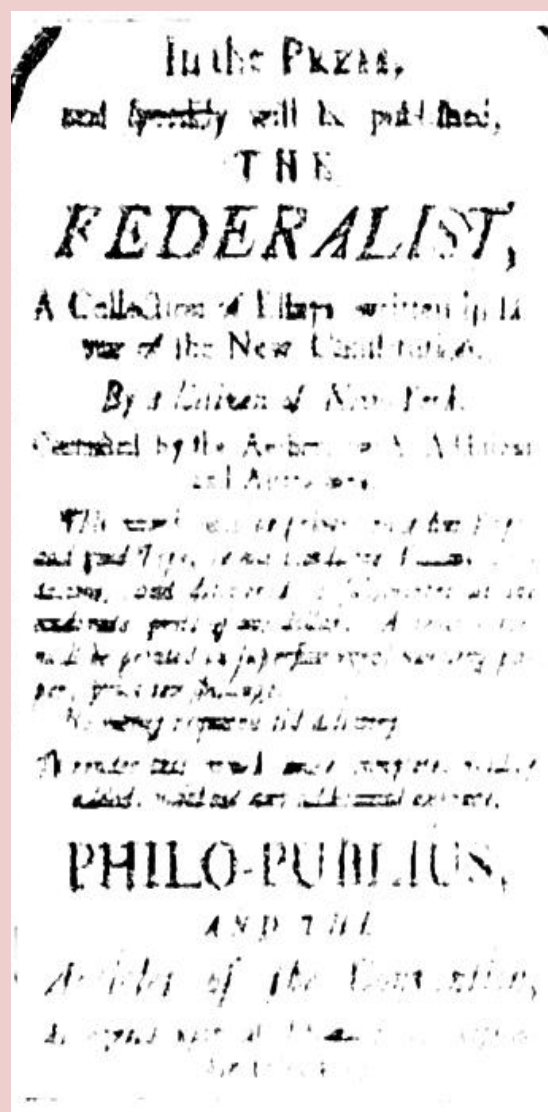


# Protecting Federalism and State Sovereignty through Anti-Commandeering Litigation



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Prepared by

The Thomas Jefferson Institute for Public Policy

and

The Environmental Law Center  
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## Preface

One no longer need imagine federal regulatory mandates on state and local government that exceed those governments' total revenue streams. This nightmare has come to fruition. Federal law has demanded that state and local government take actions they might choose not to take and these laws have commandeered state and local officials, keeping them from doing the work they were hired or elected to do. This commandeering violates the sovereignty of the states, corrodes the keystone of constitutional order in the United States and is unconstitutional.

In the seminal commandeering case *Printz v. United States*, Justice Scalia commented:

The Government points to a number of federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes. . . . We of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case.<sup>1</sup>

The Thomas Jefferson Institute and the American Tradition Institute believe the time has come for to challenge federal statutes and regulations that go too far – commandeering the officers, legislatures and revenues that belong to the states and local governments. Those resources are needed for critical uses that only the state and local governments have authority and sovereignty to provide. This treatise provides the roadmap on how to bring a case at law against the federal government for such commandeering.

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<sup>1</sup> *Printz v. U.S.*, 521 U.S. 898, 917–18 (1997).

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# Protecting Federalism and State Sovereignty through Anti-Commandeering Litigation

## Chapter 1 - Introduction

Before there was a United States there were states and they governed, sometimes very well. They still can and in some cases they still do. But, what in 1789 was to be a “more perfect union” of states has mushroomed into a federal establishment that has gone well beyond what the Founders contemplated. The states conceded part of their sovereignty to the federal government, and the government has taken that generous grant of power and run out of control. The Federal government was a houseguest that returned the favor by robbing the homeowner blind. A public without confidence in the federal executive or the federal legislature now yearns for a return to greater reliance on state prerogatives and local decision-making. They have suffered from the federal establishment commandeering local and state resources to implement programs that ignore or otherwise trample local interests and priorities. This treatise offers a means to translate that demand for accountability into an effective response by states and local governments, and perhaps even individuals.

Although law professors have published hundreds of academic papers discussing federalism and the prerogatives of states, and dozens on federal commandeering of local and state resources, those articles do not explain “how” to challenge a federal mandate that commandeers state or local powers.<sup>2</sup> You will find a roadmap to such litigation here.

That does not mean, however, that Academic contributions to the study of federalism or anticommandeering are unimportant. Those contributions have pushed the dialogue forward and you will find herein references to those academic discussions, especially where they inform litigation strategies and tactics. But we do not focus on academic discussion. We offer tools on how to prosecute an anticommandeering case at law.

For those not inculcated in federalism fervor, the question arises – why offer a litigation nutshell on anticommandeering litigation? As Adler and Keimer point out, “if [anticommandeering doctrines are] developed expansively, they threaten to undermine the

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<sup>2</sup> See, e.g., Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006); Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343 (2005); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813 (1998).

supremacy of federal law.”<sup>3</sup> We need take no position on whether there actually is such a threat nor, if real, whether that would be a bad thing. We do take the normative position that good lawyering and good cases produce good law. Just as academia has contributed to an understanding of the law, the better the litigation sharpens and brightens the line between federal and state responsibilities. And note, unlike many areas of law, in commandeering jurisprudence neither the magnitude of the federal interest nor the degree of interference with state prerogatives is relevant<sup>4</sup>. Hence, commandeering law is a question as to whether the federal government crossed the line. The brighter the line, the easier to know when it is crossed.

That said, we do embrace the dicta from *Printz v. United States*, to wit: “This separation of the two spheres [state and federal] is one of the Constitution’s structural protections of liberty.”<sup>5</sup>

We venture into this professional subject not because it is a new area of law, but because it is unsettled. In 1932, Justice Brandeis characterized this subject area as “one of the happy incidents of the federal system.”<sup>6</sup> He stood on the shoulders of other giants. In his famous letter to Justice Marshall, Fisher Ames argued, “the federalists must entrench themselves in the State governments, and endeavor to make State justice and State power a shelter of the wise, and good.”<sup>7</sup> And still earlier, Madison created the rubric we use today, writing: “the proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a *residuary and inviolable sovereignty over all other objects*.”<sup>8</sup> A fortnight later, in Federalist No. 46, Madison explained how the states will protect their prerogatives – “an over-reaching of the federal government must contend against states’ representatives and the whole body of the constituents.”<sup>9</sup>

However, Madison was not prescient and badly underestimated the accelerating attack by progressives on state sovereignty. In Federalist 45, he argued:

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<sup>3</sup> Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 Sup. Ct. Rev. 71 (1998).

<sup>4</sup> *New York v. United States*, 505 U.S. 144, 161 (1992) (“Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program”) (internal quotation omitted); *see also id.* at 161-69 (distinguishing between commandeering and conditional spending or preemption).

<sup>5</sup> Adler & Kreimer, *supra* note 1, at 80 (quoting *Printz v. United States*, 521 U.S. 898, 921 (1997)).

<sup>6</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>7</sup> 3 BEVERIDGE, A.J., *THE LIFE OF JOHN MARSHALL* 97–98 (1919).

<sup>8</sup> FEDERALIST NO. 39, “Conformity of the Plan to Republican Principles,” *INDEPENDENT JOURNAL*, Jan. 16, 1788 (*emphasis added*).

<sup>9</sup> FEDERALIST NO. 46, “The Influence of the State and Federal Governments Compared,” *New York Packet*, Jan. 29, 1788.

“Several important considerations have been touched in the course of these papers, which discountenance the supposition that the operation of the federal government will by degrees prove fatal to the State governments. The more I revolve the subject, the more fully I am persuaded that the balance is much more likely to be disturbed by the preponderancy of the last than of the first scale.”

Unlike Madison then, no one today would argue that the states have put a stake through the heart of the federal government. Many would argue the reverse.

If the states have failed to protect their sovereignty, how did they fail and what can they now do to reassert themselves? Madison offers one approach:

[S]hould an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.<sup>10</sup>

By this, Madison means that where a state government chooses not to participate in a federal scheme, the federal government must do so on its own; and where multiple states refuse, then implementation of the federal scheme would become impossible. This approach deserves its own discussion and we leave it for another day, but note that it does indeed work.<sup>11</sup> The remaining alternative is enforcement of state sovereignty through constitutional litigation. That is the subject we address here.

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<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> In 1981, Iowa returned the responsibility to implement the federal Safe Drinking Water Act to the U.S. Environmental Protection Agency for lack of resources. In so doing, it created a strong incentive for EPA to provide more funding and to reduce the requirements on Iowa, allowing Iowa to retake primary enforcement authority (“primacy”) a year later. Following this lead, in 1982 California returned its primacy over the Clean Water Act construction grant program, arguing that EPA required more of primacy States than it did of its own regional officers who would otherwise implement the program. EPA again responded with structural changes that favored the state. The federal government has fewer resources to implement major programs than do the states, placing the states in a strong bargaining position. See, JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM—THE GROWTH OF NATIONAL POWER (2d. ed., 2008). Few states, however, have had the gumption to use this power—an avenue still open and ready for use.



Because the federal government has indeed proved fatal to the “residuary and inviolable sovereignty”<sup>12</sup> of the states, the states’ representatives and the whole body of the constituents headed to court to reclaim State sovereignty. Over time, litigation in this area has swung like a pendulum. Looking only at the last 35 years, in 1976, the Supreme Court sought to protect states’ core sovereignty in *National League of Cities v. Usery*,<sup>13</sup> then in 1985, reversed course and *Usery* forcing states to rely not on jurisprudence but instead requiring them to depend on political processes to protect federalism and state sovereignty.<sup>14</sup> Seven years later, the Court shifted again, returning to law as the bulwark against commandeering, as reflected in the current line of cases: *United States v. Lopez*,<sup>15</sup> *New York v. United States*,<sup>16</sup> *Printz v. United States*,<sup>17</sup> *Pennsylvania Department of Corrections v. Yeskey*,<sup>18</sup> and *Bond v. United States*<sup>19</sup>.

Thus, the importance of anticommandeering litigation does not spring from new judicial activism and it does not reflect new law. Rather, it has taken on increasing significance because of the expansion of the federal sweep. The federal statutes at issue in these cases, as Justice Kennedy suggests, violate “the etiquette of federalism”.<sup>20</sup> Litigation, however, is not about etiquette. Litigation is war. One goes to war with an expectation of victory only if fully prepared, and at the right time and place. The remainder of this monograph provides the legal foundation for anti-commandeering litigation, a litigation blue-print, cases and case studies.

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<sup>12</sup> This term remains the touchstone of state sovereignty arguments and we see it used in that manner in Federalist 39 and explained in Federalist 45.

<sup>13</sup> 426 U.S. 833, 845 (1976).

<sup>14</sup> *Garcia v. San Antonio Metropolitan Transit Authority*. 469 U.S. 528, 551–52 (1985) (political process, not courts, should protect state sovereignty).

<sup>15</sup> 514 U.S. 549 (1995).

<sup>16</sup> 505 U.S. 144 (1992).

<sup>17</sup> 521 U.S. 898 (1997).

<sup>18</sup> 524 U.S. 206 (1998).

<sup>19</sup> 121 S.Ct. 2355 (2011)

<sup>20</sup> *United States v. Lopez*, 514 US 549, 583 (1995) (Kennedy, J., concurring) (citing *New York* as a case “where the etiquette of federalism has been violated by a formal command from the National Government directing the state to enact a certain policy . . . or to organize its governmental functions in a certain way”).

## Chapter 2 – What is State Sovereignty

When pleading a commandeering case, litigators need to avoid the legal morass associated with defining the boundary between state and federal sovereignty. As opposing counsel may make every effort to drag this boundary issue into the case, litigators need to know enough to steer the court clear of the issue. The question is not whether the state has the sovereignty to do the act, but instead whether the federal government can force the state to act to enforce its programs. It is irrelevant to commandeering.

Many boundary arguments begin with the recognition of our system of dual sovereignty, always noting the residuary and inviolable sovereignty of the states, as neatly described by Justice O'Connor in *Gregory v Ashcroft*.<sup>21</sup> Thereafter the trouble begins as courts attempt to define state sovereignty. In *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>22</sup> the Supreme Court puts these futile efforts to rest. There simply is no bright line definition as to what constitutes the boundaries of states' sovereignty. Any efforts to define state sovereignty by their "traditional governmental functions," "the historical reality" of state or federal activities, "basic state prerogatives," "essential, usual, traditional or strictly governmental," "uniquely" or "necessary" functions simply result in courts "employing freestanding conceptions of state sovereignty," a license the courts do not have.<sup>23</sup>

Instead, *Garcia* points courts to Justice Black's formulation:

There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been nongovernmental. The genius of our government provides that, within the sphere of constitutional action, *the people -- acting not through the courts but through their elected legislative representatives -- have the power to determine as conditions demand, what services and functions the public welfare requires.*<sup>24</sup>

*Garcia* provides the standard for identification of state sovereignty, such as it is:

The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in *any activity that their citizens choose for the common weal*, no matter how unorthodox or unnecessary

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<sup>21</sup>*Gregory v Ashcroft*, 501 U.S. 452, 457 (1991). Litigators should be thoroughly familiar with the arguments in this case.

