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The Spending Clause as a Positive Source of Environmental Protection: A Primer

Denis Binder*

INTRODUCTION

The last third of the Twentieth Century witnessed a veritable explosion of environmental legislation. While some environmental statutes harken back a century,¹ indeed long before the word “environmental”² was conceived, most environmental legislation started emerging in the late 1960’s, highlighted by the enactment of the National Environmental Policy Act of 1970 (NEPA).³

The statutes may be widely known and of broad applicability, such as the Clean Air Act,⁴ Clean Water Act,⁵ Resource Conservation and Recovery Act (RCRA),⁶ Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁷ NEPA, and the Endangered Species Act,⁸ or of specific application, such as the Surface Mining Control and Reclamation Act (SMCRA),⁹ or of little public familiarity, such as the Ports and Waterways Safety Act of 1970.¹⁰

As the number of statutes approach the century mark, little thought has been given by Congress to the constitutional basis of the legislation. The underlying assumption is that the Commerce

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¹ The Rivers and Harbors Act of 1899, 33 U.S.C. § 401 (1986), was enacted to maintain the navigability of bodies of water. It became a major source of environmental protection through much of the Twentieth Century. Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (1986), which required a permit for obstructions to navigation, was the predecessor to the permit provisions of section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1986). Section 13, 33 U.S.C. § 407 (1986), was commonly referred to as the “Refuse Act.”

² Professor Rodgers, in a recent article, traces the phrase “environmental law” back to the 1960’s. William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: “The Whats,”* 2000 U. ILL. L. REV. 1, 14 (2000).

³ 42 U.S.C. §§ 4321-4370d (1994).

⁴ 42 U.S.C. §§ 7401-7671q (1995).

⁵ 33 U.S.C. §§ 1251-1376 (1986).

⁶ 42 U.S.C. §§ 6901-6992k (1995).

⁷ 42 U.S.C. §§ 9601-9675 (1995).

⁸ 16 U.S.C. §§ 1531-1544 (1986).

⁹ 30 U.S.C. §§ 1201-1328 (2000).

¹⁰ 33 U.S.C. §§ 1221-1236 (1986).

Clause¹¹ grants virtually carte blanche authority to Congress to legislate for environmental protection.

Indeed, because environmental problems often transcend artificial political boundaries, such as state borders,¹² only Congress can comprehensively address major environmental problems. Yet, the environmental statutes have been stretched further and further until they have been applied to isolated wetlands¹³ and isolated endangered species.¹⁴ Even Congress has pushed the jurisdictional envelope to the extremes. For example, the Clean Water Act dispenses with the traditional tests of commerce, such as “navigability,” and instead uses as its definition “waters of the United States.”¹⁵

Often overlooked since the broad expansion of federal powers during wartime, the New Deal, and the Great Society,¹⁶ is that pursuant to the United States Constitution, the federal government is a government based on *enumerated* powers, rather than a government of omnipotent power. The requisite granting powers may be derived from several provisions of the Constitution, such as the Commerce Clause, the Property Clause,¹⁷ the Taxation

11 The Commerce Clause allows Congress “to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” U.S. CONST. art. I, § 8, cl. 3.

12 See, e.g., *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

13 See, e.g., *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 121 S. Ct. 675 (Jan. 9, 2001).

14 See, e.g., *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000).

15 33 U.S.C. § 1362(7) (1986).

16 With the understandable exception of vast wartime increases in federal power, President Roosevelt’s New Deal ushered in modern government with broad regulatory powers and ever-expansive budgets. The “Great Society” was President Johnson’s anti-poverty program, consisting of new and vastly expanded program.

17 The Property Clause provides “the Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States” U.S. CONST. art. IV, § 3, cl. 2. The federal government owns approximately one-third of the nation’s land. See Public Land Law Review Commission, *One Third of the Nation’s Land: A Report to the President and to the Congress* (1970). For example, the federal government controls roughly 44.3% of California’s total acreage of 100,206,720 acres. *Id.* at 377. The corresponding figure for Nevada is 86.4%. *Id.* The Supreme Court in *Kleppe v. New Mexico*, 429 U.S. 529, 540 (1976), clearly articulated that the United States acts both as a proprietor and in a legislative capacity over its lands. The United States is free to develop, not develop, control, and regulate development on its lands as it wishes, subject to the limiting provisions of the Constitution, *id.* It may, therefore, ban or limit the use of motorized boats, snowmobiles, all-terrain vehicles, or off-road vehicles on its lands, *id.* It may allow or restrict the harvesting of federal timber resources, or the development or mining of other resources, such as oil and gas, *id.* It may regulate recreational activities in the nation’s forests, parks, and deserts, *id.* Unless the federal government clearly, unequivocally waives sovereign immunity, it is not bound by state law. See, e.g., *United States Dep’t of Energy v. Ohio*, 503 U.S. 607 (1992); *Dalehite v. United States*, 346 U.S. 15 (1953).

