v. United States*, 117 S. Ct. 2365, 2394 (1997) (Stevens, J., dissenting) (citing 40 Stat. 80-1 (registration of young adults for the draft), 42 U.S.C. §§ 11001, 11003 (creation of response commissions for release of hazardous substances), 42 U.S.C. § 6991a (data collection and reporting on underground storage tanks), 23 U.S.C. § 402(a) (reporting traffic fatalities), and 42 U.S.C. § 5779 (a) (reporting missing children)).

²⁷⁵ Pub. L. No. 99-499 (1986). Superfund is the common name of the Comprehensive Environmental Response, Cleanup, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9674 (1994).

²⁷⁶ See, e.g., 42 U.S.C. § 11004 (1994).

²⁷⁷ *Id.* § 11001(a) (1994) (emphasis added).

²⁷⁸ *Id.* (emphasis added).

emergency planning districts” and “[i]n making such designation, . . . *shall indicate* which facilities subject to the requirements of this subtitle are within such emergency planning district” and “*shall appoint* members of a local emergency planning committee for each emergency planning district.”²⁷⁹ The commission (or the governor herself) also “*shall review*” the plans developed by local emergency committees, and “make recommendations . . . to ensure coordination of such plans with emergency response plans of other emergency planning districts.”²⁸⁰ The commission must also collect emergency and hazardous chemical inventory forms from covered facilities and make such information available to members of the public who file written requests for such information.²⁸¹ Finally, the governor, commission, or local committee “shall [make] available to the general public” emergency response plans and information provided by covered facilities.²⁸² Failure to fulfill these duties can subject the governor or the commission to citizen suits.²⁸³ In sum, EPCRA mandates that state executive officers, indeed the governor herself, take specific actions, including creating what are effectively new state agencies.²⁸⁴

The foregoing should make clear that EPCRA directly commands the governor of each state to fulfill certain functions. This is an explicit violation of the Court’s holding in *Printz* that “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”²⁸⁵

Unlike the Low-Level Radioactive Waste Policy Amendments, there is nothing in EPCRA that gives states an option as to whether to comply. There is no regulatory scheme or pot of money that the state can give up to avoid EPCRA’s requirements.²⁸⁶ Moreover, there are no provisions in

²⁷⁹ *Id.* §§ 11001(b)-(c) (emphasis added). The emergency planning committees themselves have additional obligations to provide public notice for their activities, hold public meetings, and distribute an emergency plan. *See id.* § 11001(c). Moreover, the committees must prepare and annually revise an emergency plan that, among other things, designates community emergency coordinators, provides for community notification of releases, develops evacuation plans and develops training programs. *See id.* § 11003(c).

²⁸⁰ *Id.* § 11003(e) (emphasis added).

²⁸¹ *See id.* §§ 11022(a), (e)(3).

²⁸² *Id.* § 11044(a).

²⁸³ *See id.* §§ 11046(a)(1)(C), (D).

²⁸⁴ “It is difficult to avoid the conclusion that the commission and the committees are state regulatory agencies By ordering governors to create and fund state regulatory agencies, EPCRA forces the executive branch to exercise legislative powers in violation of core separation of powers principles.” Nicholas J. Johnson, *EPCRA’s Collision with Federalism*, 27 *IND. L. REV.* 549, 563-64 (1994).

²⁸⁵ *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997).

²⁸⁶ Although in some cases this may not matter. *See Board of Natural Resources v. Brown*, 992 F.2d 937, 947 (9th Cir. 1993).

EPCRA that suggest failure to abide by its strictures will simply result in the state's loss of specific federal funding.²⁸⁷ In that context, the language of EPCRA cannot be viewed as discretionary or "precatory admonitions rather than commands." Such an argument "ignores the long line of Supreme Court decisions upholding 'the power of federal courts to order State officials to comply with federal law,'"²⁸⁸ and EPCRA's own language authorizing citizen suits to achieve the same purpose.²⁸⁹ Under *Printz*, it is difficult to conclude that substantial portions of EPCRA are not unconstitutional.²⁹⁰

2. Underground Storage Tanks

In 1984, Congress enacted the Hazardous and Solid Waste Amendments of 1984²⁹¹ which amended the Resource Conservation and Recovery Act of 1976 (RCRA).²⁹² This legislation included provisions for the regulation of underground storage tanks (USTs), and the approval of state programs for such regulation under the traditional cooperative federalism model.²⁹³ In 1986, provisions were added which are non-discretionary requirements contrary to the holding of *Printz*. Specifically, the UST provisions declare that "[e]ach State *shall* make 2 separate inventories of all underground storage tanks in such State containing regulated substances."²⁹⁴ In addition, "each State *shall submit* such aggregated data to the Administrator [of the Environmental Protection Agency]."²⁹⁵ These provisions are wholly separate from the regulatory provisions that can be included in a discretionary state UST regulatory program.²⁹⁶

²⁸⁷ Indeed, EPCRA provides for no financial assistance to states whatsoever. It merely authorizes "such sums as may be necessary to carry out" its provisions. 42 U.S.C. § 11050.

²⁸⁸ *Brown*, 992 F.2d at 947 (quoting *New York v. United States*, 505 U.S. 144, 179 (1992)).

²⁸⁹ See 42 U.S.C. §§ 11046(a)(1)(C), (D).

²⁹⁰ Also, given that these provisions of EPCRA are central to its structure in that without the state commissions most other provisions of the Act are inoperable, the entire statute may be void.

The standard for determining the severability of an unconstitutional provision is well established: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)).

²⁹¹ Pub. L. No. 98-616, 98 Stat. 3221 (1984).

²⁹² 42 U.S.C. §§ 6901-6992.

²⁹³ See *id.* § 6991.

²⁹⁴ *Id.* § 6991a(c).

²⁹⁵ *Id.* (emphasis added). The law also imposes specific requirements upon the owners of USTs to report various information about their USTs to "the State or local agency or department designated" by the Governor to receive such information. See *id.* §§ 6991a(a)(1), (b)(1).

²⁹⁶ See *id.* § 6991c. The elements of a state program are listed in 42 U.S.C. § 6991c(a). Where there is no state program in place, the EPA regulates directly pursuant to 42 U.S.C. § 6991b, a section

There is no doubt that the requirements imposed on states under the UST law are less burdensome than those contained in EPCRA or even in the Brady Act itself. However, the language of *Printz* does not admit any exceptions for *de minimis* or negligible intrusions. Rather, the Court was clear: "It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."²⁹⁷ By this standard, it would seem that the UST reporting and record keeping requirements are as constitutionally suspect as the relevant portions of EPCRA.