<sup>22</sup> 469 U.S. 528 (1985).

<sup>23</sup> *Id.* at 523–50.

<sup>24</sup> *Id.* at 546 (citing to *Helvering v. Gerhardt*, 304 U.S. 360, 427 (1934) (concurring opinion)), (*emphasis added*).

anyone else -- including the judiciary -- deems state involvement to be.<sup>25</sup>

This formulation of state sovereignty does not, however, settle the matter. Federal attorneys will begin from a different starting point. They will begin with the argument that state sovereignty is protected not by litigation of constitutional questions, but rather than by the political process, and thus the case should be dismissed for lack of subject matter jurisdiction. They will cite to *Garcia*, arguing “the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.”<sup>26</sup>

But what if the political process fails to adequately protect the states, as it did under the Brady gun control law (*Printz*), the Low-Level Radioactive Waste Policy Amendments Act (*New York*), and the Americans with Disabilities Act (*Yeskey*). In these cases, the majority refused to defer to the political process and instead directly examined the reach of the commerce clause and its commandeering effect.<sup>27</sup> In light of these cases, governmental attorneys will retreat to the “plain statement rule.”

The plain statement rule is that “If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”<sup>28</sup> Federal attorneys will argue that Congressional mandates alter the usual constitutional balance in one of three ways. They will claim there is a base-line balance between the federal and state constitutions that heavily favors the federal role, mainly through the supremacy and commerce clauses. Secondly, they will argue that they entered a contract with the state and thus the state gave up any sovereignty it had voluntarily. Finally, they will argue that the federal act serves very important purposes, is most efficiently administered under their regime, and places a minimal burden upon state officers, thus only incidentally (and thus allowably) commandeering the state. Each of these arguments has a complete response. In general, however, where the “whole *object* of the [federal] law [is] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a “balancing” analysis is inappropriate”<sup>29</sup> and hence the cases one wishes to litigate in order to bring federalism back to its intended role. We take up each of these federal arguments in the following sections, showing where they work, where they do not and where the area remains grey.

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<sup>25</sup>*Id.*

<sup>26</sup>*Id.* at 556; *see also*, *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983) (“we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the ‘States as States’ is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a “sacred province of state autonomy.”).

<sup>27</sup>*See Printz*, 521 U.S. at 955 (Stevens, J., dissenting).

<sup>28</sup>*Gregory v. Ashcroft*, 501 U.S. at 460–61.

<sup>29</sup>*Printz*, 521 U.S. at 932 (*emphasis* in the original).

## Chapter 3 - Supremacy and Phantom Supremacy – The *New York* and *Printz* Doctrine

When Congress makes clear that it is applying an enumerated power and preempting state actions that may be in place, one must carefully examine whether that power is indeed within the constitutional enumeration. Recall, the court, not Congress, makes that determination.

In a pre-emption case, if the federal law at issue is beyond the scope of Congress' enumerated powers, there can be no pre-emption. Expansion of congressional power through an "increasingly generous . . . interpretation of the commerce power of Congress," creates "a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic."<sup>30</sup> This is not a new point of view.<sup>31</sup> Thus, the federal attorney will argue that they have supremacy because they have supremacy – surely a circular argument. In a commandeering case, regardless of the federal supremacy, the federal argument has no sway if the "object" of the federal law is to "direct the functioning of the state executive."<sup>32</sup> The State can accept the federal direction if it chooses, but it need not.

Supremacy versus commandeering seems straightforward. Perhaps it should be, but in litigation government attorneys will simply not give up the ghost. Commandeering law has been kneaded so many times by the Supreme Court that the swing to and from a bright line rule provides so rich a case law dough that enterprising government attorneys will, despite *Printz*, make an attempt to shift the court's attention away from the commandeering bright line. Thus, it pays to understand the power of *Printz* and ensure the courts follow it.

It may be helpful on such a task to trace the *Printz* dissent by Justice Stevens and explain that the Court rejected his arguments. In brief, *Printz* ignored *Dennison*,<sup>33</sup> and rejected *Branstad*<sup>34</sup> and *Testa*<sup>35</sup> as not pertinent.

One wishes the majority in *Printz* had followed the rule laid down by *Dennison*, a civil war case. The *Dennison* rule is clear, bright and simple: Congress "has no power to impose on a

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<sup>30</sup> *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. at 583-584 (O'Connor, J., dissenting).

<sup>31</sup> See, *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written"). Both *Garcia* and *Marbury* are cited by Justice Thomas in *Wyeth v. Levine*, 555 U.S. 555, 583-587 (2009) (Thomas, J., concurring).

<sup>32</sup> *Printz*, 521 U.S. at 932.

<sup>33</sup> *Kentucky v. Dennison*, 65 U.S. 66 (1861).

<sup>34</sup> *Puerto Rico v. Branstad*, 483 U.S. 219, (1987), (overruled *Kentucky v. Dennison*, arguing that the passage of time has mooted its jurisprudential power through a century of constitutional development).

<sup>35</sup> *Testa v. Katt*, 330 U.S. 386 (1947) (requiring state courts to accept jurisdiction for federal questions).

State officer, as such, any duty whatever."<sup>36</sup> But, in *FERC v. Mississippi*,<sup>37</sup> the Court had already rejected the *Dennison* rule as "rigid and isolated".<sup>38</sup> It was left with fashioning a new rule based on *Hodel* and *FERC*,<sup>39</sup> concluding that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs. If confronted with the government attempting to distinguish *Printz* anti-commandeering, it will pay to review the *Printz* majority's disassembly of the minority's argument.<sup>40</sup>

The Court's decision in *NFIB v. Sebelius* reinforces *Printz* and *New York*, clarifying that:

Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when "pressure turns into compulsion," the legislation runs contrary to our system of federalism. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.<sup>41</sup>

With regard to supremacy, at least under the Commerce Clause, the federal government may not compel the states or arms of the states to enact or administer a federal program.<sup>42</sup>

### **3.1. Carving away at the *New York* and *Printz* doctrine**

Federal attorneys have an institutional commitment to maximizing federal supremacy and thus seek ways to limit the effect of *New York* and *Printz*. The proving grounds for new theories that undercut these seminal cases, as always, are the Federal District Courts. Decisions in these courts have little precedence, but they spur others to apply the same arguments and may eventually result in success in a U.S. Court of Appeals, and thus winning significant precedential value. At present, two limiting arguments have been attempted, indirect compulsion and impact on an individual but not the state. The latter did reach two courts of appeals, but it appears a third case which rose to the Supreme Court beat back this line of attack.

The litigation opposing the national health care legislation created a platform for states to audition a wide array of anti-commandeering arguments, mostly without success. In *Minnesota v. United States*, the state argued that the federal statute may not have directly compelled state action, but because of the existing state commitment to health care, the

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<sup>36</sup> *Kentucky v. Dennison*, 65 U.S. 66 (1861).

<sup>37</sup> 456 U.S. 742, 761–62 (1982).

<sup>38</sup> *Id.*

<sup>39</sup> See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981); and *FERC*, 456 U.S. 761–62.

<sup>40</sup> *Printz*, 521 U.S. at 925–33.

<sup>41</sup> *NFIB v. Sebelius*, 132 S.Ct. 2566, 2602 (2012) (internal citations omitted).

<sup>42</sup> *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 933.

federal law “indirectly” compelled the state legislature to act. The district court held that “any claim that Congress ‘indirectly’ compelled the members of the State legislature to act is not of constitutional significance. The holdings of *New York* and *Printz* are clear: the Tenth Amendment's anticommandeering principle prohibits only direct federal compulsion.”<sup>43</sup> Based on this case, anti-commandeering litigators may have to face arguments about what is and what is not a “direct” compulsion. Federal attorneys may marshal this argument when confronted by accusations of coercion.

In *City of New York v. United States*,<sup>44</sup> the court rejected plaintiffs' argument that the Tenth Amendment was violated because the statute resulted in political cost to city officials. This case has risen to precedential status, the 2<sup>nd</sup> Circuit affirming the lower court decision, holding: "Congress has not compelled state regulation where 'any burden caused by a State's refusal to regulate will fall on [individuals], rather than on the State as sovereign.'"<sup>45</sup>

In like measure, in *Fraternal Order of Police v. United States*,<sup>46</sup> citing *New York v. United States*,<sup>47</sup> the District Court held that because the participation of the Chief Law Enforcement Officer in the certification process is optional, and because the burden of such an officer's refusal to certify an application falls exclusively on the individual applicant, these regulations do not violate the Tenth Amendment. This holding was affirmed by the D.C. Circuit.<sup>48</sup>

Both *City of New York* and *Fraternal Order of Police (FOP)* need to be read in conjunction with *Bond v. United States*,<sup>49</sup> a 2011 decision. *Bond* appears to reject the Circuit Court holdings that where burden falls on an individual, a commandeering claim cannot stand.<sup>50</sup> Rather, the *Bond* court ruled that a petitioner could assert her own injury resulting from governmental action that exceeded the authority that federalism defined, finding that federalism's limitations were not a matter of rights belonging only to the states. Petitioner also was not precluded from arguing that a statute interfered with a specific aspect of state sovereignty, as the principles of limited national powers and state sovereignty were intertwined. Thus, the *Bond* Court concluded, a petitioner, as a party to an otherwise justiciable case or controversy, could assert that her injury resulted from disregard of the federal structure of the government. *Bond*, did not, however, address the compulsion aspect raised by *FOP*, a subject discussed below.

### 3.2. Supremacy Carve-outs.

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<sup>43</sup>Minn. v. United States, 102 F. Supp. 2d 1115, 1121 (D. Minn. 2000).

<sup>44</sup>City of New York v. United States, 971 F. Supp. 789, 793 (S.D.N.Y. 1997).

<sup>45</sup>City of New York v. United States, 179 F.3d 29 (2d Cir. 1999).

<sup>46</sup>Fraternal Order of Police v. United States, 981 F. Supp. 1, 6 (D.D.C. 1997).

<sup>47</sup>505 U.S. 174.

<sup>48</sup>Fraternal Order of Police v. United States, 173 F.3d 898 (D.C. Cir. 1999).

<sup>49</sup>Bond v. United States, 131 S. Ct. 2355, 2361 (2011).

<sup>50</sup>Note that *Lomont v. Summers*, 135 F. Supp. 2d 23, 26 (D.D.C. 2001), cites to *Fraternal Order of Police v. United States* for the same principle and is now overtaken by *Bond*.

The structure of the Constitution was intended to circumscribe the federal sweep through enumeration of federal powers. Thus, for example, the text of the Constitution plainly confers authority on the federal courts to enforce federal law, allowing them to order state officials to comply.<sup>51</sup> This enumerated power has been extended to the imposition on “state judicial officers, or those the state designates as functioning as judicial officers, to enforce Federal law in state courts, propositions that by no means imply any authority on the part of Congress to mandate state regulation.”<sup>52</sup>

The post-civil war amendments significantly extended federal power by enumerating new federal authorities and these amendments directly allow for commandeering in circumscribed circumstances. Specifically, the "Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States."<sup>53</sup>

Some have argued that, in light of the broad sweep of the Reconstruction Amendments, the only basis for arguing commandeering is under the Commerce Clause. Indeed, the Court's language in *Yeskey*<sup>54</sup> implies that the anticommandeering doctrines limit only legislation adopted pursuant to the Commerce Clause, and are inapplicable to any federal statute appropriately grounded in the Fourteenth Amendment. Reading *Yeskey* and *Printz* together, the Court might suggest that legislation adopted pursuant to the Fourteenth Amendment is exempt from limits to commandeering. This, however, arises as dictum that merely noticed that the court did not address the issue. Such dictum cannot serve as binding precedent. The lack of precedent notwithstanding, however, district courts have begun to apply this principle.<sup>55</sup>

Nevertheless, challenging Reconstruction Amendment-based legislation (e.g., voter rights) is heavily charged with political ramifications. While there are limits to the free reign of the 14<sup>th</sup> amendment, to prevail in a commandeering action rising from this amendment would likely overturn a large amount of existing civil rights legislation – something no court would want to see happen. For a more lengthy discussion of this, see Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, *Printz, and Yeskey*, Sup. Ct. Rev. 71, 131-33 (1998).

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<sup>51</sup> U.S. CONST. art III, § 2.

<sup>52</sup> *New York*, 505 U.S. at 179 (citations omitted) (*emphasis added*). This language, in turn, seems to trace back to Justice O'Connor's opinion in *FERC v. Mississippi*. See 456 U.S. at 784, n. 13 (O'Connor concurring in the judgment in part and dissenting in part).

<sup>53</sup> *Lopez v. Monterrey County*, 525 U.S. 266, 282 (1999).