Clause,¹⁸ and the Spending Clause.¹⁹

The Commerce Clause was viewed not so long ago as a grant of plenary authority. However, the seemingly inexorable rise of federal hegemony and the corresponding eclipse of state sovereignty has been called into question by a series of 5-4 Supreme Court decisions granting the states' rights with a concomitant diminution of federal power.²⁰ Of particular note are the cases of *United States v. Lopez*,²¹ dealing with the Gun Free School Zone Act of 1990, and *United States v. Morrison*,²² addressing the Violence Against Women Act. Both cases involved the Supreme Court, again by narrow 5-4 decisions, striking down federal statutes on the ground that an insufficient nexus existed between the proscribed acts and interstate commerce. The current Supreme Court is unwilling to interpret the Commerce Clause and congressional creativity to transform incidental effects on interstate commerce into a carte blanche grant of regulatory power to Congress.

However, Congress may be able to accomplish many of the same legislative goals by expressly basing jurisdiction on the Spending Clause. This provision grants Congress broad powers to

¹⁸ "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States . . ." U.S. CONST. art. I, § 8, cl. 1. With the major exception of "Superfund," 42 U.S.C. § 9611 (1995), the Taxation Clause has not been widely utilized to further environmental objectives. Under Superfund, the government when necessary may effectuate a cleanup of hazardous substances through a fund created pursuant to CERCLA. Superfund is funded through a tax on the petrochemical industry, utilities, and crude oil importers, and through reimbursement from responsible parties. See generally 26 U.S.C. §§ 9611-12, 9631-33, 9661-62, 9671-72 (1995).

On the other hand, a sulfur emissions tax on power plant emissions, The Pure Air Tax Act, was proposed in 1972 by President Nixon, but shortly disappeared from the political radar screen. Adam Chase, *The Efficiency Benefits of "Green Taxes" A Tribute to Senator John Heinz*, 11 UCLA J. ENVTL. L. & POL'Y 1, 36 (1992). President Clinton's proposed BTU tax on energy consumption was defeated in 1993, although other tax increases were approved.

¹⁹ U.S. CONST. art. I, § 8, cl. 1. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981).

²⁰ See especially the Tenth Amendment case, *New York v. United States*, 505 U.S. 144 (1992), and the Eleventh Amendment cases, *Alden v. Main*, 527 U.S. 706 (1999), *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)). The Eleventh Amendment creates a form of state sovereign immunity by precluding lawsuits against states in federal court. The Supreme Court in *Seminole Tribe* held the Commerce Clause did not grant Congress the power to abrogate a state's sovereign immunity. For general discussions of the Eleventh Amendment, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983), and John Randolph Prince, *Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Infidelity*, 104 DICK. L. REV. 1 (1999).

²¹ 514 U.S. 549 (1995). The Gun Free School Zone Act of 1990, 18 U.S.C. § 921(a)(25)(B) (2000), created a federal offense for knowingly possessing a firearm within 1,000 feet of a school.

²² 529 U.S. 598 (2000).

achieve its goals.²³ Indeed, conditions on grants can be traced back to the Hatch Act of 1877.²⁴

PARAMETERS OF THE SPENDING CLAUSE

The Supreme Court decided in *South Dakota v. Dole*²⁵ that Congress could condition the receipt of federal highway funds upon states raising the minimum drinking age to twenty-one. South Dakota argued the condition violated both the Spending Clause and the Twenty-First Amendment.²⁶

The Court's interpretation of the Spending Clause was based on an earlier case, *United States v. Butler*.²⁷ The *Butler* Court held Congress was not limited by the direct grants of legislative power found in the Constitution in authorizing funds.²⁸ Congress's powers under the Spending Clause were not thereby limited to the other enumerated powers. Congress is free, therefore, to condition the receipt of federal funds upon compliance with federal statutes and administrative directives.²⁹

The expansive interpretation of the Spending Clause has not been universally acclaimed. For example, Professor Baker argues the Spending Clause should be construed in congruence with the Commerce Clause and should not be stretched broader than the other enumerated Article I powers.³⁰ She asserts the *Dole* test should be replaced by a rule that would invalidate any attempt by Congress to regulate states in a manner that Congress could not directly mandate.

The spending power is not unlimited. Several limitations exist. First, spending must be in pursuit of "the general welfare."³¹ Courts should generally defer substantially to Congress's judg-

²³ See, e.g., Ann Althouse, *Enforcing Federalism after United States v. Lopez*, 38 ARIZ. L. REV. 793 (1996).

²⁴ See 7 U.S.C. §§ 361-390(d) (1999); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 871 n.144 (1979). This statute required annual financial reports from agriculture experimentation stations. *Id.* Truly, big trees can grow out of small acorns.

²⁵ 483 U.S. 203 (1987).

²⁶ *Id.* at 205.

²⁷ 297 U.S. 1 (1936).

²⁸ *Id.* at 66.

²⁹ See *Dole*, 483 U.S. at 207.