C. *Cooperative Federalism or Coercive Mandates: The Case of the Clean Air Act*

For cooperative federalism to be constitutional, it must be truly cooperative. The federal government can bribe states with the promise of federal funds or threaten states with sanctions. However, it can neither direct state legislatures nor commandeer state executive officials. A formalistic division between these two types of federal action is possible, but it is likely to be arbitrary in practice. Conditional spending can be the basis for greater intrusions on state sovereignty than the administrative burdens struck down in *Printz*. Though the Supreme Court has supported the cooperative federalism model, it has also acknowledged that "in some circumstance the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"²⁹⁸

It is fairly clear that those environmental programs that are less cooperative in their federalism are constitutionally suspect.²⁹⁹ However,

separate from the notification requirements imposed directly upon states.

²⁹⁷ *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997). *But see id.* at 2385 (O'Connor, J., concurring) ("[T]he Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid.").

²⁹⁸ *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

²⁹⁹ There is an exception to this general statement in the case of those federal programs that impose similar requirements on both private and governmental entities across the board. For example, the Safe Drinking Water Act (SDWA), Pub. L. No. 93-523, 88 Stat. 1661 (1974), imposes requirements upon all water systems that maintain at least fifteen connections or regularly service more than twenty-five people, irrespective of whether it is owned and operated by a state or local government or a private firm. This sort of regulation is constitutional insofar as it represents a valid exercise of Congress' Commerce Clause power (a debatable point) as it does not regulate states *qua* states. Other examples of neutral environmental regulations that apply to both state and local governments and private firms would be emission standards, automotive fleet alternative fuel vehicle requirements, and employee carpooling rules. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (upholding the application of the Fair Labor Standards Act to government employers).

insofar as some ostensibly "cooperative" federal environmental programs become coercive in their implementation, they may suffer from constitutional defects as well. In particular, insofar as Congress' spending power is not subject to constitutional constraints, it threatens to swallow whole the state sovereignty protected by *Printz*. For just as the dissent's reasoning in *Printz* would have blown a hole in the protections offered by *New York*, an unconstrained conditional spending power can emasculate the federalist protections found by the Court in the past five years.

In 1995, two states filed constitutional challenges to portions of the Clean Air Act in federal court.³⁰⁰ Though neither challenge was successful, these two cases demonstrate that states increasingly question the extent to which their relationship to the federal government is truly "cooperative" in the context of environmental law. These cases suggest that if the principles underlying the *New York*, *Lopez*, and *Printz* decisions are to be vindicated, the Supreme Court may need to ensure that cooperative federalism lives up to the first part of its name.

1. Court Challenges to the Clean Air Act

The Clean Air Act³⁰¹ is arguably the most contentious environmental law ever enacted. The Act is sweeping in its scope and has, at times, sought to encourage land use control, restrictions on personal automobile use, and outright bans on new development in urban areas that fail to meet federal standards. Over the past three decades there has been "substantial friction and resistance by states, EPA, and the regulated community to implementing the immensely costly requirements of the Clean Air Act, thereby requiring substantial expenditure of regulatory oversight resources and imposing costly litigation."³⁰²

The cost and intrusiveness of federal air pollution regulations has sparked fierce criticism. The 1990 Amendments to the Act are widely considered to be the single most expensive piece of environmental legislation ever enacted.³⁰³ The perception that the Act is inflexible and ineffi-

³⁰⁰ See *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996); *Missouri v. United States*, 918 F. Supp. 1320 (E.D. Mo. 1996), *vacated*, 109 F.3d 440 (8th Cir. 1997).

³⁰¹ 42 U.S.C. §§ 7401-7661f (1994).

³⁰² Joshua D. Saroff, *The Continuing Imperative (but only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225, 307 (1997).

³⁰³ For example, the ozone non-attainment provisions of the Clean Air Act alone are estimated to cost \$11.2 billion per year. See Kenneth W. Chilton & Stephen Huebner, *Has the Battle Against Urban Smog Become "Mission Impossible?"*, 1996 CENTER FOR THE STUDY OF AM. BUS. 136. With the recent promulgation of new air quality standards, the costs of the Clean Air Act ozone and particulate matter non-attainment provisions will continue to increase, by as much as \$55 billion per year. See Kenneth W. Chilton & Stephen Huebner, *Beyond the Air Quality Dust Cloud: Fundamental Issues Raised by the Air Quality Proposals*, 1997 CENTER FOR THE STUDY OF AM. BUS. 183.

cient also fosters political opposition.³⁰⁴ Since 1970, the Act has impressed states into regulating air quality in line with federal dictates through the State Implementation Plan (SIP) process. Beginning soon thereafter, states have resisted.

All states with metropolitan areas that do not attain the National Ambient Air Quality Standards (NAAQS) for criteria air pollutants must develop SIPs which they submit to the EPA for its approval. Among other things, an adequate SIP must include "enforceable emission limitations . . . as well as schedules and timetables for compliance,"³⁰⁵ monitoring systems,³⁰⁶ a fee-based permitting system for stationary sources,³⁰⁷ an enforcement program,³⁰⁸ and provide for sufficient public participation in the SIP process.³⁰⁹ The 1990 Amendments also added Title V, which requires states to develop an omnibus permitting program for stationary sources,³¹⁰ complete with permit fees deemed sufficient by the EPA to cover the cost of implementation,³¹¹ and outlined numerous specific control measures that non-attainment areas must include in their SIP.³¹² "In short, the states' role, if they accept, is subject to a great deal of federal specification, oversight and approval."³¹³ Failure to submit an adequate SIP by the appropriate deadlines³¹⁴ results in the imposition of federal sanctions, including the loss of federal highway funds, increased offset requirements for new development, and the imposition of a Federal Implementation Plan (FIP) that the EPA will enforce.³¹⁵ Moreover, local transportation projects cannot receive federal funding unless they conform to an EPA-approved SIP.³¹⁶ Although the Clean Air Act fits the cooperative model in that it offers states the choice of allowing the federal government to take over air

³⁰⁴ See K.H. Jones & Jonathan Adler, *Time to Reopen the Clean Air Act: Clearing Away the Regulatory Smog*, CATO INST. POL'Y ANALYSIS, July 11, 1995, at 1.

³⁰⁵ 42 U.S.C. § 7410(a)(2)(A).

³⁰⁶ See *id.* § 7410(a)(2)(B).

³⁰⁷ See *id.* § 7410(a)(2)(L).

³⁰⁸ See *id.* §§ 7410(a)(2)(C), (E).

³⁰⁹ States must provide "reasonable notice" and public hearings on SIPs, and consult with affected local entities. *Id.* § 7410(a)(2)(M).

³¹⁰ See *id.* § 7651o. For a critique of Title V, see BEN LIEBERMAN, *TITLE V OF THE CLEAN AIR ACT: WILL AMERICA'S INDUSTRIAL FUTURE BE PERMITTED* (CEI 1995).