<sup>54</sup> *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998). ("We do not address another issue presented by petitioners: whether application of the ADA to state prisons is a constitutional exercise of Congress's power under either the Commerce Clause, compare *Printz v. United States* with *Garcia v. San Antonio Metropolitan Transit Authority*, or § 5 of the Fourteenth Amendment, see *City of Boerne v. Flores*." (citations omitted).

<sup>55</sup> *McGarry v. Director, Dept. of Revenue*, 7 F.Supp. 2d 1022, 1025 (W.D. Mo. 1998); *Nanda v. Bd. of Trs. of the Univ. of Ill.*, 219 F. Supp. 2d 911, 912 (N.D. Ill. 2001).

Another federal authority that appears to be beyond the reach of *New York* and *Printz* is the Spending Clause.<sup>56</sup> In *NFIB v. Sebelius*, however, the Court has refined and restated the inability of the Spending Clause to trample state sovereignty, noting that this clause must be viewed as a “contract” in which the state voluntarily and knowingly accepts the terms of the contract.<sup>57</sup>

### 3.3. Conditional Supremacy

As discussed above, the federal government cannot compel states to enact or administer a federal program, but they can prevent a state from administering a state program. As explained in *Reno v. Condon*, a federal statute does not commandeer state resources by forcing a state to not act.<sup>58</sup> Where a federal program is available for use, even if not required to be used, a state must regulate consistently with federal directions or federal law will take away (preempt) their ability to regulate the area in question.<sup>59</sup>

Note, these cases involve actual state activities. Where federal officials act under federal law that rises from an enumerated authority, there can be no commandeering and efforts to wedge that argument into such a case are nugatory.<sup>60</sup>

### 3.4. Reverse Supremacy

A number of federal programs incorporate state law. In so doing, the federal government takes pains to make the state law federally enforceable. Where the federal government takes an enforcement action based on state law, it applies state sovereignty under color of a federal admission of state sovereignty, not only giving the state law dignity but also

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<sup>56</sup>*Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000) (“Kansas devotes a significant portion of its brief to a discussion of two cases that invalidated acts of Congress, *New York v. United States* [and] *Printz v. United States*. Neither of these cases is persuasive to us because neither concerned legislation passed pursuant to the Spending Clause.”).

<sup>57</sup> *NFIB v. Sebelius*, 132 S.Ct. 2566, 2602 (2012).

<sup>58</sup> *Reno v. Condon*, 528 U.S. 141, 151 (2000) (“Like the statute at issue in *Baker*, the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.”). *And see, City of New York v. United States*, 179 F.3d 29 (2d. Cir. 1999) (city ordinance prohibiting city officials from sharing information with federal authorities does not require the city to share the information, but impermissibly allows the city to discipline an employee that does so.)

<sup>59</sup> *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (forcing Massachusetts to bring the state law into line with the federal Endangered Species Act).

<sup>60</sup> *United States v. Jones*, 231 F.3d 508, 515 (9th Cir. 2000) (“The statute at issue here is a federal criminal statute to be implemented by federal authorities; it does not attempt to force the states or state officers to enact or enforce any federal regulation.”).



giving the state interpretation of its own regulations and laws dignity as well. This does not commandeer a state or its officers.<sup>61</sup>

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<sup>61</sup>United States v. Meienberg, 263 F.3d 1177, 1183 (10th Cir. 2001) (“By making a violation of state law a federal crime, the federal government has not commandeered the states into enforcing federal policy. Quite to the contrary, § 922(b)(2) can be seen as a cooperative effort by the federal government to assist the states in enforcing state policies. There are both old and recent examples of such cooperative efforts between the federal government and the states. See 18 U.S.C. § 1955(b)(1)(i) (defining an "illegal gambling business" as one which is in violation of state law); Leonard D. White, *The Federalists* 401, 403 (1956) (cataloging historic examples of cooperation between the states and federal government). Because § 922(b)(2) does not involve an attempt to use the states as mechanisms to enforce federal regulation, the political accountability concerns expressed in both *Printz* and *New York* do not apply. See *Printz*, 521 U.S. at 929-30; *New York*, 505 U.S. at 168-69.”).

## Chapter 4 - Voluntary Waiver of Sovereignty

Where the state is able to rebuff a claim of supremacy, the second major argument federal attorneys will make is that the state waived its sovereignty and volunteered to allow the federal government to commandeer state and local resources. Such “waiver” generally sits on a slippery slope rather than a defined set of terraces. Where on this slope the federal program rests will also define the litigation risk of challenging the federal mandate in the face of a claim the state waived its sovereignty.

### 4.1. Contracting out of Sovereignty

A state may and often does enter into some kind of contract with the federal government by taking funds somehow related to the specific statute at issue. Couched as a “structural protection” of state sovereignty, this Constitutional “protection” takes the form of insulating the states from federally imposed burdens through federal funding.<sup>62</sup> No funding, no insulation, no loss of sovereignty. Funding, insulation, loss of sovereignty.

More specifically, the Spending Clause gives Congress the authority “to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”<sup>63</sup> In the main precedent on this issue, *Dole* explains that this authority includes the power to require states to comply with federal directives as a condition of receiving federal funds.<sup>64</sup> In addition, Congress may use its spending power to pursue objectives outside of Article I’s “enumerated legislative fields.”<sup>65</sup>

As discussed in the section below on coercion, *Dole* sets forth five limitations on the federal spending power. States, however, routinely complain that *Dole* offers no bright line test for what is or is not within the federal spending authority. Instead it leans on the depression era decision of *Steward Machine* that followed the massive federal enlargement under the New Deal – notably a Court that at this time was moving away from its reliance on *laissez faire* economic theory and becoming more willing to accept Commerce Clause laws that treaded on state sovereignty. The *Steward Machine* rule, such as it is, offers the following:

“Every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has

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<sup>62</sup>Garcia v. San Antonio Metro, 469 U.S. at 555.

<sup>63</sup> U.S. Const. Art. I, § 8, cl. 1.

<sup>64</sup>See South Dakota v. Dole, 483 U.S. 203, 206 (1987) (holding that Congress may require each state to raise its minimum drinking age to 21 in order to receive its full share of federal highway funds).

<sup>65</sup>*Id.* at 207 (quoting United States v. Butler, 297 U.S. 1 (1936)).

been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems."<sup>66</sup>

Based on this argument, the Court presumes that States will use their common sense before taking the federal money, to include examining whether the amount of federal funding is sufficient to pay for what the state would not be willing to fund itself.

The litigator wishing to argue that a state could not have understood the implications of taking federal funds will have a steep hill to climb. We note as well, time enters into this calculation. When a state or local government accepts federal funding and the duties associated therewith, they are presumed to have calculated the value of that funding in the context of otherwise losing control over the issue, either because the federal government will take on the responsibility or more likely because without the federal funding the work simply won't be done, the state not having sufficient funds to do the work on their own. At the time the bargain is struck, the state and/or local government enters with an expectation that the exchange is fair. Then time passes and things change.

Rarely, over time, does federal funding keep pace with the federal mandates associated with that funding. When the U.S. Environmental Protection Agency adds another drinking water standard, another Clean Water Act standard, another Clean Air Act standard, another hazardous waste or toxic chemical control standard, they do not also increase the funds available to the states to implement those standards. Nor do federal funding levels grow through a set formula. The same problems arise in the health care setting, in labor and occupational health settings or in transportation or education. Find a program that began with a fair balance between funding and mandates (if you can find one even at inception) and then look ten years thereafter. The imbalances are legend.

When the state or local government finds it can no longer make up for an insufficient federal share, it faces a very tough decision. It either must rob from other budget accounts or retract its responsibility for the program, placing it back into federal hands. The latter is extremely dissatisfying to those citizens and businesses directly affected by the government programs as local governments are more sensitive to their needs than a distant federal bureaucrat. This places significant political pressure on the state that must reorder priorities not on actual social need, but on political expediency.

The *Steward Machine* court held that the state should have taken all these well-known potential problems into account before agreeing to enter into the bargain. There has been little effective legal analysis on the demarcation between voluntary waiver of sovereignty and coercion that is, effectively, commandeering the revenue stream of the states or local governments as a result of shrinking federal funding or federal program growth over time.

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<sup>66</sup>Steward Machine Co. v. Davis, 301 U.S. 548, 589–90 (1937).

The litigator seeking to claim a federal mandate constitutes commandeering must ensure that any volunteerism, whether adequately funded or not, does not compromise the commandeering claim. A working rule may be that unless return of a program to the federal government would prohibit a state from applying its own police powers over the subject, or otherwise would compromise the safety and order of the state (typically because the federal government either could not or would not take up the preempted police power), then the volunteerism trumps any commandeering claims. This remains a subject deserving of case law and thus strategic litigation may be appropriate if for no other reason than to force the federal establishment to confront this underfunding problem.

#### **4.2. Incidental Funding as Evidence of a Waiver**

The voluntariness of the waiver also rises as an issue where the federal funding is not specifically intended to underwrite the mandated state or local action. In *Garcia*, the city argued that a federal statute providing wage and hour protection to transit workers trampled state sovereignty over how the city governed its transit system. The Court concluded, however, that because the city received “extensive funding for state and local mass transit” it had voluntarily subjected itself to the Fair Labor Standards Act,<sup>67</sup> even though the FLSA is not specifically aimed at mass transit<sup>68</sup> and the funding was not aimed at FLSA mandates. Litigation in cases of this kind will require a detailed demonstration that the federal funding does not reflect a decision by the state to enter into a contract with the federal government for incidental services not paid for or even intended to be paid for by the funding. Although it will take a crisp argument, *Garcia* is open to being distinguished on that ground.

We contemplate two examples of this kind, raising them as questions that only litigation can answer. Would taking a \$50,000 grant to study ways to implement energy saving practices through changes in its building codes also mean that the state must adhere to federal building requirements that incorporate those practices? Here the purposes of the grant address the same issues – how best to build buildings. But, is that enough?

The second example is quite different. Under the Clean Air Act, if a state chooses not to incorporate a federal standard in its air permits program, the United States can withhold all the federal highway funds intended for the state. Does the threat of withholding such funds create a coercive “non-voluntary” relationship that goes too far in its effect, thus improperly deconstructing state sovereignty? One must ask, did one agree to place highway funds at risk when agreeing to implement the Clean Air Act? Was it a conscious act? Was it a negotiated element of the contract? Does it constitute a demand insufficiently related to clean air that it

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<sup>67</sup>*Id.*

<sup>68</sup> Notably, and not discussed in the opinion, is the fact that if a job is governed by some other federal labor law, the FLSA does not apply. For example, most railroad workers are governed by the Railway Labor Act. Yet the transit workers, working on smaller trains, but trains none the less, were covered by FLSA. The court was able to ignore these facts because the parties did not raise them, a cautionary note for litigators.

constitutes a coercive act? Could a state refuse to accept that element of their “contract” when receiving new funds or otherwise renewing their program management with EPA?

At this point we only wish to make it clear what this issue involves. States, counties and cities fully understand underfunded mandates. Implementation of a federal mandate is simply never fully funded by federal grants. The question as to what level of funding is sufficient to reflect a waiver of the state’s sovereignty remains unclear and deserving of attention. Nevertheless, where this issue exists, the commandeering claim is at risk.

### 4.3. Coercion

Coercion is a recognized if unsettled area of commandeering law first formulated in *Steward Machine Co. v. Davis*<sup>69</sup> but more commonly citing to *South Dakota v. Dole*: “Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>70</sup>

In *Dole*, South Dakota challenged a federal law withholding five percent of highway funds from states that failed to raise the drinking age. The *Dole* Court ruled in favor of the federal government, concluding that in exercising its spending power, Congress is generally free to attach conditions on the receipt of federal funds. The Court articulated “four” limitations on the spending power, to which coercion is added as a fifth. The four non-coercion prongs to the inquiry are: (1) the expenditure must be for the general welfare; (2) the conditions imposed must be unambiguous; (3) they must be reasonably related to the purpose of the expenditure; and (4) the legislation may not violate any independent constitutional prohibition.<sup>71</sup>

Each of these are independent tests and provide a basis for striking the federal law. See, for example, *Frank Krasner*<sup>72</sup> where a federal gun control statute imposed spending limitations on a condition of how states controlled display and sale of firearms, holding that there simply was no relationship of the spending to the requirement. However, these four factors are spending limitations requirements and do not address coercion.

After South Dakota argued, and the Court rejected, challenges under these four factors, it claimed that “the coercive nature of this program is evident from the degree of success it has

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<sup>69</sup>301 U.S. 548, 590 (1937).

<sup>70</sup>*South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

<sup>71</sup>*Id.* at 207.

<sup>72</sup>*Frank Krasner Enters. v. Montgomery County*, 166 F. Supp. 2d 1058, 1063 (D. Md. 2001) (Vacated for lack of standing, but otherwise a reported case indicating the position of the 4th Cir. on the merits) (“In sharp contrast, the condition imposed by § 57-13 requires no relationship between the County’s spending being controlled and the organizations’ permitting the display and sale of firearms anywhere and any time after December 1, 2001.”).

achieved.”<sup>73</sup> The Court found this an insufficient test for coercion but never offered an alternative.