³⁰ See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1916, 1962-63 (1995). See also Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115, 122 (1998); Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1434 (1994).

³¹ See, e.g., *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127 (1947); *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (explaining courts should substantially defer to Congress's judgment in determining if an expenditure is in pursuit of the general welfare).

ment in determining whether the expenditure is intended to serve general public purposes.³²

Second, Congress's intent to condition funds in a particular action must be articulated and unambiguous "enabl[ing] the States to exercise their choice knowingly, cognizant of the consequence of their participation."³³ Legislation pursuant to the Spending Clause can be analogized to a contract. The states agree to federally imposed conditions in exchange for the receipt of federal funds. Therefore, the disclosure of conditions must be unambiguous.³⁴ Precision is especially critical because the fundamental constitutional sovereignty of the federal and state governments is at issue. In this respect, Professor Engdahl posits that "sufficient clarity is required not only as to the fact that an obligation is being assumed, but also as to the scope or scale of that obligation."³⁵

Third, the conditions on federal funds must be reasonably related to the articulated grant;³⁶ a valid exercise of the Spending Clause occurs when Congress conditions the receipt of federal funds in a way reasonably calculated to address the "particular impediment to a purpose for which the funds are expended."³⁷

Finally, other Constitutional provisions may bar the conditional grant of federal funds.³⁸ *Dole* construed this limitation to mean Congress cannot use the Spending Clause to induce states to engage in conduct that would otherwise be unconstitutional.³⁹

The *Dole* majority acknowledged that in some undefined circumstances, the financial inducements might be so coercive as to pass the point at which "pressure turns into compulsion."⁴⁰ The federal government may not condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with the federal standards.

The links in *Dole* between raising the drinking age to twenty-one, Congress's purpose of safe interstate travel and the expenditures of federal highway funds seemed clear. However, Justice O'Connor's dissent viewed the statute as an attempt to regulate the sale of liquor, which laid outside Congress's legislative powers

³² See *Dole*, 483 U.S. at 207.

³³ *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

³⁴ *Pennhurst*, 451 U.S. at 17. The Supreme Court, though, does not require exact specificity. In *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 665, 665-66 (1985), the Court held Congress simply has to put the party accepting federal funds on notice of its prescribed or proscribed conduct.

³⁵ David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 78 (1994).

³⁶ See *Dole*, 483 U.S. at 207; *Massachusetts v. United States*, 435 U.S. 444, 461 (1978).

³⁷ *Dole*, 483 U.S. at 209.

³⁸ See *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269-70 (1985).

³⁹ See *Dole*, 483 U.S. at 210.

⁴⁰ *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). For a detailed analysis of the coercion issue, see Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163, 172 (2001).

because of the Twenty-First Amendment.⁴¹ Justice O'Connor also felt the drinking age conditions were "far too over and under inclusive."⁴²

The coercion theory was tested by the Ninth Circuit in *Nevada v. Skinner*,⁴³ which involved a challenge to the federally mandated speed limit of fifty-five miles per hour.⁴⁴ Nevada claimed the potential loss of ninety-five percent of its highway funds deprived it of any choice, forcing it to adhere to the national speed limit.

The *Skinner* court felt the difficulty of assessing a state's financial capabilities "renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments."⁴⁵ This approach has been followed by other courts.⁴⁶ As a practical matter, federal courts have been reluctant to invalidate funding conditions.⁴⁷

However, the court did not base its opinion on the coercion theory. Instead, it held the Congressional statute could be independently supported by another enumerated power, the Commerce Clause.⁴⁸ Congress clearly has the power to enact a uniform speed limit pursuant to the Commerce Clause. The threatened withholding of substantial highway funds is in fact a lesser form of coercion than the direct, federal enactment of a flat mandate.⁴⁹

The *Skinner* court, in a significant footnote, saw no need to "min[e] history" for evidence of legislative intent.⁵⁰ Indeed, the court held Congress was not required to identify the precise source of its authority in enacting legislation. Rather, the court's task is to determine if Congress acted within its authority. The court emphasized Congress can use its spending power to encourage states to participate in voluntary and cooperative ventures within the parameters of the Commerce Clause.⁵¹

41 The Twenty-First Amendment, which repealed prohibition, gave great powers to the states to regulate the sale of alcoholic beverages. See U.S. CONST. amend. XXI, § 2.

42 *Dole*, 483 U.S. at 214-15.

43 884 F.2d 445, 447-48 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

44 The 55 mph speed limit was enacted in 1973 as part of the Emergency Highway Conservation Act. States were required to impose the 55 mph speed limit or risk losing 95% of federal highway funds on all highways. *Id.*

45 *Skinner*, 884 F.2d at 448.

46 See, e.g., *Kansas v. United States*, 214 F.3d 1196, 1201-02 (10th Cir. 2000); *California v. United States*, 104 F.3d 1086, 1093 (9th Cir. 1997) (complaining about federal mandates for illegal aliens); *Virginia v. Browner*, 80 F.3d 869, 881 (4th Cir. 1996); *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981); *Missouri v. United States*, 918 F. Supp. 1320, 1330 (E.D. Mo. 1996).