³¹¹ This is the sort of measure that illustrates the potential accountability problem when the federal government relies upon states to administer federal policy. As David Schoenbrod notes, through Title V "unelected federal officials supplanted much of the budgetary and taxing authority of elected state officials" through their ability to approve or reject state permit fee schedules. Schoenbrod, *supra* note 49, at 265.

³¹² See 42 U.S.C. § 7511(a).

³¹³ Dwyer, *supra* note 32, at 1194.

³¹⁴ Different regions face different deadlines dependent upon their air quality designation. See 42 U.S.C. § 7509(a).

³¹⁵ See *id.* § 7509(b).

³¹⁶ See *id.* § 7506.

quality regulation, such a decision would come at tremendous cost.

The sponsors of the original legislation clearly intended for the federal government to tell states what to do. Congressman Staggers, who managed the Clean Air Act on the floor in 1970, explained that:

If we left it all to the Federal Government, we would have about everybody on the payroll of the United States. We know this is not practical. Therefore the Federal Government sets the standards, we tell the States what they must do and what standards they must meet. These standards must be put into effect by the communities and the States, and we expect them to have the men to do the actual enforcing.³¹⁷

However, contemporary legal authority for such impositions was certainly lacking,³¹⁸ prompting several states to challenge the law.

Indeed, in 1973, several states submitted inadequate or incomplete SIPs, in outright defiance of the EPA's demands. The EPA responded by including requirements that *state* officials implement transportation control measures and land-use regulations at state expense as part of the FIP.³¹⁹

Several state and local governments took exception to the EPA's attempts to force them to implement federal regulations. They successfully challenged the EPA's measures in federal courts.³²⁰ While the states' victories were on statutory grounds, several courts expressed serious reservations about the constitutional legitimacy of the EPA's actions. In particular, the courts separated federal efforts to control pollution from industrial sources that impact state-run facilities from federal efforts to directly conscript state officers in the administration of a federal program. Upholding the EPA's actions, in the Ninth Circuit's view, would have endorsed "[a] Commerce [Clause] Power so expanded [that it] would reduce the states to puppets of a ventriloquist Congress."³²¹ Such a power "would enable Congress to control ever increasing portions of the states' budgets. The pattern of expenditures by states would increasingly become a Congress-

³¹⁷ 116 CONG. REC. 19,204 (1970) (statement of Rep. Staggers).

³¹⁸ "But the matter would be very different were Congress to invoke the commerce power as a justification for compelling state and local governments to implement federal environmental policies. There is no close precedent, historical or legal, supporting such an undertaking." Stewart, *supra* note 41, at 1223.

³¹⁹ Among the requirements pushed by EPA were bus and carpool lanes, vehicle emission inspection programs, increased parking fees at municipal facilities, and other measures. Subject states were required to find the funds to fulfill these requirements, and the EPA asserted that it could bring legal action against state officials that did not comply.

³²⁰ See *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated sub nom.*, *EPA v. Brown*, 431 U.S. 99 (1977); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub nom.*, *EPA v. Brown*, 431 U.S. 99 (1977). A fourth federal appeals court found in favor of the EPA. See *Pennsylvania v. EPA*, 500 F.2d 246 (3rd Cir. 1974).

³²¹ *Brown*, 521 F.2d at 839.

sional responsibility."³²²

After losing in federal court, the EPA appealed a portion of the rulings to the Supreme Court. The Supreme Court accepted certiorari, but the EPA backed off of its position, and conceded that it had exceeded its statutory authority, if not constitutional limitations, and the cases were declared moot.³²³ There is little doubt that if the cases were litigated today, the EPA's effort to conscript state and local officials would be invalidated under *Printz* and *New York*.

The 1970 court battles were hardly the last conflicts between the federal and state governments over implementation of the Clean Air Act. After passage of the 1990 Amendments, state and local governments loudly protested EPA regulations on automobile emission inspection programs,³²⁴ carpool regulations,³²⁵ and permitting program requirements.³²⁶ More recently, states took the EPA back to court, raising constitutional objections to its uncooperative approach to "cooperative federalism."

Virginia and Missouri, respectively, challenged the imposition of sanctions under the Clean Air Act.³²⁷ Both states alleged that the EPA's decision, if not the statutory provisions authorizing sanctions themselves, were unconstitutional infringements upon state sovereignty. According to the states, the Clean Air Act impermissibly authorized the EPA to impose severe sanctions upon those states that fail to comply with the EPA's interpretation of the Act.³²⁸ In particular, the Clean Air Act authorizes the EPA to withhold federal highway funds, to increase the "offset" requirements that companies wishing to locate in a non-complying area must meet,³²⁹ and to preempt the state regulatory program altogether.³³⁰ Impos-

³²² *Id.* at 840. "In essence, the Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles." *Train*, 521 F.2d at 992.

³²³ See *Brown*, 431 U.S. 99.

³²⁴ See Dwyer, *supra* note 32, at 1208-16.

³²⁵ The federal carpool mandate, which was to be imposed in the eight smoggiest metropolitan areas, was rescinded by Congress in 1995. See Clean Air Act: Optional Employer Mandated Trip Reduction, Pub. L. No. 104-70, 109 Stat. 773 (1995) (amending 42 U.S.C. § 7511a). It was the first use of a new "correction" procedure designed by House Republicans to expedite minor changes to regulatory laws needed to "correct" otherwise absurd regulatory requirements.

³²⁶ See Carrie Shook, *Title V Terror: Clean Air 'Sleeper' Clause Comes to Haunt*, BUS. FIRST-COLUMBUS, Oct. 23, 1995, at 21. The administrative costs of Title V on states are significant. In 1995, the Ohio Environmental Protection Agency estimated that it would have to add 100 to 150 new staff to implement the program in accordance with federal guidelines. See LIEBERMAN *supra* note 310, at 1, 12.

³²⁷ See *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996); *Missouri v. United States*, 918 F. Supp. 1320 (E.D. Mo. 1996).

³²⁸ Virginia also argued that the EPA was wrong to conclude that Virginia's stationary source permit program failed to comply with Title V of the Clean Air Act. See *Browner*, 80 F.3d at 872.

³²⁹ If a company wishes to build a new factory in a non-attainment area, it must make investments to reduce pollution to offset the new facility's marginal contribution to local air pollution. When states

sition of either of these first two sanctions, Missouri claimed, would produce irreparable harm to the state, due to the magnitude of funding at stake and the impact that heightened offset requirements would have upon private development within the state.³³¹ Virginia made a similar case.³³² Neither state was successful.