In order to examine what rule a litigator might offer, a deeper look at coercion will help provide a factual construct that gives some substance to the discussion. Current case law offers facts on three forms of coercion. First is where funding is tied to a statute, but the funding does not appear to pass the third *Dole* prong, which requires the funding to be clearly related to the purposes of the statute, and yet is extremely important to the needs of the state. A second is where the funding is insufficient to underwrite the mandated state activity and the state cannot abandon its participation. Examples of this might be where abandonment of the program would disrupt an essential program within the state such as a prison system or maintenance of the transportation grid. Neither argument has had much traction. As the 10<sup>th</sup> and D.C. Circuits explained:

[N]umerous courts have upheld conditions on Medicaid grants even where the removal of Medicaid funding would devastate the state's medical system. In *Schweiker*, 210 U.S. App. D.C. 288, 655 F.2d 401, [at 414] Oklahoma argued that the threat of losing all Medicaid funding was so drastic that it had no choice but to comply in order to prevent the collapse of its medical system. The D.C. Circuit stated: "the courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely with a hard choice. . . . We therefore follow the lead of other courts that have explicitly declined to enter this thicket when similar funding conditions have been at issue.”<sup>74</sup>

The Fourth Circuit, however, appears willing to enter this thicket. In *Virginia v. Riley* the federal government was prepared to pull all funding for disabled children on the basis that the state refused to fund private tutors to the 126 disabled students expelled or suspended for serious misconduct wholly unrelated to their disabilities. This, the Fourth Circuit held, “resembles impermissible coercion, if not forbidden regulation in the guise of Spending Clause condition.”<sup>75</sup>

Alternatively, the Ninth Circuit leapfrogs over the need for a coercion test altogether by suggesting that

appellant's claim can be answered by reference to the purpose of the coercion test. The coercion test flows from a fear that the federal government could wield its Spending Power to infringe upon integral state functions. The test serves, in theory, as a protection of the federalist system. However, if the congressional action passes muster under the Commerce Clause (or some other non-Spending power) and the restraints of

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<sup>73</sup>*Id.*

<sup>74</sup>*Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000) (also citing to *California*, 104 F.3d 1086 (conditioning receipt of Medicaid funds); *Padavan*, 82 F.3d at 28–29 (same); and *Planned Parenthood v. Dandoy*, 810 F.2d 984 (upholding Medicaid funding condition)).

<sup>75</sup>*Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997).

the Tenth Amendment, see *infra* §§ III and IV, there can be no reason to fear that the federal government is unconstitutionally intruding into areas of uniquely state concern.<sup>76</sup>

At present, the Court puts this in black and white terms – “conditions on funding do not intrude on state sovereignty because they leave each state with 'the 'simple expedient' of not yielding to what [the state] urges is federal coercion.”<sup>77</sup> Future litigation will need to find cracks in the armor of this argument.

A third example gives some sense of where those cracks might appear and offers a muddy rule from which a brighter line might be drawn. In *College Savings Bank*, the federal government was prepared to require a state to forego its sovereign immunity and subject itself to liability by accepting funds associated with an interstate compact that can be formed only by acquiescence of the Federal government. The Court ruled that “where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed -- and the voluntariness of waiver destroyed -- when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.”<sup>78</sup>

In explaining its decision, the Court offered this general prescription:

Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts. In the present case, however, what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity.<sup>79</sup>

It remains unclear as to how to reconcile the Court’s 1999 “exclusion of the State from otherwise permissible activity” with the 1987 *Dole* holding that the state can avoid a sanction through "the 'simple expedient' of not yielding to what [the state] urges is federal coercion.”<sup>80</sup> The litigation challenge will be to discern “the line separating encouragement from coercion.”<sup>80</sup> It may be the difference between a gift and a sanction or between a state’s ability to employ its police powers or not.

The four-justice dissent in *NFIB v. Sebelius* offers a restatement of the above, claiming this issue is straightforward:

The answer to the first of these questions--the meaning of coercion in the present context--is straightforward. As we have explained, the legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States' choice to

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<sup>76</sup>*Nevada v. Skinner*, 884 F.2d 445, 449-450 (9th Cir. 1989).

<sup>77</sup>*Dole*, 483 U.S. at 210 (*citing* *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1947)).

<sup>78</sup>*College Sav. Bank v. Fla. Prepaidpostsecondary Ed. Expense Bd.*, 527 U.S. 666, 686-687 (1999).

<sup>79</sup>*Id.*

<sup>80</sup>*See Kansas v. United States*, 24 F. Supp. 2d 1192, 1196-1199 (D. Kan. 1998).

accept or decline the offered package. Therefore, if States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power. And as our decision in *South Dakota v. Dole* makes clear, theoretical voluntariness is not enough.<sup>81</sup>

The case study offered below provides an example of this coerciveness, as does the Dissent's discussion of education (*NFIB v. Sebelius* 132 S.Ct. at 2662). This coercion might most often be found when a government agency adds a new requirement to an existing program with no renegotiation of the "contract." This is a special problem, as shown in the case study, where the incremental new mandate is well beyond the ability of the state to pay for it.<sup>82</sup>

#### 4.3.1. Unfunded Mandates

The clean commandeering claim is where there is a completely unfunded mandate. *New York*<sup>83</sup> is the precedent for cases where a federal statute mandates direct commandeering of the state legislature and *Printz*<sup>84</sup> is the precedent for federal commandeering of personnel. The area subject to future litigation will be commandeering the revenue stream of a state or local government absent any federal funding whatever. The question future litigation must address is as to whether any federal standard can be imposed on a local government where the local government does not receive any funding to pay for implementation of such a mandate.

Examples of unfunded mandates abound. One might begin with the Unfunded Mandates Reform Act<sup>85</sup> establishes certain cost thresholds beyond which the Congressional Budget Office must report to Congress, and if not made, the bill can be stalled on a point of order. Regulatory agencies must explain how they have taken unfunded mandates into account if the impacts on state and local governments exceed \$100 million. The General Accounting Office conducted a review of UMRA and offers some insight into the disutility of this statute.<sup>86</sup>

That report identifies a variety of unfunded mandates that could be subject to commandeering litigation. In addition, because the act requires UMRA analysis of large rules, any rules exceeding the cost threshold are subject to review to determine whether the agency took all necessary steps to reduce the intergovernmental costs. Notably, challenges to such a failure by a regulatory agency are only timely during the review period for the rule. However,

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<sup>81</sup> *NFIB v. Sebelius* 132 S.Ct. at 2661.

<sup>82</sup> The *NFIB* dissent makes an additional point of interest in this discussion: "unless Justice Ginsburg thinks that there is no limit to the amount of money that can be squeezed out of taxpayers, heavy federal taxation diminishes the practical ability of States to collect their own taxes." *Id* at 2662.

<sup>83</sup> *New York v. United States*, 505 U.S. at 161.

<sup>84</sup> *Printz v. U.S.*, 521 U.S. at 932.

<sup>85</sup> UMRA 2 U.S.C. §§658-658g (2012).

<sup>86</sup> GAO, UNFUNDED MANDATES—Analysis of Reform Act Coverage, May 2004, GAO-04-637, available at <http://www.gao.gov/new.items/d04637.pdf>.



where the agency clearly failed and time has passed petitions for revision of the rule to either remove the mandate or adjust it to take costs into account are always timely.

Jonathan Emord offers but one laundry list of potential litigation targets under an unfunded mandates commandeering argument:

Among the federal arch villains in robbing states of power and resources are the Fair Labor Standards Act, the Family and Medical Leave Act, the Individual with Disabilities Education Act, the Americans with Disabilities Act, the Occupational Safety and Health Act, Medicaid, the Clean Water Act, the Safe Drinking Water Act, the Endangered Species Act, Davis-Bacon related Acts, and the Patient Protection and Affordable Care Act (Obamacare).<sup>87</sup>

The National Conference of State Legislatures monitors unfunded federal mandates and can provide specific regulatory and statutory targets for commandeering litigation.<sup>88</sup> These kinds of statutes and regulations are of the kind Justice Scalia identified as “the forced participation of the States' executive in the actual administration of a federal program”<sup>89</sup> and thus ripe for litigation.

#### **4.4. Incidental Applicability of General Federal Mandates on States**

In *Printz* dicta, the Court noted that the government put forward a cluster of arguments that suggested the federal rules had very important purposes, most efficiently administered the pre-empted programs and placed a minimal and only temporary burden upon state officers. The Court reflected that “[a]ssuming *all* the mentioned factors were true, they might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments.”<sup>90</sup>

Sorting out such a balancing test may not be very easy as it ventures again into the morass of balancing commandeering against preemption, thus moving away from the strict rule that commandeering is not allowed. There appears to be some room for “balancing”, at least

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<sup>87</sup>Jonathan Emord, “Federal Mandates: Bankrupting States and Destroying Federalism,” January 31, 2011, *available at* <http://www.newswithviews.com/Emord/jonathan174.htm>.

<sup>88</sup>NCSL Mandate Monitor, *available at* <http://www.ncsl.org/state-federal-committees/scbudg/mandate-monitor-overview.aspx>.

<sup>89</sup>*Printz v. U.S.*, 521 U.S. at 917-18 (“The Government points to a number of federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes. Some of these are connected to federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States; others, which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program. We of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case.”)(*emphasis added*).

<sup>90</sup>*Id.* at 932 (*emphasis in the original*).

to the degree that the federal mandate seems to strike only a glancing, if painful impact on the functioning of state government, and where that impact is from a law of general applicability, not where the impact was specifically resultant from the law.<sup>91</sup>

Any effort to balance federal and state interests will have to first pass muster with regard to any line of cases the Supreme Court has decided that is already on point and thus controlling. For example, Fair Labor Standards Act cases are controlled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), a law of general applicability that applies to certain kinds of employees, whether in federal, state or private jobs. Specifically, “If a precedent of this [Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”<sup>92</sup>

With these caveats in mind, the litigator must assess the nature of the federal mandate and as to whether it is “a conceptually distinct category: laws of general applicability that incidentally apply to state governments.”<sup>93</sup>

The “balancing” test to which the Court refers must include the balance between the value of the federal statute within its pre-empted sphere of action to the “incidental” interference with state government functioning. This is akin to the relevancy test under *Dole*. As a thought experiment, consider whether shutting down a state’s highway construction by 100 percent reduction in federal highway funds is a mere incident of failing to apply one of the thousands of federal Clean Air Act standards.<sup>94</sup> As explained by the US Department of Transportation, “highway sanctions could be imposed even when the [Clean Air Act State Implementation Plan] deficiency is not transportation related. Sanctions apply for all types of nonattainment areas, including those without transportation-related pollutant problems.”<sup>95</sup>

An additional “incidental” impact of some federal legislation rises out of a real, but non-mandated coercive power – political pressure. As discussed above, there is no commandeering where the state may choose to not adopt a federal mandate. Post-*Printz*, the challenge to the federal legislator is to craft a statute that imposes political costs, rather than a mandate, as the means to force states to act.<sup>96</sup> Thus, one means to dodge *Printz* is to show that the federal law

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<sup>91</sup>*Printz v. U.S.*, 521 U.S. at 932 (“relevant if we were evaluating whether the *incidental* application to the States of a federal law of general applicability excessively interfered with the functioning of state governments.”)(*emphasis added*).

<sup>92</sup>*Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

<sup>93</sup>*West v. Anne Arundel County*, 137 F.3d 752, 759–760 (4th Cir. 1998).

<sup>94</sup>Clean Air Act § 179, 42 U.S.C. §7509 (2012).

<sup>95</sup> U.S. DOT “Highway Sanctions,” *available at* [http://www.fhwa.dot.gov/environment/air\\_quality/highway\\_sanctions/index.cfm#auto](http://www.fhwa.dot.gov/environment/air_quality/highway_sanctions/index.cfm#auto) (updated 2/1/2012).

<sup>96</sup>*See Lomont v. Summers*, 135 F. Supp. 2d 23, 26 (D.D.C. 2001)(a weapons market may be barred by failure of the local government to “voluntarily” implement a federal mandate, but the burden of being forced to go to another state falls on the weapon buyer, not the state official who chose to not participate in the federal program; *and* “Congress has not compelled state regulation where ‘any burden caused by a State’s refusal to regulate will fall on

imposes a burden on the citizen, but no mandate on the state official. As well, because individuals are dual citizens – citizens of both the state and the United States, the statute does not offend. This approach to defending a statute is a backdoor to the old argument that such Commerce Clause challenges are governed as political questions. Because the electorate, through their representatives, did not stop the law, it passes muster as a mandate on them. The anti-commandeering litigator will need to find more than a political cost to succeed. They will need a direct mandate or clear fiscal consequence on the state.

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[individuals], rather than on the State as sovereign.'" *Fraternal Order of Police v. United States*, 981 F. Supp. 1, 6 (D.D.C. 1997)).