47 See, e.g., *Kansas v. United States*, 214 F. 3d 1196, 1201 (10th Cir 2000).

48 The court deferred to the congressional findings of fact. *Skinner*, 884 F.2d at 451.

49 *Id.* at 449.

50 *Id.* at 448 n.8.

51 *Id.* at 448.

Dole did not specify the degree of relationship necessary to pass muster under the Spending Clause. The Supreme Court subsequently reaffirmed in *New York v. United States*⁵² that the conditions on receipt of federal funds must bear “some relationship”⁵³ to the purpose of the funding.

The Court upheld the use of Congress’s spending powers in an effort to solve the nation’s nuclear waste disposal problems, but struck down a “Take Title” provision pursuant to which states would have to take title to the commercial nuclear wastes in their states unless a solution was reached.

A critical Tenth Amendment holding by the Court found Congress lacks the power to direct state legislatures to implement programs under the Commerce Clause. Congress cannot directly compel states to implement state action plans or submit to administering federal regulatory programs, regardless of the paramount national interest.

New York v. United States illustrates Congress may choose from a wide range of options in preserving the public safety and environmental protection. It could, for example, condition the receipt of federal funds upon a state’s voluntary submission to a condition. It might also directly regulate activities within the confines of the Commerce Clause.

What Congress cannot do, however, is mandate states exercise their police power or enact legislation. It can encourage, but not compel, the states to exercise their police power.

Congress also may not mandate state and local officials to carry out federal enforcement activities. For example, in *Printz v. United States*,⁵⁴ the Supreme Court struck down a provision in the Brady Bill,⁵⁵ which required state and local law enforcement officers to conduct background checks on proposed handgun transfers. The statute placed local law enforcement officers in charge of the mandated background checks.⁵⁶

Therefore, while Congress can provide grants to states with rationally related conditions attached, it cannot directly mandate states exercise, in any way, their police powers.

The expansive interpretation of the Spending Clause allows Congress to accomplish many goals it might otherwise be precluded from achieving. First, it can extend federal environmental jurisdiction past the limits of the Commerce Clause if states cooperate. For example, even if Congress cannot regulate isolated wetlands, states might be induced to act. Congress may condition the

⁵² 505 U.S. 144 (1992).

⁵³ *Id.* at 167.

⁵⁴ 521 U.S. 898 (1997).

⁵⁵ 18 U.S.C. § 922 (1994)

⁵⁶ *Id.* at § 922(s)(2).

grants on the state's exercise of police power in areas the federal government cannot directly reach. Second, a state may waive its sovereign immunity. Congress can condition the receipt of federal funds upon a state's waiver of immunity,⁵⁷ exposing the state to citizen suit provisions common in federal environmental statutes.⁵⁸ Congress can thereby require, for example, adequate provisions for judicial review. The mere acceptance, though, of federal funding does not result in the waiver of a state's Eleventh Amendment immunity.⁵⁹

REMEDIES FOR VIOLATIONS

The typical remedy for enforcement of spending conditions is for the federal government to terminate funds to the violator,⁶⁰ and to recover amounts spent contrary to the terms of the grant.⁶¹ Similarly, a private party may have to return the funds and can be denied participation in the program.⁶² Violators may also be barred from receiving additional federal funds or participating in other programs.⁶³

RESCISSION OF CONSENT

One issue that arises is whether a state may withdraw its consent. Presumably, a state cannot rescind its consent for funds it is currently receiving from the federal government. However, a state might try to prospectively rescind its consent or attempt to return the funds previously received. No direct authority exists, but analogous situations shed light on the issue.

⁵⁷ See, e.g., *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Tennessee Dep't of Human Servs. v. U.S. Dep't of Educ.*, 979 F.2d 1162 (6th Cir. 1992); *In re O.P.M. Leasing Servs., Inc.*, 21 B.R. 993 (Bankr. S.D.N.Y. 1982).

⁵⁸ Congress included "citizen suit" provisions in many of the major environmental statutes beginning with the Clean Air Act in 1970. Under these statutes, "any person" may sue "any person" alleged to be in violation of the statute. These suits may be brought against state officials alleged to be violating the statutes. See, e.g., *Natural Resources Defense Council, Inc. v. California Dep't of Transp.*, 96 F.3d 420 (9th Cir. 1996) (holding that although a suit cannot be directly brought against a state pursuant to the Eleventh Amendment, under the doctrine established in *Ex Parte Young*, 209 U.S. 123 (1908), suit can be brought against individually named state officials). For a general discussion of citizen suits, see Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185 (2000), and Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1 (1995).

⁵⁹ See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

⁶⁰ See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981).

⁶¹ See, e.g., *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 663 (1985).

⁶² See, e.g., *United States v. Dierckman*, 201 F.3d 915. (7th Cir. 2000).