According to the Fourth Circuit, the Clean Air Act's provisions pass constitutional muster "because although its sanctions provisions potentially burden the states, those sanctions amount to inducement rather than 'outright coercion.'"³³³ The District Court in *Missouri* reached a similar conclusion, relying upon dicta in *New York* that "conditions [on receipt of federal funds] must . . . bear *some* relationship to the purpose of federal spending."³³⁴ For the *Missouri* court, "the appropriate focus is not on the alleged impact of a statute on a particular state program or economy but whether Congress has 'directly compel[led]' the state 'to enact a federal regulatory program.'"³³⁵ While the *Missouri* court only addressed the question of whether such sanctions were unconstitutional on their face, it implied that an as-applied challenge would not fare any better.³³⁶

2. Commandeering through Conditional Spending

In the wake of *Printz*, the key question raised by the *Virginia v. Browner* and *Missouri* litigation for federal environmental law is whether imposing conditions upon a state's receipt of federal funds can ever rise to the level of being coercive. Both the Fourth Circuit and the Missouri District Court relied upon *South Dakota v. Dole*³³⁷ to uphold making continued disbursement of highway funds conditional upon satisfactory implementation of the Clean Air Act.³³⁸ This reliance on *Dole* may be misplaced. As Justice O'Connor noted in her *Dole* dissent:

When Congress appropriates money to build a highway, it is entitled to

fail to comply, the EPA may increase the proportion of offsets required from 1.15:1 to 2:1. See 42 U.S.C. § 7509(b)(2).

³³⁰ See *id.* § 7661a(d)(3). It should be noted, however, that exceptions are made for certain types of highway projects, such as those that are necessary to save lives or reduce pollution. See *infra* note 353.

³³¹ See *Missouri*, 918 F. Supp. at 1326.

³³² See *Browner*, 80 F.3d at 874.

³³³ *Id.* at 881.

³³⁴ *Missouri*, 918 F. Supp. at 1333 (citing *New York v. United States*, 505 U.S. 144, 167 (1992)) (emphasis in *Missouri* opinion).

³³⁵ *Id.* at 1328 (citing *New York*, 505 U.S. at 161).

³³⁶ See *id.* at 1329. Missouri had sought to challenge the provisions on both grounds, but the District Court determined that an as-applied claim was not yet ripe.

³³⁷ 483 U.S. 203 (1987).

³³⁸ See *Browner*, 80 F.3d at 881-82; *Missouri*, 918 F. Supp. at 1330, 1332-34.

insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety.³³⁹

In *Dole*, the Court held that "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" ³⁴⁰ In particular, the Supreme Court upheld the constitutionality of Congress' withholding five percent of highway funds from states which refused to raise the drinking age to twenty-one. Nonetheless, the Court acknowledged that the spending power "is of course not unlimited," ³⁴¹ and cannot be used to coerce states into enacting unrelated programs. Conditional spending must "be in pursuit of 'the general welfare,'" and any conditions imposed by Congress must be unambiguous, and related to the federal interest in the program in question.³⁴² Moreover, the Court held that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."³⁴³

The reasons for limiting the use of conditional spending to affect state policies should be rather clear. One could imagine a situation in which every payment from the federal government to states is conditioned upon acquiescence to every jot and iota of federal dictates. Well prior to *Printz*, commentators noted that "such a broad reading of congressional power would afford Congress a way to exercise the spending power where it is not spending, by drafting grant conditions that reach areas in which the state has accepted no funds."³⁴⁴ The conditional grant of funds could eliminate the element of choice that must remain when the federal government seeks to enlist state assistance and emasculate the *Printz* decision.

If the holding in *Dole* is to place any meaningful restraint upon

³³⁹ *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting).

³⁴⁰ *Dole*, 483 U.S. at 206 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)). Relevant to this discussion is the fact that the Court also held that the "Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants." *Id.* at 210. The petitioners in *Dole* sought to argue that Congress' use of the spending power to induce states to raise the drinking age violated state sovereignty, particularly the provisions of the 21st Amendment which leave the regulation of alcohol to the states.

³⁴¹ *Id.* at 207.

³⁴² *Id.*

³⁴³ *Id.* at 208.

³⁴⁴ Stewart, *supra* note 41, at 1261. More recently, Albert Rosenthal noted that "what is decided with respect to [conditional] spending could render irrelevant many generally accepted doctrines concerning the powers of and limitations upon the federal government . . ." Albert Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1106 (1987). See also Lynn Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995).

Congress' exercise of the spending power, there must be some substantive component to the *Dole* test. In an earlier case the Court explained that "the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof."³⁴⁵ If Congress is not limited in this manner, "the spending power could render academic the Constitution's other grants and limits of federal authority."³⁴⁶ However, because the Supreme Court has yet to invalidate a congressional effort to induce state cooperation through conditional spending, few lower courts have been willing to do so.³⁴⁷

Nonetheless, it is not clear that threatening federal highway moneys falls squarely within the *Dole* holding.³⁴⁸ Highway funds are raised from a dedicated revenue source in gasoline taxes and placed in the Highway Trust Fund. These moneys are explicitly earmarked for transportation projects.³⁴⁹ The authorizing legislation suggests many reasons why federal funding of highway construction supports the "general welfare," but environmental protection is not one of them. In *Dole*, on the other hand, both the highway legislation and the drinking age increase were explicitly enacted to improve safety. The connection between the Clean Air Act's purpose and transportation is also ambiguous, as states can lose their highway funding solely for failing to comply with Title V, a portion of the Act that only deals with stationary sources.

It is certainly true that the Federal-Aid Highway Act of 1970 instructed the Secretary of Transportation to ensure that federal highway programs were "consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act, as amended."³⁵⁰ Similarly, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)³⁵¹ establishes that Congress sought to create an environmentally sound interstate highways system. Neither of these statutes, however, establishes that a *purpose* of federal highway programs is environmental protection—the relationship test set forth in *Dole*. These statutory provisions provide an indication of what

³⁴⁵ *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958).

³⁴⁶ *New York v. United States*, 505 U.S. 144, 167 (1992). See *Baker*, *supra* note 344, at 1920.

³⁴⁷ See, e.g., *Clarke v. United States*, 886 F.2d 404 (D.C. Cir. 1989) (holding that conditioning of federal appropriations for the District of Columbia on the passage of specified legislation is unconstitutional).

³⁴⁸ Though it is certain they would fall outside the test articulated by Justice O'Connor in her dissent. *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting).

³⁴⁹ Of course, many would argue that the "trust fund" system within the federal budget is all smoke-and-mirrors. Whether or not this is true when the issue is deficit reduction, a strong argument can be made that the federal government has a moral, if not legal, obligation to expend money from the trust fund for road purposes and nothing else.

³⁵⁰ Pub. L. No. 91-605, § 136(b), 84 Stat. 1713 (1970), (codified as amended at 23 U.S.C. §§ 142-143, 215-216, 321 (1994)).