## Chapter 5 – Who May Protect Sovereignty?

As discussed above, the Court has shifted multiple times as to how to protect state sovereignty, sometime relying on the political (legislative) process as in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>97</sup> and other times relying on judicial action as in *New York v. United States*<sup>98</sup>, *Printz v. United States*<sup>99</sup>, *Pennsylvania Department of Corrections v. Yeskey*.<sup>100</sup> At the present time, a state Attorney General may bring suit on behalf of their state or commonwealth. It is sometimes forgotten, however, that local governments share the state's sovereignty. Generally, these local governments are considered "arms" of the state. And, as discussed in the second subsection below, citizens also have the right to seek judicial scrutiny. The public interest litigator can find plaintiffs far afield from the state capital.

### 5.1. The Arm of the State

Citing *Printz*, the Fourth Circuit explained in *West v. Anne Arundel County*<sup>101</sup> "[h]ereafter we will use the word 'state' to include local governments. For purposes of determining whether a governmental entity is protected by constitutional guarantees of federalism, including the Tenth Amendment, the law does not distinguish between states and their political subdivisions." Thus, commandeering of local officials, their revenue streams and their facilities (*e.g.*, *Printz*) is no different than commandeering of a state legislature (*e.g.*, *New York*). Because a host of federal programs impose regulatory burdens on local governments and offer no financial offsets whatever, these impositions appear to meet the totally unfunded mandate that is commandeering. The public interest litigator has a rich field of plaintiffs to mine.

Another wrinkle on the arm-of-the-state sovereignty rises from a Ninth Circuit case. In *Burbank-Glendale-Pasadena Airport Auth. v City of Burbank*,<sup>102</sup> Judge Kozinski's concurring opinion suggested that empowering state officials to bring a preemption claim in federal court against local governments might be commandeering. One might ask whether a state action to strike a local ordinance on the grounds that federal law preempts the local ordinance can be dismissed for on the basis that the state does not have the authority to stand in the shoes of the federal government, at least as regards a preemption claim. The state can enforce the federal rule, but would not be able to argue a preemption element.

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<sup>97</sup> 469 U.S. 528, 551–52 (1985) (political process, not courts, should protect state sovereignty).

<sup>98</sup> 505 U.S. 144 (1992).

<sup>99</sup> 521 U.S. 898 (1997).

<sup>100</sup> 524 U.S. 206 (1998).

<sup>101</sup> *West v. Anne Arundel County*, 137 F.3d 752, 758 (4th Cir. 1998) (*cf. id.* "That "distinction is peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity.").

<sup>102</sup> 136 F.3d 1360, 1364–65 (9th Cir. 1998).

## 5.2. Citizen Plaintiffs

Direct federal mandates on individuals do not often involve state sovereignty, but they can. Until 2011 there had been a significant split in the Circuits as to whether the individual burdened by a federal mandate could bring a commandeering complaint in those cases where there did appear to be a facial commandeering of state resources. *Bond v. United States* has resolved the matter.<sup>103</sup> Where a federal mandate commandeers a state or its officers to the detriment of an individual, that individual has standing to assert the constitutional claim. Because some federal litigators may seek to narrow *Bond* and rely on older cases, the following excerpt from *Bond* identifies the conflicting lower court decisions that have now been supplanted.

To conclude that petitioner lacks standing to challenge a federal statute on grounds that the measure interferes with the powers reserved to States, the Court of Appeals relied on a single sentence from this Court's opinion in *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 59 S. Ct. 366, 83 L. Ed. 543 (1939). See 581 F.3d, at 136-138. As the Court of Appeals noted here, other Courts of Appeals have taken a similar approach. E.g., *United States v. Hacker*, 565 F.3d 522, 525-527 (CA8 2009); *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971-972 (CA9 2009) v. *Legal Servs. Corp.*, 552 F.3d 965, 971-972 (CA9 2009); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 234-235 (CA2 2006); *Medeiros v. Vincent*, 431 F.3d 25, 33-36 (CA1 2005); *United States v. Parker*, 362 F.3d 1279, 1284-1285 (CA10 2004). That approach is in tension, if not conflict, with decisions of some other Courts of Appeals. See *Gillespie v. Indianapolis*, 185 F.3d 693, 700-704 (CA7 1999); *Metrolina Family Practice Group, P. A. v. Sullivan*, 767 F. Supp. 1314 (WDNC 1989), *aff'd* 929 F.2d 693 (CA4 1991); *Atlanta Gas Light Co. v. United States Dept. of Energy*, 666 F.2d 1359, 1368, n. 16 (CA11 1982); see also *United States v. Johnson*, 632 F.3d 912, 918-921 (CA5 2011) (reserving issue); *Lomont v. O'Neill*, 285 F.3d 9, 14, n. 5, 350 U.S. App. D.C. 357 (CADDC 2002) (same); *Nance v. EPA*, 645 F.2d 701, 716 (CA9 1981) (same).

Tennessee Electric is the appropriate place to begin. It should be clear that Tennessee Electric does not cast doubt on *Bond*'s standing for purposes of Article III's case-or-controversy requirement. This Court long ago disapproved of the case as authoritative respecting Article III limitations. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152-154, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970). In the instant case, moreover, it is apparent--and in fact conceded not only by the Government but also by amicus--that Article III poses no barrier. One who seeks to initiate or continue proceedings in federal court must demonstrate, among other requirements, both standing to obtain the relief requested, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), and, in addition, an "ongoing interest in the dispute" on the part of the opposing party that is sufficient to establish "concrete

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<sup>103</sup>*Bond v. United States*, 131 S. Ct. 2355, 2361 (U.S. 2011).

adverseness.” *Camreta v. Greene*, 563 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2020, 179 L. Ed. 2d 1118, 1125 (2011) (internal quotation marks omitted).<sup>104</sup>

The Court held that Bond had standing and could argue that the burden placed on her because of the federal law constituted impermissible commandeering of state sovereignty with regard to its sole and sovereign right to implement state prison policies.

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<sup>104</sup>*Id.*

## Chapter 6 – The Litigation Framework

This section is a very brief refresher on litigation practice, highlighting only those practice elements particularly important to a commandeering complaint.

### 6.1. Article III Standing

The Supreme Court's "standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement ... and prudential standing which embodies judicially self-imposed limits on the exercise of federal jurisdiction."<sup>105</sup> To have Article III standing, "[t]he plaintiff must show that the conduct of which he complains has caused him to suffer an 'injury in fact' that a favorable judgment will redress."<sup>106</sup> This standard has been anatomized into three elements. A plaintiff must allege: (1) a concrete and particularized, actual or imminent injury, (2) which is fairly traceable to defendant's conduct, and (3) which a favorable court decision will redress.<sup>107</sup>

#### 6.1.1. Injury

An injury in fact must be "a palpable and distinct harm" that, even if "widely shared", "must affect the plaintiff in a personal and individual way."<sup>108</sup> In commandeering cases, the plaintiff must show the commandeering in terms of state or local resources compelled to be used. The factual basis is that which is commandeered, whether that is a person, a revenue stream or a sovereign opportunity.

#### 6.1.2. Traceability

The traceability prong "focuses on who inflicted [the] harm."<sup>109</sup> While "[t]he plaintiff must establish that the defendant's challenged actions, not the actions of some third party, caused the plaintiff's injury[,] ... [t]his causal connection need not be as close as the proximate causation needed to succeed on the merits of a tort claim," and "an indirect causal relationship will suffice."<sup>110</sup> In commandeering litigation, government attorneys will argue that the harm done is incidental and from a generalized mandate.<sup>111</sup> They will raise this issue both in challenges to standing and in the merits arguments as to whether the statute at issue meets

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<sup>105</sup>Elk Grove Unified Dist. v. Newdow School, 542 U.S. 1, 11 (2004)(internal quotation marks omitted).

<sup>106</sup>*Id.* at 12.

<sup>107</sup>Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville, 508 U.S. 656, 663–64 (1993).

<sup>108</sup>Toll Bros., Inc. v. Twp. of Readington, 555 F.3d 131, 138 (3d Cir. 2009) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n. 1 (1992)).

<sup>109</sup>*Toll Bros.*, 555 F.3d at 142.

<sup>110</sup>*Id.*

<sup>111</sup>See Section 4.4, *supra*.

the relevancy test under the spending clause. The arguments are identical and can be expected to be raised first on a challenge to standing in a FRCP Rule 12(b)(6) motion.

### **6.1.3. Redressability**

The final Article III standing element, redressability, “does not demand mathematical certainty,” but does require “a ‘substantial likelihood’ that the injury in fact can be remedied by a judicial decision.”<sup>112</sup> Striking a statute or regulations would usually meet this test, the common outcome of a successful commandeering claim.

## **6.2. Prudential Standing**

The prudential standing doctrine encompasses various situations in which a federal court may choose not to exercise jurisdiction even though a party has established Article III standing.<sup>113</sup> In general, courts apply three prudential standing rules: (1) the plaintiff must assert his, her, or its own rights rather than asserting the legal rights of others; (2) the court should decline to hear “generalized grievances” based on abstract injuries; and (3) the plaintiff’s claims must fall within the “zone of interest” to be protected by the constitutional guarantee in question.<sup>114</sup>

### **6.2.1. Assertion of Rights**

Under the first test, a plaintiff must assert his own rights, not the rights of a third-party.<sup>115</sup> The most frequent failure under this test is the “taxpayer” suit. In *Warth*, taxpayers who potentially suffered increased taxes resulting from defendant’s zoning practices were barred by the third-party prudential standing rule because they were asserting the rights or legal interest of third-parties in order to obtain relief from injury to themselves.<sup>116</sup> The Court anchored its holding on the facts that the *Warth* taxpayers were not themselves subject to the allegedly unconstitutional practice, and they did not have any relationship with the third parties whose rights were allegedly violated.<sup>117</sup> This test will not be at issue if the state or arm of the state is the plaintiff. Nor, in a case like *Bond* will this be a problem. As discussed below, this test may be significant where a case is brought by a public interest law center on behalf of an association of individuals.

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<sup>112</sup>*Id.* at 143 (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000)).

<sup>113</sup>*Warth v. Seldin*, 422 U.S. 490, 498 (1975).

<sup>114</sup>*Valley Forge Christian College v. Americans United*, 454 U.S. 464, 474–75 (1982).

<sup>115</sup>*Id.*

<sup>116</sup>*Warth*, 422 U.S. at 509.

<sup>117</sup>*Id.* at 510.



### 6.2.2. Generalized Grievances

The second prudential test also occurs in rate-payer and tax-payer cases. “The party who invokes the power [of the judiciary] must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. In short, the court must find that the plaintiff’s grievance is ‘a direct dollars-and-cents injury’ not just a ‘clash of interests’ that may nevertheless be ‘real and ... strong.’”<sup>118</sup> If a commandeering plaintiff can meet the Article III standing requirement to show injury, it will meet this prudential standing test. For the governmental plaintiff, this consists of showing what is commandeered.

### 6.2.3. Zone of Interest

The final prudential standing rule requires the plaintiff’s interests to arguably fall within the “zone of interests” intended to be protected by the constitutional provision upon which the claim is based.<sup>119</sup> Although the zone of interests “test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit[,] [t]he test is not meant to be especially demanding.”<sup>120</sup> All that is necessary to overcome the “not especially demanding” zone of interest test is that the plaintiff’s interests be “marginally related to,” and not “inconsistent” with, the interests intended to be.<sup>121</sup> It will not pay to attempt to force a case into the commandeering litigation box unless there is some actual commandeering. If there is, this test is a very low hurdle.

## 6.3. Associational Standing

An organization may establish standing when: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit.”<sup>122</sup> Although commandeering cases have been brought by states, arms of the states, local officials and citizens suffering from the loss of state sovereignty, no cases have been brought by organizations of states, counties, cities or similarly situated officials. But, they could be. Indeed, under the facts of *Bond*, even an association of prisoners might qualify for associational standing.

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<sup>118</sup>*Valley Forge*, 454 U.S. at 478 (citing *Frothingham v. Mellon*, 262 U.S. 447, 448 (1923)).

<sup>119</sup>*Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

<sup>120</sup>*Clarke v. Secs. Indus. Ass’n*, 479 U.S. 388, 399 (1987).

<sup>121</sup>*Id.* at 399; *see also* *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. at 153.

<sup>122</sup>*Hunt v. Washington State Apple Advertizing Comm’n*, 432 U.S. 333, 343 (1977). *See also* a more recent case: *United Food and Commercial Workers v. Brown Group*, 517 U.S. 544, 557 (1996).

A public interest law center seeking to pare back federal over-reach may find it cost-efficient to bring such a case on behalf of an appropriate association, thus spreading the cost of litigation over a larger group and addressing a problem that likely would have multi-jurisdictional effect. This would also allow for forum shopping, especially if it were possible to get into the Fourth Circuit, the one circuit that appears ready to entertain coercion cases.