⁶³ For example, under the "Swampbuster" provisions of the Food Security Act of 1985, 16 U.S.C. § 3821 (2000), farm subsidies are barred for farmers who grow crops on converted wetlands. See *Dierckman*, 201 F.3d 915.

In *North Dakota v. United States*,⁶⁴ the state attempted to withdraw its approval for easement acquisitions by the United States. The Migratory Bird Hunting Stamp Act⁶⁵ authorized the Secretary of the Interior to acquire easements over wetlands suitable for waterfowl breeding and nesting grounds.⁶⁶ However, the statute precluded federal acquisitions without the approval of the Governor or an appropriate agency of the state where the land is located.⁶⁷ Roughly 1.5 million acres were acquired in North Dakota between 1961 and 1977 with the approval of successive governors.⁶⁸

In the 1970's, the spirit of cooperation between North Dakota and the federal government broke down when North Dakota sought the equivalent of a divorce by withdrawing its approval. North Dakota argued the Governor's consent was revocable at will. The federal government countered that once a state gave permission, "the role assigned to the state by Congress has been exhausted."⁶⁹

The Supreme Court agreed with the government. Legislative history did not indicate Congress intended a state's consent was revocable. In addition, the acquisition program could only take place over several years. Consent, once given by the state, cannot be revoked because the statute does not provide for revocation. The Supreme Court was concerned that a "detailed federal program involving the estimate of needs, setting of priorities, allocation of funds, and negotiations with landowners" could be nullified in an instant by a state's governor.⁷⁰

A highway dispute from thirty years ago also sheds light on the issue. The state of Texas wanted to extend a highway from the San Antonio Airport into downtown San Antonio. The route would go through Brackenridge-Olmos Basin Parklands. The road was planned before enactment of § 4(f) of the Federal Aid to Highways Act⁷¹ and the National Environmental Policy Act of 1970.⁷² Amendments to the Highways Act preclude construction of federally funded highways through parklands unless there are no feasible and prudent alternatives, and the proposed program includes all possible planning to minimize harm to the park.

⁶⁴ 460 U.S. 300 (1983).

⁶⁵ 16 U.S.C. § 718(d) (2000).

⁶⁶ See *North Dakota*, 460 U.S. at 304 (explaining the Prairie Pothole regions of the Dakotas, Minnesota, and Montana are critical breeding grounds of North American waterfowl). See also Denis Binder, *Taking v. Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLORIDA L. REV. 1, 22 (1972).

⁶⁷ 16 U.S.C. § 715(f) (2000).

⁶⁸ See *North Dakota*, 460 U.S. at 305.

⁶⁹ *Id.* at 312.

⁷⁰ *Id.* at 314.

⁷¹ 49 U.S.C. § 303(c) (2000).

⁷² 42 U.S.C. §§ 4321-4370(d) (1994).

NEPA, of course, requires the preparation of an environmental impact statement on any major federal action significantly affecting the quality of the human environment.⁷³ Section 4(f) was enacted in 1964⁷⁴ and NEPA became effective on January 1, 1970.

The state attempted to avoid § 4(f) by splitting the highway into three sections with only the middle section going through parkland. Texas did not wish to prepare an environmental impact statement or comply with the conditions of § 4(f).

The state tried to avoid the conflict by offering to fully fund the highway itself. The Court of Appeals rejected the state's approach, holding the road became a federal project once the Secretary of Transportation authorized federal participation in the project on August 30, 1970.⁷⁵ The court held the state could not subvert the Supremacy Clause "by a mere change in bookkeeping or by shifting funds from one project to another"⁷⁶ even though no federal funds had yet exchanged hands. As a result, the state voluntarily submitted itself to federal law:

It entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable law. And while this marriage between the federal and state defendants seems to have been an unhappy one, it has produced an already huge concrete offspring whose existence it is impossible for us to ignore.⁷⁷

Congress ultimately resolved the siting dispute through enactment of legislation, which enabled the city and state to construct the highway segment without federal funds.⁷⁸

If we are to respect the core values of federalism, then states need the right to withdraw their consent. If a statutory scheme does not expressly provide for revocation, then courts should imply the right of rescission as a fundamental tenet of federalism.

COOPERATIVE FEDERALISM

Much of the prominent federal environmental regulatory regime is premised on the concept of "cooperative federal-

⁷³ See 49 U.S.C. § 303(c) (2000).

⁷⁴ The long-standing dispute over Brackenridge Park was the impetus for the enactment of § 4(f). See Stanley D. Olesh, *The Roads Through Our Ruins: Archaeology and Section 4(f) of the Department of Transportation Act*, 28 WM. & MARY L. REV. 155, 158-59 (1986).

⁷⁵ *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971).

⁷⁶ *Id.* at 1027.

⁷⁷ *Id.* at 1028. The courts were also unsympathetic to another attempt to "de-federalize" a highway project in an effort to circumvent NEPA. See *Scottsdale Mall v. Indiana*, 549 F.2d 484 (7th Cir. 1977).