³⁵¹ Pub. L. No. 102-240, 105 Stat. 1914 (1991) (codified at scattered sections of U.S.C.).

sort of highways Congress sought to fund; they do not establish environmental protection as a purpose of highway funding. This is clearly distinguishable from the facts of *Dole* in which the federal statute calling upon states to raise the drinking age echoed the *explicit* purposes of the federal highway programs: safe highways.³⁵²

Another important distinction is the severity of the financial penalty to which states would be subjected for failing to abide by congressional dictates. *Dole* involved a modest (five percent) loss of highway funds. Yet under the Clean Air Act, virtually all highway funds can be put at risk, with minor exceptions for special uses.³⁵³ Thus, even if the Clean Air Act's sanctions are not facially suspect, it must be the case that the imposition of sanctions could cross the line from inducement to coercion if enough unrelated funds were at stake.³⁵⁴

In *Brown*, the Ninth Circuit noted that the formal existence of a choice—such as the option to cease *all* timber sales from state lands—is insufficient to make a federal program voluntary.³⁵⁵ Similarly, in 1989, the D.C. Circuit Court of Appeals struck down a conditional spending provision for being unduly “coercive” because Congress sought to condition the District of Columbia’s appropriations upon the enactment of legislation to exempt religious institutions from a sexual preference anti-discrimination law.³⁵⁶ In *Clarke v. United States*, the court held that “the severe consequences attendant to rejecting the amendment meant the Council members were effectively coerced into not imposing it,” in violation of their First Amendment rights.³⁵⁷ Citing numerous cases associated with the doctrine of unconstitutional conditions, the court held that “the government may not disregard the strictures of the Constitution when conferring discretionary benefits.”³⁵⁸

³⁵² For a contrary view, see Laura Rapacioli, Note & Comment, *Be Careful What You Ask For: Attacking the Constitutionality of the Clean Air Act Operating Permit Program*, 14 PACE ENVTL. L. REV. 323 (1996). But see William J. Klein, Note, *Pressure or Compulsion? Federal Highway Fund Sanctions of the Clean Air Act Amendments of 1990*, 26 RUTGERS L.J. 855 (1995).

³⁵³ See 42 U.S.C. § 7509 (b)(1). The EPA may not cut off highway funds for projects necessary to “resolve a demonstrated safety problem,” mass transit, car pooling programs, construction of high-occupancy vehicle (HOV) lanes, “programs to limit or restrict vehicle use in downtown areas,” and other programs that will “improve air quality and would not encourage single occupancy vehicle capacity.” *Id.* § 7509 (b)(1)(B).

³⁵⁴ According to Stewart, “[s]uch a condition, accompanying funds which the state cannot afford to forgo, intensifies federal interference with local mechanisms of political accountability by compelling states to enforce against their constituencies restrictions the constituencies oppose.” Stewart, *supra* note 41, at 1255.

³⁵⁵ Board of Natural Resources v. Brown, 992 F.2d 937, 947 (9th Cir. 1993).

³⁵⁶ *Clarke v. United States* 886 F.2d 404, 413 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990). The court found that the conditional grant of funds violated D.C. legislators’ First Amendment guarantee of free expression.

³⁵⁷ *Id.* at 409.

³⁵⁸ *Id.* at 410. Among the cases cited by the court were *Goldberg v. Kelly*, 397 U.S. 254 (1970)

Of course, the rights of states are not always upheld to the same degree as those of individuals. In *Nevada v. Skinner*, decided just before *Clarke*, the Ninth Circuit Court of Appeals found that Congress could make ninety-five percent of a state's highway funds conditional upon that state's setting of a 55 miles-per-hour highway speed limit.³⁵⁹ According to Judge Reinhardt, the conditional grant of funds did not amount to "coercion" that would "leave the state with no practical alternative but to comply with federal restrictions."³⁶⁰ This expansive view of Congress' conditional spending power is at odds with the substance of *Printz* and *New York*.

Left unrestrained, Congress may use the conditional grant of federal funds to achieve those ends that would otherwise be barred by the holdings of *New York*, *Lopez*, and *Printz*. States receive federal grants for welfare, environmental programs, highways, police, and many other purposes, and are therefore quite reliant upon the national fisc. A federal recommendation that states implement a desired program or risk losing federal support would be quite compelling. Thus, the ultimate import of the Court's recent federalist holdings may depend upon whether it opts to limit Congress' ability to use conditional spending to bribe and compel state actions.

IV. IMPLICATIONS OF FEDERALIST JURISPRUDENCE ON ENVIRONMENTAL POLICY

For the past twenty-five years, the federal government has played the central role in the formulation, if not implementation, of environmental policy. Even the cooperative federalism model presupposes active federal oversight and direction of state efforts. The conventional policy presumption is that the federal government has the primary responsibility for environmental protection. The revival of federalism, as symbolized by *Printz* and other recent cases, suggests that this presumption needs to be reconsidered.

No doubt the extension of federalist jurisprudence into the environmental realm will be resisted in federal agencies, the legislature, and the courts;³⁶¹ federal judges are often willing to engage in policy-making from

(Congress may not condition grant of welfare benefits on waiver of due process rights), and *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment benefits may not be conditional on recipient's willingness to work on Sabbath). For an overview of the doctrine of unconstitutional conditions, and one possible jurisprudential approach to it, see RICHARD EPSTEIN, *BARGAINING WITH THE STATE* (1993).

³⁵⁹ *Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989).

³⁶⁰ *Id.* at 448.

³⁶¹ Judicial reluctance to extend federalism jurisprudence into the environmental area is evident in the *Lopez*-based challenges to federal environmental programs. See *Cargill v. United States*, 116 S. Ct. 407 (1995) (denial of certiorari) (Thomas, J., dissenting) (wetlands regulations upheld under Commerce

the bench when the stakes are high.³⁶² The presumption is that without active federal involvement, there will be insufficient environmental protection. This view is misguided. There are few reasons to assume that, in the 1990s, environmental protection efforts must be centralized at the federal level in order to be effective.

In practical terms, states are already responsible for the bulk of environmental enforcement and policy implementation;³⁶³ it is merely priority setting from which they are excluded. Removing states from the environmental picture is not possible.³⁶⁴ Twenty years ago Richard Stewart noted the "sobering fact is that environmental quality involves too many intricate, geographically variegated physical and institutional interrelations to be dictated from Washington."³⁶⁵ This is even more true today as environmental policy is increasingly focused on smaller, more complex problems which are tied to local conditions.