#### **6.4. No Harm No Foul Standing Issues**

One element of standing that has affected commandeering claims, and which deserves special mention here, is the “injury in fact” element of Article III standing, where there may be a federal mandate but the state has not actually taken any action as a result of the mandate. In *U.S. v. Hall* the court held that since the states had no need to implement a federal law that mimicked the existing state law and there was no evidence the state took any actions under the federal law, there could be no commandeering and hence no standing to claim commandeering.<sup>123</sup> If a litigator makes a claim that is fully rebutted by the no harm no foul defense, this would likely be raised either as a standing issue or in a FRCP Rule 12(b)(6) motion and surely the claim would be struck. Hence, a litigator wants to be certain the federal law impinged on the state, something that ought be obvious during the analysis of standing.

#### **6.5. Notice pleading**

Although a commandeering claim can be brought in a state court, federal attorneys will seek its removal to federal court and because the matter is a federal constitutional question, it would not be unusual or unexpected to have the case removed from the state court at the United States’ request. The plaintiff’s litigator should consider the appellate process as well. Strategically, it is helpful to obtain decisions in multiple U.S. Circuit Courts in order to get an issue before the Supreme Court. The route to the Supreme Court from a State court is more difficult. Further, the precedential value of a state supreme court decision is decidedly smaller than a U.S. Circuit Court. As such, this section discusses federal rules of civil procedure as they will be those most likely in effect.

The amount of information required in an initial pleading varies depending on the type of pleading made. For a typical complaint, FRCP Rule 8 requires no more than notice pleading. The plaintiff need only state his claims in general terms without alleging detailed facts to

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<sup>123</sup> *United States v. Hall*, 577 F. Supp. 2d 610, 617 (N.D.N.Y 2008) (*rev’d on other grounds*) (“defendant is unable to show how Congress commandeered the states’ law enforcement officials.”). *And see*, *Zuniga*, 2008 U.S. Dist. LEXIS 41474, 2008 WL 2184118, at \*20 (holding defendant’s Tenth Amendment challenge to SORNA failed because “Nebraska has not implemented any provision of SORNA, and there is no evidence that Utah has made any changes in response to SORNA.”); and, *United States v. Utesch*, No. 2:07-CR-105, 2008 U.S. Dist. LEXIS 19834, 2008 WL 656066, at \*15 (E.D. Tenn. March 6, 2008) (rejecting defendant’s Tenth Amendment claim because neither of the states in which defendant had lived changed their registration requirements after SORNA’s enactment. Therefore, defendant has failed to show an encroachment of federal power upon state sovereignty, and his Tenth Amendment challenge must fail.).

support each claim, and with little factual detail. Federal Rules of Civil Procedure, and specifically Rules 7-10 apply.

As a tactical matter, however, a detailed complaint is useful, especially if the initial pleading is for declaratory relief. In addition to the FRCP, local courts have their own rules. Thus, for example, the D.C. District Court allows, but disfavors, lengthy exhibits to initial pleadings, and recommends initial filings be brief and to the point. Other courts are less restrictive, but all expect careful attention to their rules.

#### **6.5.1. Factual statements and proof requirements**

The discussion on the limits to a commandeering claim provided in previous sections should frame the complaint or motion for declaratory judgment. The federal attorneys will deny every averment unless it constitutes nothing more than citation to a statute or regulation. They will not “answer” any statement of law. With this in mind, one might offer the briefest possible complaint. Strategically for the case, that would reduce the power of the initial complaint for no good reason.

The plaintiff’s initial filing is typically the first document ready by the court. It should contain a powerful, clear, logical statement of the case. It should identify the offending statute or regulation, explain its effect on the state, identify the exact nature of the commandeering and define the sovereignty of the state in that matter. The pleading should frame the issues in light of the commandeering case law without necessary reference to that law. Where the case is intended to raise fresh issues of first impression, the pleading should lead the court through the established issues and directly to the new issue. Commandeering cases are rare and controversial. The initial pleading needs to display the gravamen of an important constitutional case. A general pleading rule of particular importance in these kinds of cases is that the initial pleading makes an indelible first impression of the plaintiffs and their complaint and thus must give the court confidence in the merits of the case.

#### **6.5.2. *Yeskey* failure to raise issues**

An important early decision a litigator must make involves the scope of the case the plaintiff will put to the court. Traditionally, public interest lawyers use the gumbo-against-the-wall approach. They make every possible claim and see what sticks. While traditional, it carries with it a heavy briefing burden and the court will not enjoy being the one to impose discipline on the case, rather expecting attorneys to do so as a normal part of their job. Alternatively, too narrow a complaint may result in failure to include an issue that would otherwise have resulted in striking the offending federal law.

Strategic litigation may require limitation of claims in order to get a specific issue before the court, but to frame a case too narrowly may eliminate the opportunity to make equally important new law under a different theory. In general, if the court can avoid constitutional questions, it will. Thus, if you raise a constitutional question, you will want to ensure your

factual case does not contain a basis for resolving the dispute on non-constitutional grounds. That should not, however, limit address of other issues whose resolution would not allow the court to ignore your primary issue; or, alternatively, would allow the court to address an equally important strategic issue, even if it left your primary issue unaddressed.

*Yeskey*, gives an example of too narrow a pleading. In that case the plaintiffs sought to limit the reach of the Americans with Disability Act (ADA) and relied on the “cannon of construction that absent an ‘unmistakably clear’ expression of intent to ‘alter the usual constitutional balance between the States and the Federal government,’ [the court] will interpret a statute to preserve rather than destroy the States’ ‘substantial sovereign powers.’”<sup>124</sup> Before the Supreme Court, plaintiff-petitioners raised a new issue, whether the ADA was a constitutional exercise of Congress’s power under the Commerce Clause, citing to *Printz* and *Garcia*. The Court chose not to consider the argument because it had not been raised at trial or at the appellate level.<sup>125</sup> The trial litigator could not have known his complaint would end up on Justice Scalia’s desk – a Justice looking for *Printz*-like cases.

In commandeering cases, one ought hope one’s case does contain issues the Court wants to address and can profitably plead any issues that would result in protection of state sovereignty. Strategic cases, however, need to be as clean and narrow as possible.

## **6.6. Causes of action**

Litigators have a modicum of choices on how to bring their cases to court, limited mostly by when they choose to file. If a statute has been passed, but the plaintiff wants to prevent the impacts of commandeering, one can seek declaratory relief. If the statute is in place, but wishes to give the federal government an opportunity to fix the problem, the plaintiff can petition for a change and file if the petition is denied. Finally, in the case where sovereignty is commandeered through regulation, the plaintiff can participate in the rulemaking process and then challenge the rule in the appeal period following its final promulgation.

### **6.6.1. Declaratory Relief**

The Federal Declaratory Judgment Act establishes a right to seek a declaration of the court as to the status of a law or regulation:

In a case of actual controversy within its jurisdiction, \* \* \* any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief

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<sup>124</sup>*Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 208–09 (1998) (citing *Gregory v. Ashcroft*, 501 U. S. 452, 460–61 (1991)).

<sup>125</sup>*Id.* at 213 (citing *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970); *Dothard v. Rawlinson*, 433 U. S. 321, 323, n. 1 (1977); and *Duignan v. United States*, 274 U. S. 195, 200 (1927)).

is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.<sup>126</sup>

The Federal Rules implement this statute through FRCP Rule 57.

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. §2201. \* \* \* The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

The Advisory Committee Notes offers some additional, helpful information.

The fact that a declaratory judgment may be granted “whether or not further relief is or could be prayed” indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will “terminate the controversy” giving rise to the proceeding. Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion.

The “controversy” must necessarily be “of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts.” *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 325, 56 S.Ct. 466, 473, 80 L.Ed. 688, 699 (1936). The existence or nonexistence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited. A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

When declaratory relief will not be effective in settling the controversy, the court may decline to grant it. But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. The demand for relief shall state with precision the declaratory judgment desired, to which may be joined a demand for coercive relief, cumulatively or in the alternative; but when coercive relief only is sought but is deemed ungrantable or inappropriate, the court may *sua sponte*, if it serves a useful purpose, grant instead a declaration of rights. *Hasselbring v. Koepke*, 263 Mich. 466, 248 N.W. 869, 93 A.L.R. 1170 (1933). Written instruments, including ordinances and statutes, may be construed before or after breach at the petition of a properly interested party, process being served on the private parties or public officials

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<sup>126</sup>28 USC § 2201 - Creation of remedy.

interested. In other respects the Uniform Declaratory Judgment Act affords a guide to the scope and function of the Federal act. Compare *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461 (1937); *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249 (1933); *Gully, Tax Collector v. Interstate Natural Gas Co.*, 82 F.(2d) 145 (C.C.A.5th, 1936); *Ohio Casualty Ins. Co. v. Plummer*, 13 F.Supp. 169 (S.D.Tex., 1935); Borchard, *Declaratory Judgments* (1934), *passim*.

These notes should be followed with care when formulating the initial pleading. With regard to commandeering, the facts necessary to support the motion should be as complete as possible as the Court may treat the initial pleading as a motion, giving you only a reply brief through which to make any additional points.

A motion for declaratory judgment can be combined with some other plea. In so doing, the litigator creates the opportunity for discovery and other opportunities that have the potential for strengthening the declaratory judgment motion. One such claim might be a commerce clause claim.

### **6.6.2. Petition**

The First Amendment to the U.S. Constitution provides a right to “petition the Government for a redress of grievances.” This is an extremely powerful tool, in part because of the breadth of its scope. The word “government” covers a lot of territory. It has limits, however. “Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues.”<sup>127</sup>

So, a petition can speak but the government has no duty to listen. But often they do. Indeed, frequently federal agencies grant, deny or deny in part petitions for reconsideration of rules or petitions asking them to take other specific actions. If the agency evidences an adverse decision with regard to the petition, a petitioner can get into court and under very favorable conditions. Where an agency takes a final action, including any decisions about a petition, under the Administrative Procedure Act (APA) that final action is subject to judicial review. APA § 706 controls the judicial review:

#### USC § 706 - Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

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<sup>127</sup> *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984).

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The strength of a petition-litigation process is that it is typically very amenable to settlement and one that only involves the petitioner and the Agency, as discussed below.

From the perspective of the litigator, the petition needs to build the “record” that will be the basis of the judicial review. There will be no discovery allowed, so the petition must go beyond notice pleading. The Agency can and usually does place additional information into the record of its decision regarding the petition. There is rarely any form of public comment provided in these processes, so the record will be only what the petitioner and the agency submit and that will be the extent of the “facts” before the court. Failure to include all facts needed to prove the commandeering allegation will leave the petitioner in an impossible position as the court will not accept any further addition to the record.

### **6.6.3. Regulatory challenge**

Following promulgation of regulations, the court will entertain challenges to the rules. Some statutes specify the form and timing of such judicial review. In other cases, the APA controls. Time is of the essence of these actions, so any challenge of a rule must be done within the allowed time and the litigator should be prepared to file long before the agency is finishing promulgation of its rule.

Constitutional challenges during judicial review of a rule are always within the jurisdiction of the reviewing court, but it is highly advisable to submit a comment to the record during the regulatory process, thus forcing the agency to confront the issue early and to reveal its legal theories regarding whether its law and rules cause commandeering.

Unlike the petition process, the challenge to a rule begins with no more than notice pleading. Although there is no discovery, the merits briefs follow the initial pleadings and it is not necessary to reveal all legal theories and facts until preparation of the merits briefs. How to prepare a regulatory challenge is beyond the scope of this discussion and a public interest law firm considering entering this practice area will want to seek experienced regulatory counsel early in the regulatory process to ensure the case is well set up by the time the rule is promulgated and then challenged.

### **6.7. Settlement practice**

Legal disputes need not require adjudication, but resolutions of disputes against the federal government deserve the majesty of enforceable court orders and consent decrees. Without an enforceable order the federal government cannot be held to its side of the bargain. Thus, whether filing a motion for declaratory judgment, litigating a response to a petition or challenging a regulation, settlement is a cost-efficient means to resolve the dispute.

Where the dispute involves the need to strike a law, settlement will not avail. Only the court can strike a law and only through adjudication. Regulations, however, are subject to revision under a court-ordered consent decree. Further, where the commandeering is regulatory rather than statutory, settlement can be very desirable because of the considerable latitude in the form of the settlement and the limitation on participation in such efforts.

Although a plaintiff may allege a specific rule commandeers state sovereignty, there may be many other changes to similar rules that can be incorporated into the settlement. Further, the federal government may be willing to change spending levels or otherwise waive related requirements and mandates in order to craft a constitutional mandate.

Notably, the parties engaged in the settlement are only those who are party to the legal proceeding. Absent intervenors, that means the plaintiffs are on one side of the table and the federal government is on the other side. This tends to favor a negotiating strategy that need not accommodate parties seeking even more extreme commandeering than the federal agency itself would demand. The only opportunity that third parties have to engage in the process is a 30 day period after submission of the consent decree to the court. During that time the public may make comment to the court on the agreement. Rarely, however, does the court moot an agreement to which the federal government has reasonably agreed.

The next chapter concludes this treatise, discussing a specific regulatory action that appears to unconstitutionally commandeer a local government.