⁷⁸ See LEWIS F. FISHER, *SAVING SAN ANTONIO* 331 (1996). Ironically, the freeway was named in 1981 as one of the three most attractive urban expressways in the nation. *Id.* at 333.

ism”⁷⁹ in which the federal and state governments share regulatory duties.⁸⁰ Congress enacts an environmental regulatory statute, such as the Clean Air Act or the Clean Water Act, pursuant to which Congress delegates enforcement to a federal agency, such as the Environmental Protection Agency. A state may then assume much of the primary regulatory and enforcement powers under the statute, including the day-to-day administration of the statute, if the state satisfies procedural and substantive standards set by Congress. Indeed, the state essentially manages its own pollution control regime and regulatory program.

The federal government retains concurrent and residual power as well as supervisory or oversight authority. This model reflects the national concern about controlling pollution and recognizes the historic police powers of the states to control pollution.

A state so empowered under cooperative federalism may enforce higher standards than the minimal standards mandated by Congress.⁸¹ However, many states responded to their delegated powers by enacting legislation precluding agencies from promulgating rules more stringent than the minimal federal requirements.⁸²

Cooperative federalism is accomplished by a “carrot-and-stick” approach. Benefits to the state include local control, awareness of local problems, and perhaps an infusion of cash. Several of these statutes condition the receipt of federal funds upon adoption of plans acceptable to the federal government. The stick consists of the federal government assuming all the regulatory and enforcement powers if the state demurs. The state would then have no discretion in how the program is to be implemented or administered. The federal statute and ensuing regulatory program would also preempt contrary state action pursuant to the Supremacy Clause.⁸³

Implicit in cooperative federalism is the freedom of a state to decide for itself if it wishes to participate in the regulatory pro-

⁷⁹ See generally Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205 (1997); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996).

⁸⁰ Statutes subject to cooperative federalism include the Clean Water Act, 33 U.S.C. § 1342(b) (1986), Occupational Safety and Health Act (OSHA), 29 U.S.C. § 667(b) (1999), Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6926(b) (1995), Safe Drinking Water Act, 42 U.S.C. § 300g-2 (1991), Surface Mining Control and Reclamation Act, 30 U.S.C. § 1253 (1986), and the Underground Storage Tank Program, 42 U.S.C. § 6991b(h)(7)(A) (1995).

⁸¹ See, e.g., Clean Air Act § 116, 42 U.S.C. § 7416 (1995); Clean Water Act § 510, 33 U.S.C. § 1370 (1986).

⁸² See James M. McElfish, Jr., *Minimal Stringency: Abdication of State Innovation*, 25 ENVTL. L. REP. (Envtl. L. Inst.) 10,003 (Jan. 1995).

⁸³ U.S. CONST. art. VI, cl. 2.

gram.⁸⁴ The Tenth Amendment⁸⁵ does not bar cooperative federalism because the federal government may often directly regulate the activity pursuant to the Commerce Clause. Congress may induce a state to cooperate by offering financial incentives and other favors and exacting financial penalties and other disincentives from recalcitrant states.⁸⁶

The freedom of states to decide if they will participate goes to the essence of federalism.⁸⁷ States have selectively exercised their discretion in different ways rather than be subject to a monolithic national government dictating uniformity. Thus, while states rushed to participate in the Clean Air and Clean Water Acts, many states have not similarly participated in OSHA.⁸⁸

The 1990 Amendments to the Clean Air Act illustrate the interaction of cooperative federalism, immunity and the Spending Clause. Virginia sought review of an EPA decision disapproving the state's proposed program for issuing air pollution permits.⁸⁹ The gist of the EPA's decision was that Virginia's proposal lacked adequate provisions for judicial review of Virginia's permit decisions. The sanctions imposed by the 1990 amendments include the loss of federal highway funds in non-attainment areas.⁹⁰ The court of appeals held Congress lacked the power to infringe upon the core of sovereignty retained by the states, including the administration of their judicial systems.⁹¹ However, the court also held that the Clean Air Act's judicial reviewability rules did not

⁸⁴ See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589 (1937).

⁸⁵ U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

⁸⁶ See, e.g., *Maryland v. EPA*, 530 F.2d 215, 226 (4th Cir. 1975), *vacated and remanded for consideration of mootness sub. nom.*, *EPA v. Brown*, 431 U.S. 99 (1977) (per curiam); *District of Columbia v. Train*, 521 F.2d 971, 984-85 (D.C. Cir. 1975).

⁸⁷ See *Steward Mach. Co.*, 301 U.S. at 589.

⁸⁸ See Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulations: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1268 (1995) (explaining that although 40 states operate delegated National Pollution Discharge Effluent Systems (NPDES) permit authority under the Clean Water Act, only two implement § 404 programs). Conversely, 22 states, Puerto Rico, and the Virgin Islands have OSHA-approved state programs, and an additional three, Connecticut, New Jersey, and New York have rules that cover only the public sector. The participating states include Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. *OSHA, State Occupational Safety and Health Plans* (visited Feb. 12, 2001) <<http://www.osha-slc.gov/fso/osp/>>.