Three basic arguments were put forward to justify the federal government's entrance upon the environmental stage in the late 1960s and early 1970s: (1) cross-boundary pollution ("spillovers"); (2) states' failure or inability to provide for adequate environmental protection (economies of scale); and (3) interstate competition (the "race-to-the-bottom").³⁶⁶ Others have suggested that national policies are more suited to the pursuit of moral ideals, such as those which underlie environmentalism.³⁶⁷ Similar argu-

Clause); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Endangered Species Act regulations upheld under Commerce Clause); *United States v. Olin*, 107 F.3d 1506 (11th Cir. 1997) (Superfund regulations upheld under Commerce Clause). *But see* *United States v. Wilson*, No. 96-4498, 1997 U.S. App. LEXIS 35971 (4th Cir. Dec. 23, 1997) (wetlands regulations invalidated under Commerce Clause).

³⁶² Indeed, the *Printz* dissent opens by praising the Brady Act as a "remarkable success" and a wise public policy response to the "epidemic of gun violence." *Printz v. United States*, 117 S. Ct. 2365, 2386 (1997) (Stevens, J., dissenting). The federal government also appealed to these sentiments, arguing that the Brady law should be upheld, *inter alia*, because it "serves very important purposes." *Printz*, 117 S. Ct. at 2383. No doubt similar arguments would be marshaled to defend environmental statutes from a federalism challenge.

³⁶³ See Tom Arrandale, *Environment: Pollution Control Has Been Steadily Propelled Away from Washington to the States*, GOVERNING, Oct. 1997, at 36. The Environmental Council of the States reports that states are responsible for over 85% of environmental enforcement actions and approximately 80% of environmental program expenditures. See Robert E. Roberts, *Debunking the 'Race to the Bottom' Myth*, ECOSTATES, Nov. 1997, at 13.

³⁶⁴ No one has argued that state and local governments should be excluded altogether from environmental policy. Some have argued, however, that governments generally should be excluded from the formulation and enforcement of environmental policy, beyond the use of courts and other dispute resolution mechanisms. See, e.g., TERRY ANDERSON & DONALD LEAL, *FREE MARKET ENVIRONMENTALISM* (1991); Smith, *A Critical Reappraisal*, *supra* note 42; Fred L. Smith, Jr., *A Free-Market Environmental Program*, 11 CATO J. 457 (1992); Fred L. Smith, Jr., *The Market and Nature*, THE FREEMAN, Sept. 1993, at 352; Richard Stroup, *Controlling Earth's Resources: Markets or Socialism?*, POPULATION & ENV'T, Spring 1991, at 265.

³⁶⁵ Stewart, *supra* note 41, at 1266.

³⁶⁶ These arguments are summarized in Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 601-02 nn.101-03 (1996).

³⁶⁷ This argument is put forward in Stewart, *supra* note 41, at 1217-19. Stewart also suggests three

ments are used today to defend the central place of the federal government in environmental policy from calls for decentralization.³⁶⁸

Each of the arguments put forward in defense of national supremacy in environmental policy is at least open to question, if not demonstrably false. There is little reason to believe that genuine environmental protection will suffer from judicially enforced limits on federal power. There are also independent arguments for increasing state and local autonomy on environmental matters so as to encourage greater political accountability and innovation in environmental policy. Courts should not seek to identify public policy justifications for resisting the logical extension of federalism jurisprudence into the environmental realm.

A. *Spillovers*

Cross-boundary pollution, like any interstate externality, is a valid concern in environmental policy. If State A can pollute State B without fear of retribution, it has successfully externalized its environmental costs. Absent some external controls or dispute resolution system, this situation can lead to significant environmental harm. But the mere existence of such externalities does not necessarily call for a centralized regulatory bureaucracy. There are other means of dealing with at least some spillover problems, including compacts and regional authorities,³⁶⁹ and common law nuisance actions.³⁷⁰ Pollution tends to ignore political boundaries, but that does not mean that every environmental problem is national. Where environmental concerns are regional in scope, there is an argument for entrusting a regionally-based entity or group with devising an adequate solution.³⁷¹

other "structural factors" which hinder environmental quality on a decentralized basis which overlap with the historical factors identified by Esty. They are (1) national economies of scale; (2) the disparate under-representation of environmental interests at the state level; and (3) spillovers. *See id.* at 1211-17.

³⁶⁸ *See, e.g.*, Sarnoff, *supra* note 302.

³⁶⁹ For instance, Congress authorized the Tahoe Regional Planning Compact between California and Nevada in 1969, creating the Tahoe Regional Planning Agency which oversees the Lake Tahoe basin. *See* Pub. L. No. 96-551, 94 Stat. 3234 (1969). *See also* BRUCE YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT 27, 57 (1997) (discussing the Ohio River Sanitation Commission).

³⁷⁰ *See, e.g.*, ELIZABETH BRUBAKER, PROPERTY RIGHTS IN DEFENSE OF NATURE (1995); Roger E. Meiners, *Elements of Property Rights: The Common Law Alternative*, in LAND RIGHTS: THE 1990S PROPERTY RIGHTS REBELLION (Bruce Yandle ed., 1995); Roger E. Meiners & Bruce Yandle, *Clean Water Legislation: Reauthorize or Repeal?*, in TAKING THE ENVIRONMENT SERIOUSLY 88-93 (Bruce Yandle & Roger E. Meiners eds., 1993).

³⁷¹ It is also worth noting that while concerns about spillovers are generally accepted as an explanation for the nationalization, many national statutes are more focused on *intrastate* pollution than *interstate* pollution, and that even where federal rules address potential spillover effects, federal enforcement has been less strict in the *interstate* context. *See* Schoenbrod, *supra* note 49, at 260-61. "Thus, the national takeover of environmental law must be defended, if it can be defended at all, on the basis that Washington should regulate *local* pollution." *Id.* at 261.

It should also be remembered that interstate pollution problems, particularly those that are national in scope, are still the exception, not the norm.³⁷² Most urban air pollution problems are local or regional, not interstate. Houston's failure to meet the National Ambient Air Quality Standard for ozone does not affect Baton Rouge, let alone Philadelphia.³⁷³ Drinking water systems serve the local communities in which they are based. Superfund sites are local sites that rarely, if ever, impact other states. Thus, even if one accepts the spillover argument for national environmental regulation, it cannot be used to justify regulation in each and every case.³⁷⁴

B. *Economies of Scale*

Many states were engaged in environmental protection prior to the 1970s.³⁷⁵ Nonetheless, there were several reasons why concerns about economies of scale encouraged the federal government to enter upon the environmental stage. Relatively little was known about environmental policy in the 1970s. Research and analysis were necessary to identify all but the most obvious problems and solutions, so it seemed logical that centralizing expertise would allow for a sound setting of priorities. Today, however, the states spend more money on environmental matters and employ more environmental bureaucrats than does the federal government. Research on environmental issues has proliferated and is easily available through research libraries and the Internet. Centralized expertise is no longer

³⁷² This argument ignores "psychic" or aesthetic spillovers, such as when one jurisdiction allows for economic development that offends the environmental values of those in another jurisdiction, as would occur if one state allows the cutting of trees on land deemed a pristine wilderness by outsiders. It is questionable whether the federal government should regulate based upon such concerns and, if it does, how the proper measure of such regulation is determined. For instance, the use of "contingent valuation" or other means of indirectly measuring the psychic, aesthetic, or even religious value placed upon such environmental amenities is fraught with difficulty. See, e.g., Robert H. Nelson, *Does "Existence Value" Exist?—Environmental Economics Encroaches on Religion*, INDEP. REV., Spring 1997, at 499.