## Chapter 7 – Case Study on Environmental Commandeering

In June, 1999, Judge T.S. Ellis of the U.S. District Court for the Eastern District of Virginia entered a consent decree between the U.S. Environmental Protection Agency and the American Canoe Association.<sup>128</sup> This decree required EPA to establish enforceable water pollution “Total Maximum Daily Limits” (TMDLs) for rivers and streams in Virginia whose water quality was “impaired”, but only in the event Virginia itself did not establish those standards. Included in the list of streams covered by this decree is Accotink Creek, an urban stream in Fairfax County, Virginia. Virginia proposed a TMDL for Accotink Creek, but EPA refused to approve it and thus was duty bound to prepare one itself. On April 18, 2011 EPA published the final standard, one that, according to EPA, Virginia is required to adopt and implement through a water quality permit Fairfax County is required to obtain from the State.<sup>129</sup> As a result of this decree, Fairfax County would become responsible for limiting the amount of rain water entering the stream.

This case study examines the legal argument that EPA, by imposing an unfunded mandate on Fairfax County, has violated the County’s sovereignty, an unconstitutional act under the 10<sup>th</sup> amendment.

Accotink Creek is one stream within a single watershed. There are 30 watersheds within the county. Many of these watersheds require attention and to that end Fairfax County has established watershed plans that would require \$47 million over 10 years to build the structural projects needed to address the watershed problems countywide.<sup>130</sup> To cover the cost of this effort, the County established a fund allocated \$5 million per year, thus planning to address all its watershed physical problems within 10 years. In comparison, to meet the Accotink Creek TMDL EPA has set, Fairfax County would need to expend in excess of \$400 million.<sup>131</sup> If compliance with the new standard were completed over a five year period, Fairfax County would need to increase its watershed budget by 1,600 percent and dedicate all such funds to Accotink Creek. Alternatively, the County could take 80 years to complete Accotink project implementation, again dedicating all such funds to this single creek, abandoning all efforts on the rest of the 30 watersheds, many in considerably greater need of attention.

This massive unfunded federal mandate on an arm of the Commonwealth of Virginia begs for relief from the federal commandeering of the county officers, offices and revenue stream.

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<sup>128</sup> *American Canoe Association, Inc. et al. v. U.S. Environmental Protection Agency, et al.*, Civil Action No. 98-979-A (U.S. Dist. Ct. Eastern District of Virginia) (Consent Decree entered June 11, 1999)

<sup>129</sup> Letter from Jon Capacasa, Director EPA Region III Water Protection Division to Ellen Gilinsky, Ph.D., Director Division of Water Quality Programs, Virginia Department of Environmental Quality (April 18, 2011).

<sup>130</sup> Fairfax County Department of Public Works and Environmental Services, “Watershed Management in Fairfax County”, October 29, 2008 <http://www.slideserve.com/makya/watershed-management-in-fairfax-county> (accessed 5/22/2012).

<sup>131</sup> Schnare, D.W., In re: U.S. EPA Agency Report, Draft Benthic TMDL Development, Accotink Creek, Virginia, “Public Comment and Request for Correction” June 2010, p.22.

## 7.1. A Water Pollution Primer

More than a century ago, the common law in Virginia established that streams serve the purpose of draining stormwater and that:

"When the population becomes dense, and towns or villages gather along its banks, the stream naturally and necessarily suffers still greater deterioration. Roads and streets crossing it, or running by its side, with their gutters and sluices discharging into it their surface water collected from over large spaces, and carrying with it in suspension the loose and light material that is thus swept off, are abundant sources of impurity, against which the law affords no redress by action."<sup>132</sup>

Until 1972, States had sole authority to limit pollution of their rivers and streams. In 1972, Congress enacted the Clean Water Act, superseding previous federal laws and establishing a requirement that anyone discharging water containing pollution from a "point source" must first obtain a federally enforceable permit, one typically issued by the state under a state-federal partnership.

Virginia entered into such a partnership and updated its own laws to implement the federal mandate. Following the federal lead, Virginia defined a point source broadly, to include the discharge from any kind of pipe or culvert. In so doing, it superseded the old common law and incorporated rain water run-off (stormwater) as a discharge.

It is important to understand, however, that despite Federal law, Virginia has reserved the right to determine what constitutes a pollutant subject to regulation under state permits. The U.S. Environmental Protection Agency (EPA) reserves to itself, under authority of the Clean Water Act, the authority to define pollutants subject to regulation and enforcement under the partnership. Notably, neither Virginia nor EPA has ever designated water as a pollutant (of water).

This case study involves the problem associated with increased flows of water into streams due to increased impervious surface associated with development. Roads, roofs and driveways do not allow water to soak into the ground and stormwater sewers channel that runoff water through culverts and into streams. Although such waters have long been known to carry pollutants with them, this case study involves no such pollutant.

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<sup>132</sup> *Trevett v. Prison Ass'n of Virginia*, 98 Va. 332, 337 (Va. 1900).

When water rushes downstream, it has the potential to erode the sides of streambeds. Notably, while the water belongs to the Commonwealth of Virginia, the “water course” or streambed is land and usually belongs to a private party. The erosion of dirt from the land causes that dirt to wash downstream, only to settle on the bottom of the stream somewhat distant from where it came. This dirt is called “sediment” and can be measured by taking a water sample, letting it settle or otherwise filtering it out to determine its concentration and mass. Because this sediment can smother organisms that live on the streambed, and which are the bottom of the food chain for fish, both EPA and Virginia seek to control the amount of sediment allowed in the water.

Note, however, this sediment that enters the water because of erosion of streambeds ***never passes through a culver or pipe*** and thus never arises from a point discharge. Such sediment is from a “non-point” source – the streambed – and thus is cannot be controlled under a point source discharge.

EPA wishes to ignore this fact, avoiding it by arguing that water, itself, can be a pollutant or at least can serve as a surrogate for a pollutant, specifically, “reductions for a surrogate (stormwater runoff) are established to achieve the necessary reductions for the pollutant of concern (sediment).”<sup>133</sup> EPA simply ignores that the sediment in question does not enter the stream through a point source and thus not subject to point source controls or permits.

As explained in the following sections, and because neither EPA nor Virginia defines water as a pollutant, EPA’s approach violates both its authority under the Clean Water Act, and the Constitution by imposing on Fairfax County an unfunded mandate to reduce the flow of water allowed into Accotink Creek through its stormwater sewers.

## **7.2. Statutory Background**

The objective of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.<sup>134</sup> More specifically, the Act declares it is the national goal that wherever attainable, the U.S. Environmental Protection Agency (EPA), acting through the states and localities, protect the health and propagation of fish, shellfish, and wildlife and provide for recreation through control of both point and nonpoint sources of pollution.<sup>135</sup> By extension, this objective includes protection of the food chain of fish, shellfish and wildlife living in those waters. The bottom of the food chain consists of organisms living on the bottom of these waters, commonly called benthic organisms.

The State-Federal regulatory “partnership” addresses the national objectives, in part, through identification of “impaired” waters, establishment of Total Maximum Daily Loads

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<sup>133</sup> U.S. EPA, “TMDL for Benthic Impairments in the Accotink Creek Watershed”, p. E-3 (April 18, 2011).

<sup>134</sup> See, Clean Water Act §101(a), 33 U.S.C. §1251(a).

<sup>135</sup> *Id.*

(TMDLs) for each such impaired water, and development of an implementation plan by which to restore the water to a point where it is no longer impaired. The state has the lead responsibility for developing the TMDLs and the implementation plans. In the event the state fails to take these actions, EPA is required to do so not only as a function of the *American Canoe* consent decree but as a matter of federal law.<sup>136</sup>

Where pollution arises from a “point source”, the state issues a permit that limits that pollution. Again, if the state does not issue such permits, EPA must do so. In contrast, states have the sole responsibility for addressing pollution from “non-point” sources, which they do through impaired waters implementation plans, among other means. EPA has repeatedly reiterated the dominance in the state role with regard to water quantity management activities, especially as they affect water quality.<sup>137</sup> Its official policy statement on the state role:

“The question touches on the delicate balance created in the statute between protection of water quality to meet federal water quality goals, and the management of water quantity left by Congress in the hands of States and water resource management agencies.”<sup>138</sup>

Notably, the Clean Water Act limits EPA’s authority to enforce the Act.<sup>139</sup> EPA may enforce for violations of point-source permits or for failure to otherwise take action required by the Act. Thus, EPA can enforce the Act against a state for failure to prepare a non-point source implementation plan, if the state has accepted legal responsibility to do so. But EPA has no authority to force a state to be successful in carrying out that plan. Even in the case where the state fails to develop an acceptable TMDL or implementation plan, the Act does not contemplate an enforcement action, but instead simply places a responsibility on EPA to write the TMDL and implementation plan, as memorialized in the 1999 Consent Decree. Nothing in the Act gives EPA authority to force private parties or municipalities to take action under an implementation plan, unless it is specifically related to a point source permit.

EPA takes as much latitude in this authority as it can. Thus, it has concluded that water collected in storm drains constitutes a discharge from a “point source” and thus, according to EPA, the owner of those drains must obtain a point-source permit. In the case of storm water, these permits are called Municipal Separate Storm Sewer System permits, or MS4 permits. In case of the Accotink stream, it is EPA’s TMDL that EPA requires the state to insert into Fairfax County’s MS4 permit.

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<sup>136</sup> Clean Water Act §303(d), 33 U.S.C. §1313.

<sup>137</sup> U.S. EPA, *Agency Interpretation on Applicability of Section 402 of the CWA to Water Transfers*, Memorandum from Ann Klee, General Counsel, and Benjamin Grumbles, Assistant Administrator for Water, to Regional Administrators, August 5, 2005.

<sup>138</sup> *Id.* (emphasis added).

<sup>139</sup> Clean Water Act §309, 33 U.S.C. §1319.

To make this point extremely clear, EPA has forced Fairfax County to comply with a federal mandate. Fairfax County has received no funding under the Clean Water Act to comply with the MS4 permit. EPA has commandeered Fairfax County's entire storm revenue stream. Under *Printz*, this tramples Fairfax County's sovereignty and is unconstitutional.

### **7.2.1. Relevant Statutory Provisions**

State and federal law and regulations create the law that EPA claims authorizes and requires inclusion of its Accotink Benthic TMDL into the MS4 permit for Accotink Creek. Tracing these statutory and regulatory provisions demonstrates that EPA has imposed an unfunded mandate that requires Fairfax County to implement a federal program – one not imposed by or even through Virginia. This violates the *Printz* rule that "The Federal Government may not compel the States to enact or administer a federal regulatory program."<sup>140</sup> This section shows EPA's legal missteps.

Section 303(d) of the Clean Water Act (CWA), 33 U.S.C. §1313(d), and EPA's implementing regulations at 40 C.F.R. §130.7(b)-(e) require each State to (1) identify those State waters that it expects will fail to achieve applicable water quality standards after application of technology-based effluent limitations and other controls; (2) establish a priority ranking for such waters; and (3) establish total maximum daily loads (TMDLs) for pollutants for which those waters are not in attainment with water quality standards.

Virginia implements this federal mandate through various statutes and titles. It authorizes the State Water Control Board to adopt TMDLs and related criteria and standards by major river basin, but it does not automatically accept TMDLs prepared by EPA.<sup>141</sup> It controls stormwater "point sources" through Title 4, Chapter 60 Virginia Stormwater Management Program (VSMP) Permit Regulations that apply to the MS4 permitting program. That Chapter defines TMDL as:

"Total maximum daily load" or "TMDL" means the sum of the individual wasteload allocations for point sources, load allocations (LAs) for nonpoint sources, natural background loading and a margin of safety. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. The TMDL process provides for point versus nonpoint source trade-offs.<sup>142</sup>

This chapter defines WLA's as:

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<sup>140</sup> 521 U.S. at 933.

<sup>141</sup> 9VAC24-720-20.

<sup>142</sup> 4VAC50-60-10.

"Wasteload allocation" or "wasteload" or "WLA" means the portion of a receiving surface water's loading or assimilative capacity allocated to one of its existing or future point sources of pollution. WLAs are a type of water quality-based effluent limitation.

Virginia defines "load allocation" (LA), "load or loading" and "nonpoint source" as follows:

"Load or loading" means the introduction of an amount of matter or thermal energy into a receiving water. Loading may be either man-caused (pollutant loading) or natural (background loading).

"Load allocation (LA)" means the portion of a receiving water's loading capacity attributable either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished.

"Nonpoint source" means a source of pollution, such as a farm or forest land runoff, urban storm water runoff, mine runoff, or salt water intrusion that is not collected or discharged as a point source.<sup>143</sup>

Load allocations are those loadings that do not enter the stream through a point source. They are, by definition, non-point sources or natural background sources. They are accounted for in an MS4 permit, but they are not controlled by the permit. They serve as the baseline pollution contributions to the stream, unaddressable and uncontrollable through point source controls or permits.