⁸⁹ See *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996).

⁹⁰ 42 U.S.C. § 7509(b)(1) (2000). Non-attainment areas are those that have not achieved the National Ambient Air Quality Standards, which define the level of air quality necessary to protect the public health and welfare. These standards exist for a number of pollutants, such as ozone (smog), carbon monoxide, particulate matter, and nitrogen dioxide. See, e.g., 42 U.S.C. §§ 7511(a) (ozone), 7512 (carbon monoxide), 7513 (particulate matter), and 7514 (nitrogen dioxide).

⁹¹ See *Browner*, 80 F.3d at 879.

cross the forbidden constitutional line because they did not compel the states to change their rules, but only induced them to do so.⁹²

The court upheld the highway sanctions provision on two grounds: the Spending Clause and the Commerce Clause. The conditions were reasonably related to the goal of reducing air pollution and did not rise to the level of "outright coercion."⁹³ The state was free not to participate, leaving the full regulatory program to the federal government.⁹⁴ The Clean Air Amendments simply followed a well-established pattern of cooperative federalism.⁹⁵

USE OF THE SPENDING CLAUSE FOR ENVIRONMENTAL PROTECTION

If Congress can address environmental problems directly through the Commerce Clause, then its power through the Spending Clause is superfluous. The only role for the Spending Clause then is to serve as an added inducement to states to voluntarily assent to federal programs, including the critical enforcement powers, and provide an illusion of state concurrence. If, as *Lopez* and *Morrison* indicate, the Commerce Clause has reached its limits, then the Spending Clause becomes of critical importance.

If the Spending Clause continues to be construed to extend the reach of the federal government beyond the limits of the other enumerated powers in the Constitution, then Congress may continue to rely upon the spending power to achieve broad environmental goals, which might otherwise be constitutionally questionable. However, Congress has not, with the major exception of the Federal Aid to Highways Act, extensively relied upon the Spending Clause to achieve such goals.

Congress's powers under the Spending Clause to effectuate environmental goals can be illustrated by two wetlands cases. The Supreme Court held in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*⁹⁶ that the Corps lacked regulatory power over isolated wetlands because the exercise of such power was beyond the scope of the statute. The familiar 5-4 majority did not address the Commerce Clause issue, but resolved the case on the basis of statutory interpretation. The effect of *Solid Waste Agency* is to renew attention on the Spending Clause.

⁹² *Id.* at 880.

⁹³ *Id.* at 881 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

⁹⁴ *Id.* at 882.

⁹⁵ See generally Jeffrey Geiger, Note, *Canary in a Coal Mine? Federalism and the Failure of the Clean Air Act Amendments of 1990*, 20 WM. & MARY ENVTL. & POL'Y REV. 81 (1995); William J. Klein, Note, *Pressure or Compulsion? Federal Highway Fund Sanctions of the Clean Air Act of 1990*, 26 RUTGERS L.J. 885 (1995).

⁹⁶ 121 S. Ct. 675 (Jan. 9, 2001).

A court of appeals reached a contrary result in *United States v. Dierckman*,⁹⁷ which involved 15 acres of “converted” wetlands within the meaning of the “Swampbuster” provisions of the Food Security Act.⁹⁸ Farmers are ineligible for United States Department of Agriculture food subsidies if they “convert” a wetland by draining, dredging, filling, leveling or other means for the purpose of producing commodities.

The farmer argued the land involved did not affect interstate commerce. The court held the Food Security Act was enacted pursuant to the Spending Clause rather than the Commerce Clause. Therefore, the Swampbuster provision is not limited to activities affecting interstate commerce.⁹⁹

As a practical matter, states will not reject large sums of money offered by Congress unless the conditions are unduly repressive. Professor Epstein reasons because the states’ taxpayers are already paying into the federal treasury, the pressure to return some of these funds will be great, especially since the citizens of neighboring states would be receiving and benefiting from these funds.¹⁰⁰

Congress has realized that because federal funds account for ninety-five percent of a state’s transportation budget, highway funds provide the leverage for Congress to achieve its goals. For example, \$4,619,112,289 in highway funds was certified for the 2000 fiscal year, with the largest sum, \$437,310,349 going to California.¹⁰¹ These sums serve as an irresistible lure to the states, even with substantial conditions attached.

As we have seen, South Dakota,¹⁰² Nevada,¹⁰³ and Virginia¹⁰⁴ sued to invalidate conditions attached to the receipt of federal highway trust funds. However, upon losing their suits, the states promptly complied with the conditions. Federal funds trumped state principles.

Thus, Congress has used the funds as leverage to impose a national speed limit,¹⁰⁵ a minimum national drinking age of twenty-one,¹⁰⁶ and air pollution conditions, as seen by the EPA’s

⁹⁷ 201 F.3d 915 (7th Cir. 2000).