³⁷³ Of course, in some parts of the country, particularly the Northeast, air pollution is a regional interstate problem. Air pollution in Philadelphia, for example, significantly impacts air quality across the river in Camden, New Jersey. However, such *regional* problems do not make the case for *national* intervention.

³⁷⁴ Esty makes the argument that U.S. environmental policy should be informed by the idea of subsidiarity. That is to say that each environmental problem should be dealt with by the level of government—local, state, national, international—best positioned to address that particular concern: "the challenge is to find the best fit possible between environmental problems and regulatory responses—not to pick a single level of government for all problems." Esty, *supra* note 366, at 574 (citation omitted).

³⁷⁵ See, e.g., Karol Ceplo & Bruce Yandle, *Western States and Environmental Federalism: An Examination of Institutional Viability*, in ENVIRONMENTAL FEDERALISM 225-57 (Terry Anderson & Peter J. Hill eds., 1997).

necessary; it can actually be counterproductive. As noted below, the record shows that some states may even have a thing or two to teach the federal government.³⁷⁶

In addition, the local and regional nature of many environmental problems means that local knowledge and expertise is necessary to develop proper solutions.³⁷⁷ Such localized knowledge is inevitably beyond the reach of even the most intrepid federal regulators.³⁷⁸ The most effective and equitable strategy for controlling ozone ("smog") precursors will vary from city to city based upon the local mix of stationary and mobile sources, the relative age of the automobile fleet, and dominant weather conditions, for example. One-size-fits-all can very easily become one-size-fits-nobody. Moreover, when policies are nationalized, it can become difficult for those communities which suffer disproportionately from policy errors or omissions to get their concerns addressed.³⁷⁹ Indeed, it is possible to conclude, like Butler and Macey, that "whatever the economies of scale associated with the centralization of environmental policy, they are surely overwhelmed by the diseconomies of scale in centralized administration."³⁸⁰

While states are typically characterized as having done too little to address environmental concerns, some have suggested that at least a few states may have done too much. It is certainly arguable that national corporate interests may have preferred uniform national standards to the patchwork of state standards which was emerging at the time the federal environmental regime was erected.³⁸¹ Given the extent of special-interest

³⁷⁶ See *infra* Part IV.C.

³⁷⁷ "The environmental harm caused by the emission of the same amount of pollution can vary widely, depending on local environmental conditions." HENRY N. BUTLER & JONATHAN R. MACEY, *USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY* 27 (1996).

³⁷⁸ Ecological central planning, while perhaps more well-intentioned, is no more conceivable to implement than economic central planning, not least because of what Nobel laureate F.A. Hayek termed the "knowledge problem." See Hayek, *supra* note 44, at 519-30. This point is also made by Butler and Macey: "Federal regulators never have been and never will be able to acquire and assimilate the enormous amount of information necessary to make optimal regulatory judgments that reflect the technical requirements of particular locations and pollution sources." BUTLER & MACEY, *supra* note 377, at 27.

³⁷⁹ This concern for political accountability was an issue for the court in *Printz*. See *supra* Part II.C.

³⁸⁰ BUTLER & MACEY, *supra* note 377, at 27.

³⁸¹ See, e.g., E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326-29 (1985). In the early 1960s, Lloyd Cutler reportedly recommended that national auto manufacturers support granting the federal government authority to set national vehicle emission standards to preempt state standards. "He reasoned that the companies would be able to keep the secretary [of Health Education and Welfare] from imposing expensive pollution reduction measures . . ." Schoenbrod, *supra* note 49, at 261. Congress authorized federal standards in 1965, and preempted state standards in 1967. See *id.*

For modern examples of this phenomenon in the air pollution policy context, see Jonathan Adler, *Watching Paint Dry*, REG., 1995 No. 4, at 23 (national paint manufacturers seek national evaporative emission standards that will hurt regional, specialty paint manufacturers), and Jones & Adler, *supra*

manipulation of environmental policy,³⁸² this argument cannot be rejected out of hand.

C. *The "Race-to-the-Bottom"*

The "race-to-the-bottom" argument is rather straightforward: Faced with the prospect of competition from other states, states will lower their environmental standards to attract and retain corporate investment. As Stewart suggested, "[i]f each locality reasons the same way, all will adopt lower standards of environmental quality than they would prefer if there were some binding mechanism that enabled them simultaneously to enact higher standards, thus eliminating the threatened loss of industry or development."³⁸³ This argument is also flawed.³⁸⁴

There is a fundamental conceptual problem with the "race-to-the-bottom" argument, for it assumes that any change to existing environmental standards or regulations which makes them less onerous and burdensome must necessarily come at the expense of environmental protection and overall social welfare. This presumption is unfounded. Given the strong public support for environmental protection, it is just as likely that states will compete on *both* economic *and* environmental grounds. Under this model, state legislators and executive officials will seek out innovative ways of making environmental programs more flexible, predictable and efficient, without compromising environmental quality.³⁸⁵

Empirical evidence suggests this is actually the case in this country. First, it is not uncommon for states to exceed federal regulatory requirements when there is a particularly acute environmental concern.³⁸⁶ Accord-

note 304, at 23-25 (national auto manufacturers seek imposition of low-emission vehicle standard in all states except California as alternative to a regional standard imposed in the northeastern United States).

³⁸² See, e.g., Adler, *Rent-Seeking*, *supra* note 205, at 26; see generally ENVIRONMENTAL POLITICS, *supra* note 205.

³⁸³ Stewart, *supra* note 41, at 1212. It is interesting to note that the "race-to-the-bottom" argument is fundamentally at odds with the contention advanced by some that environmental regulations do not entail significant environmental cost. If environmental regulations are so costly that no state will implement them alone because the regulatory cost will drive away economic development, then surely environmental controls are a significant cost of doing business. Conversely, if the cost of environmental regulations is substantially overblown, as some environmentalists contend, then there is no fear of a "race-to-the-bottom" absent the creation of a federal floor.