⁹⁸ 16 U.S.C. §§ 3801-34 (1994).

⁹⁹ See *Dierckman*, 201 F.3d at 922.

¹⁰⁰ See Richard A. Epstein, *Standing and Spending: The Role of Legal and Equitable Remedies*, 4 CHAP. L. REV. 1, 52 (2001).

¹⁰¹ See FEDERAL HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., *Revised Apportionment of Fiscal Year 2000 National Highway System Funds* (2000) (visited Feb. 5, 2000) <<http://www.fhwa.dot.gov/legisregs/directives/notices/n4510432.htm>>.

¹⁰² See *South Dakota v. Dole*, 483 U.S. 203 (1987).

¹⁰³ See *Nevada v. Skinner*, 884 F. 2d 445 (9th Cir. 1989).

¹⁰⁴ See *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996).

¹⁰⁵ See *Skinner*, 884 F. 2d at 446 (the much derided 55 mph speed limit, which was ultimately repealed by Congress).

¹⁰⁶ See *Dole*, 483 U.S. 203 (1987).

prohibition of federal highway funding by the Secretary of Transportation to states maintaining non-attainment areas.¹⁰⁷ Congress in 2000 further conditioned receipt of up to 8% of federal highway funds on the enactment by states of a .08 blood alcohol level for drunk driving purposes.¹⁰⁸

The Clean Water Act can similarly be used to advance environmental goals. The government grants available under its various programs are quite large.¹⁰⁹ For example, The Public Water Systems Supervision Program Grants for the fiscal year 2000 are estimated to be \$99,013,000,¹¹⁰ the Drinking Water State Revolving Fund is \$1,196,317, 000,¹¹¹ and the Clean Water State Revolving Fund is \$1,190,968,000.¹¹² These sums, similar to those of the Federal Aid to Highway Act, will be very attractive to states.

If Congress chooses to entice states by offering large sums of money through programs such as the Clean Water Act or the Federal Aid to Highways Act, then Congress can achieve three major purposes.

First, states can be induced into directly enforcing federal statutes—an amplification of the existing cooperative federalism scheme.

Second, Congress can indirectly extend federal jurisdiction through the states to regulate activities that would otherwise exceed the reach of the Commerce Clause. An example would be the use of “wetlands preservation grants” to protect isolated wetlands.

The third effect would be to have states waive their Eleventh Amendment sovereign immunity, opening themselves up to environmental citizen suits.

CONCLUSION

The next few years will witness a reassessment of the federal role in environmental protection. The changes may be great or minor depending upon the further unfolding of the federalism debate in the Supreme Court and political circles.

The recent emphasis on the Eleventh Amendment, accompanied by the narrowing of the scope of the Commerce Clause, necessitates a reappraisal of Congressional constitutional authority to protect the environment. Broad statutes of general application,

¹⁰⁷ 42 U.S.C. § 7509(b)(1)(A) (2000); 42 U.S.C. § 7410(m) (2000).

¹⁰⁸ See, McConville, *supra* note 40 at 151.

¹⁰⁹ For example, Congress appropriated \$33.2 billion from 1972 to 1981 under the construction grants program for municipal wastewater treatment plants. U.S. COUNCIL ON ENVIRONMENTAL QUALITY, 1981 ANNUAL REPORT 74-75 (1981).

¹¹⁰ EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, BUDGET OF THE UNITED STATES GOVERNMENT: BUDGET INFORMATION FOR STATES 150 (2000).

¹¹¹ *Id.* at 152.

¹¹² *Id.* at 153.

such as the Clean Air or Clean Water Acts, CERCLA, and RCRA, will be upheld in their application to interstate activities. Chief Justice Rehnquist in *Lopez v. United States*¹¹³ cited *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*¹¹⁴ for the principle that where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.¹¹⁵

However, the problem arises in the application of such broad statutes to problems of tangential connection to interstate commerce, such as isolated wetlands¹¹⁶ and isolated species,¹¹⁷ where no overt or substantial effect on interstate commerce is discernible.

By making almost all of the environmental statutes dependent on one clause, albeit a broad clause of the Constitution, Congress has placed at risk many environmental statutes.

If the Commerce Clause applies, then the Spending Clause is superfluous. If, however, the Commerce Clause does not encompass such environmentally sensitive matters as isolated wetlands or species, then Congress may still accomplish these goals by attaching conditions to federal funds. The conditions can also result in the waiver of a state's Eleventh Amendment sovereign immunity. States would need to be clearly informed of the conditions attached to the federal funds; specifically, any waivers of sovereign immunity and the conditions upon which a state may rescind its consent.

¹¹³ 514 U.S. 549 (1995).

¹¹⁴ 452 U.S. 264 (1981).

¹¹⁵ *Lopez*, 514 U.S. at 559.

¹¹⁶ See, e.g., *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 121 S. Ct. 675 (Jan. 9, 2001).

¹¹⁷ See, e.g., *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000).