³⁸⁴ See generally Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

³⁸⁵ Revesz points out that it is wrong to assume that competition between states necessarily produces less stringent pollution controls and that reducing such controls is always socially undesirable. See Revesz, *supra* note 384, at 1219. One could only make these assumptions if one were to equate environmental protection with the promulgation of regulations rather than with direct measures of environmental quality.

³⁸⁶ See, e.g., Dana C. Joel, *Rhetoric vs. Reality: New Jersey Regulatory Reform*, REG., 1996 No. 2, at 53. "A state where regulations frequently exceed federal requirements, New Jersey contains some

ing to Robbie Roberts of the Environmental Council of the States, “[a]lmost every State has some area where it has either adopted a standard higher than the federal standard or adopted a standard in an area where there was no federal standard.”³⁸⁷ Second, despite the dominant federal role in most pollution-control matters, many states are seeking to create business-friendly environments through administrative reforms that will not compromise environmental protection.

Despite extensive federal involvement in environmental policy, many states have become green “laboratories of democracy,”³⁸⁸ experimenting with new ways of advancing environmental protection.³⁸⁹ For instance, forty states have their own hazardous waste site cleanup programs. The performance of these programs compares favorably with the federal program; states are cleaning up hazardous waste sites faster and less expensively than the federal government.³⁹⁰ Side-by-side comparisons of state and federal forests are even more striking. National forests lose money on timber sales and have a poor record of environmental protection; state forests, such as those in Montana, turn a profit *and* have superior environmental performance.³⁹¹ While the environmental policy debate centers on Washington, states are developing the next generation of environmental policies from air quality to park management.³⁹² A judicial reinvigoration of federalism can only serve to further invigorate the experimentation and innovation that is going on at the state level.

If it were demonstrably true that most states would lower their environmental standards in order to attract industry, then there would be a potential case for federal standards. But this downward pressure cannot justify extensive federal mandates directing states to administer particular programs in a particular fashion. Yet that is the dominant model of “cooperative federalism” in use today. This is further evidence that the *Printz* decision and the revival of state autonomy do not threaten environmental protection so much as they may threaten the existing federal approach to environmental policy.

of the most costly regulations in the nation.” *Id.* at 55.

³⁸⁷ Roberts, *supra* note 363, at 14.

³⁸⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³⁸⁹ See, e.g., David L. Markell, *States as Innovators: It's Time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347 (1994).

³⁹⁰ See J. Winston Porter, *Cleaning Up Superfund: The Case for State Environmental Leadership*, REASON FOUND. POL'Y STUDY 195 (1995).

³⁹¹ See Donald Leal, *Turning a Profit on Public Forests*, PERC POLICY SERIES PS-4 (1995).

³⁹² A catalog of state-level innovations in environmental policy can be found on the Environmental Council of the States' web site, *Innovative Ideas* (visited Feb. 12, 1998) <<http://www.sso.org/ecos/innovate.htm>>. This list would be significantly more extensive were it not for the obstructions posed by federal mandates. “State-by-state experiment . . . disappears with federal mandates. Yet experiment is what we need.” Schoenbrod, *supra* note 49, at 264.

D. *What Do People Want?*

These are not the only arguments suggesting that a devolution of authority over environmental policy making can and should occur in the wake of *Printz*. There is no doubt that most Americans consider themselves to be environmentalists, but there is no longer uniform agreement as to what "environmentalism" means (if there ever was).³⁹³ There are conservationists and preservationists, those who recognize nature's instrumental value and those who appreciate its intrinsic worth. Some want to actively restore ecosystems and landscapes, other would like as much of the world as possible left alone. With all these differences, there is certainly an argument to be made for allowing environmental pluralism. Indeed, many of the grass-roots criticisms of environmental policy, from both the left and the right, tacitly call for a return of power closer to home.³⁹⁴

The public's broad support for environmental protection is often confused with public support of existing policies, in particular, and an extensive federal role in environmental policy more generally. Joshua Sarnoff, for instance, writes that "the data strongly and consistently indicate that a 'supermajority' of the national voting public continues to support preserving and even expanding the traditional federal role in protecting the environment."³⁹⁵ This is only the case if one conflates support for current or increased levels of environmental protection with federal action. When voters are given the choice as to which level of government they would prefer to direct environmental policy, they almost invariably choose state and local governments over the federal government. For instance, in a 1996 national survey of registered voters, sixty-five percent of those surveyed felt that state or local government was better at environmental protection, and large majorities agreed that state or local government should have the "primary responsibility" for protecting water quality and should determine which air pollution control measures are enacted.³⁹⁶ Rightly or wrongly, a substantial number of Americans believe there is nothing incompatible with the devolution of power and environmental protection.

³⁹³ Some of the various approaches are discussed in ADLER, ENVIRONMENTALISM *supra* note 12, ch. 6. See also MARK DOWIE, LOSING GROUND (1995); WALLACE KAUFMAN, NO TURNING BACK: DISMANTLING THE FANTASIES OF ENVIRONMENTAL THINKING (1994); MARTIN LEWIS, GREEN DELUSIONS: AN ENVIRONMENTALIST CRITIQUE OF RADICAL ENVIRONMENTALISM (1992).

³⁹⁴ This is particularly evident with the environmental justice movement and the property rights and "wise-use" movements. See ADLER, ENVIRONMENTALISM, *supra* note 12, ch. 6.

³⁹⁵ Sarnoff, *supra* note 302, at 319 n.31.

³⁹⁶ THE POLLING CO., *supra* note 66, at 8, 10.

CONCLUSION

If the Court adheres to the principles it enunciated in *Printz*, the federalist revival will spread. With renewed judicial vigilance against overreaching congressional enactments will come increased accountability within the political process. As the Court noted, whether state and local governments are forced to pay the costs of implementing federal programs or not, they often take the blame for the burdensomeness of programs designed in Washington, D.C.³⁹⁷ For this reason, the federal government's ability to direct state and local governments must be proscribed. This concern for accountability in the federal system is as acute in the environmental arena as any, if not more so. The proliferation of codes, standards, and agencies at all levels of government has short-circuited accountability in environmental policy.³⁹⁸

Federalism's return to the Supreme Court's focus should be welcomed, even in the realm of environmental policy. Adhered to by federal courts, the federalist revival will accelerate the reformulation of environmental policy for the next century. They offer the opportunity to reawaken state experimentation and revisit the nationalist assumptions underlying contemporary environmental policy.

Opponents of federal gun control may have cheered the loudest when the Brady Act was declared unconstitutional, but the green aspects of *Printz* may yet prove to be the sweetest.³⁹⁹

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³⁹⁷ See *Printz v. United States*, 117 S. Ct. 2365, 2382 (1997).

³⁹⁸ See Schoenbrod, *supra* note 49, at 264.

³⁹⁹ With further apologies to the Bard, *see supra* note 1.

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