Erosion of stream banks is, in part, a natural event that has happened long before the advent of major human development near streams and rivers.<sup>144</sup> But, there is no question that increased flow of stormwater due to human development causes erosion that would not have happened naturally. This human-caused erosion may not be natural but remains a nonpoint source load because it emerges from the stream bank directly into the stream, never passing through ("discharged as") a point source.

Under the Clean Water Act, reduction of load allocations are left to the sole discretion of the state and are addressed through the CWA Section 319 Nonpoint Source Pollution Management Program (NSPMP) (33 U.S.C. § 1329). Under this section of the Act, EPA's sole

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<sup>143</sup> 9VAC25-720-10.

<sup>144</sup> See, e.g., *Arkansas v. Tennessee* - 246 U.S. 158 (1918) where normal river flow severed a meander of the Mississippi River, depositing a small Tennessee village on the Arkansas side of the river. The Court discussed the nature of natural erosion and its lack of relationship to human activities.

means for requiring address of LA's is by withholding funds or approving an NSPMP submitted by local government acting for the state over the lands within its jurisdiction. Only the state has the authority to limit LAs, and does not do so through an MS4 permit.

The existing MS4 permit for Accotink Creek acknowledges this limitation, authorizing specified "existing and new storm water point source discharges to waters of the state from those portions of the Municipal Separate Storm Sewer System owned or operated by the permittee."<sup>145</sup> The MS4 permit also includes a "TMDL Reopener" that requires modification of the permit "if any approved wasteload allocation procedure, pursuant to Section 303(d) of the Clean Water Act, imposes wasteload allocations, limits, or other conditions on the facility that are not consistent with the requirements of this permit."<sup>146</sup>

EPA now argues that its Accotink Creek Benthic TMDL wasteload allocation requires modification of the MS4 permit to limit the amount of water entering the creek.

Sediments eroded from the banks of watercourses are not discharged into water through point sources. Thus, the sediments causing problems in Accotink Creek are not properly included in wasteload allocations (WLAs) for point source discharges. These sediments must be included in the Load Allocation (LA), the loadings from "non-point sources".

Because EPA uses stormwater discharge as a surrogate for sediments, it bypasses the need to allocate sediment to either a point source WLA or to the portion of the "pollution" attributable to non-point sources and not subject to an MS4 permit. If EPA wished to continue its illusion that water is a surrogate for the "sediment pollutant", it would have to recognize that the only sediment at issue is that sediment passing through the stormwater culverts. While there is some small amount of such sediment, EPA has not estimated what that might be, and it is certainly not the sediment resulting from erosion of the streambed. Thus, the EPA "water as a surrogate for point source sediment pollution" would result in a very tiny WLA as compared with the non-point source LA.

### **7.2.2. Collateral Statutory provisions**

Although the Title 4 provisions of the Virginia Stormwater Management Program control the MS4 permit, Title 9 (General Virginia Pollutant Discharge Elimination System) contains general policies associated with protecting Virginia waters, some of which buttress the argument that a flow-based TMDL constitutes an unfunded Federal mandate that commandeers Fairfax County sovereignty.

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<sup>145</sup> Permit No.: VA0088587, Effective Date: January 24, 2002, Expiration Date: January 24, 2007, AUTHORIZATION TO DISCHARGE UNDER THE VIRGINIA POLLUTANT DISCHARGE ELIMINATION SYSTEM AND THE VIRGINIA STATE WATER CONTROL LAW, A. DISCHARGE AUTHORIZED UNDER THIS PERMIT, §1. Authorized Discharge (*emphasis added*).

<sup>146</sup> *Id.* at Sec. D (3).

The Virginia Legislature recognizes the tension between maintaining water quality and meeting the needs of a growing population. It specifically addresses this, while emphasizing the state sovereignty, under Title 9.

The State Water Control Board finds that the Virginia water resource policy must be based upon the following broad precepts of natural and man-made law and must recognize natural conditions and the distribution and growth of Virginia's population and industry:

\* \* \*

14. State constitutional provisions, statutes and common law constrain water resources use;
15. Federal constitutional provisions and federal statutes constrain and influence water resources use at state level;<sup>147</sup>

The Legislature also gives specific attention to the economic implications of its water quality policy, limiting those impacts to practicable levels:

The board has established its Water Resources Policy in order to fulfill its statutory responsibilities under § 62.1-44.36 of the Code of Virginia, as follows:

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11. Assure that the management demands of a water resource project do not exceed the capability of that unit of government responsible for its operation and maintenance;<sup>148</sup>

These policies help explain the basis for Virginia rejecting a flow-based TMDL for Accotink Creek. That EPA is not bound by these policies does not ameliorate the sovereignty of both the state and Fairfax County in wishing to address benthic impairments through other means than those demanded by EPA.

Notably, Virginia and Fairfax County had address benthic impairments from sediment on other streams. In those cases, the State established a sediment level measured in tons of sediment per year allowed into the stream.<sup>149</sup> Fairfax County addressed the problem by protecting stream beds with various kinds of bank armor, including placement of rock or rip wrap against highly eroding banks. Because Virginia is sovereign over its own waters, it has the authority to require Fairfax County to control bank erosion, although because such erosion is a non-point source, the mechanism Virginia used may be *ultra vires*, but neither those streams nor Virginia's use of a TMDL on those streams is the subject of this case study and must await another day.

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<sup>147</sup> 9VAC25-390-10 (*emphasis added*).

<sup>148</sup> 9VAC24-390-30.

<sup>149</sup> 9VAC25-720-50 (Establishing three different Total Maximum Daily Sediment Loads, one each for Difficult Creek; Bull Run; and Popes Head Creek).



### 7.2.3. Irrelevant Statutory provisions

At this point, we address a potential argument EPA might make in defense of its TMDL. EPA will likely argue that water is a pollutant or serves as a surrogate for a pollutant and thus, because it is discharged into a stream through a point source, the point source wasteload allocation process applies. The relevant Virginia point source law obviates this issue.

Virginia addresses point source TMDLs and wasteload allocations, in part, through Title 9, Chapter 151, addressing “General Virginia Pollutant Discharge Elimination System (VPDES) Permit For Discharges Of Storm Water Associated With Industrial Activity”.<sup>150</sup> There Virginia defines a TMDL as

“the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards, and an allocation of that amount to the pollutant's sources. A TMDL includes wasteload allocations (WLAs) for point source discharges, load allocations (LAs) for nonpoint sources and/or natural background, and must include a margin of safety (MOS) and account for seasonal variations.”

Note with care that the Chapter 151 definition of TMDL addresses “pollutants” and that the definition is intended to address stormwater discharges associated with industrial activity.

In a separate Title 9 Chapter, Virginia defines pollutants under the title, as:

"Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 USC § 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.<sup>151</sup>

Under its EPA-approved MS4 permit, Fairfax County is required to obtain a VPDES permit to deal with stormwater associated with industrial activity.<sup>152</sup>

Further, under the VPDES program, stormwater is regulated by a VPDES permit if “A discharge which either the board or the regional administrator determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to surface waters.”<sup>153</sup> This code continues,

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<sup>150</sup> 9VAC25-151-10. Definitions (*emphasis added*).

<sup>151</sup> 9VAC25-31-10.

<sup>152</sup> *Op. cite*, Permit No.: VA0088587 at § A(1)(b).

<sup>153</sup> 9VAC25-31-120.

[O]perators shall be required to obtain a VPDES permit only if:

(1) The board or the EPA regional administrator determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern;<sup>154</sup>

The key word in this requirement is the term "discharge", a word defined by code:

"Discharge of a pollutant" means:

1. Any addition of any pollutant or combination of pollutants to surface waters from any point source; or
2. Any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into surface waters from: surface run-off which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a state, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works.<sup>155</sup>

Because the sediment causing the impairment of Accotink Creek comes from the bank of the creek, it does not fall within the definition of a pollutant or within the definition of a discharge of a pollutant. Nor does water, including rain water, fall within the definition of a pollutant.

EPA has no basis for demanding a VPDES permit requirement or the Accotink Creek Benthic TMDL to be incorporated into the MS4 permit, either under Federal or Virginia law.

#### **7.2.4. Federal TMDL Regulations do not apply to an MS4 Permit**

Section 303(d)(2) of the CWA, 33 U.S.C. §1311(d)(2), requires EPA to approve or disapprove a State's Section 303(d) list or TMDL submissions within 30 days of such submission. If EPA disapproves a State's Section 303(d) list or TMDL, then EPA must identify such waters in the State or establish the TMDL for such waters that EPA determines necessary to implement applicable water quality standards.

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<sup>154</sup> *Id.* at §A(7)(a) (*emphasis added*).

<sup>155</sup> 9VAC25-31-10. Definitions.

Section 303(e) of the CWA, 33 U.S.C. § 1313(e), and EPA's implementing regulations at 40 C.F.R. §130.5 require that each State have an EPA-approved Continuing Planning Process (CPP), and that EPA from time to time review each State's CPP in order to ensure that it is at all times consistent with the CWA.

EPA's implementing regulations at 40 C.F.R. §122.44(d)(1)(vii)(A) provide that, when developing water quality-based effluent limits, the permitting authority shall ensure that "the level of water quality to be achieved by limits on point sources is derived from and complies with all applicable water quality standards".

EPA's implementing regulations at 40 C.F.R. §122.44(d)(1)(vii)(B) provide that, when developing water quality-based effluent limits, the permitting authority shall ensure that "effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 C.F.R. §130.7".

CWA Section 303(d)(2) provides that States shall incorporate TMDLs into their current water quality management plans under subsection (e) of Section 303 of the CWA, and hence in the permits issued thereunder.

As discussed above, Virginia, like most states, operates two permitting systems. One is to control pollution from commercial and industrial discharges and municipal waste treatment facilities. This program, regulated by the State Water Control Board under 9VAC25 *et seq.*, controls water pollution under the Virginia Pollutant Discharge Elimination System (VPDES) and requires municipalities to obtain VPDES permits for storm water under limited conditions.

The second permitting more generally controls storm water discharge into streams under the Virginia Stormwater Management Program (VSMP), regulated by the Virginia Soil and Water Conservation Board under 4VAC50-60 *et seq.* To that end, municipalities are required to obtain MS4 permits under this program.

Under the requisite Stormwater Pollution Prevention Plan used to implement Virginia's Stormwater Management program, the State includes limited requirements with regard to TMDLs.

"If a specific WLA for a pollutant has been established in a TMDL and is assigned to stormwater discharges from a construction activity, additional control measures must be identified and implemented by the operator so that discharges are consistent with the assumptions and requirements of the WLA in a State Water Control Board-approved TMDL."<sup>156</sup>

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<sup>156</sup> 4VAC50-60-54 (*emphasis added*).

Note with care that the TMDL only addresses “pollutants”, and as discussed above, water is not a pollutant and sediment eroded from a stream bed is not a discharge. Nor does the TMDL address exclusively construction activity. Nor is EPA’s TMDL a State Water Control Board-approved TMDL.

Virginia Administrative Code references to TMDLs in MS4 permits always include the necessity that they are established by the State Water Control Board, not EPA.<sup>157</sup> Because the Virginia State Water Control Board refused to approve a water flow-based TMDL, much less the EPA TMDL, the MS4 permits cannot include the EPA TMDL wasteload allocations or load allocations.

### **7.3. Causes of Action**

Under the facts of this case study, Fairfax County, and potentially certain other citizens, have standing to make two claims that would relieve Fairfax County of the need to address the EPA Accotink Creek Benthic TMDL in any way.

#### **7.3.1. Challenge the Wasteload Allocation**

Following its normal practices, EPA attempts to avoid the fact that the sediment that is causing problems in Accotink Creek is not discharged through a point source. Rather, it is a human-caused non-point source problem. Because the “pollutant” is not discharged through a point source, it is not subject to inclusion within a WLA – wasteload allocation under either federal or state law or regulation. Use of water flow as a surrogate does not ameliorate this fact, simply because the stormwater is discharged through a point source. Water is not a pollutant as defined by federal or state law, and cannot serve as a surrogate for a point source pollutant if the pollutant at issue is not itself a point source pollutant.

Because Virginia is free to apply any policy or regulation it wishes to its own waters, Virginia can include non-point sources in wasteload allocations and require their control. We note that Virginia has done so, but does not appear to have authority to do so, so Fairfax County may wish to address this issue within any legal action it takes regarding the Accotink Benthic TMDL, but that would constitute a different claim and may not be ripe as Virginia has not mandated inclusion of a benthic TMDL into the Fairfax County MS4 permit at this time.

#### **7.3.2. Challenge the EPA TMDL mandate as Unconstitutional**

In its April 18, 2011, letter to Virginia, EPA asserted that its TMDL must be incorporated into Virginia’s Water Quality Management Plan, thus requiring Fairfax County obtain either a

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<sup>157</sup> See, 4VAC50-60-54; 4VAC50-60-1170; 4VAC50-60-1210; and, 4VAC50-60-1240.

VPDES permit for stormwater discharges or inclusion of the TMDL load allocations (and control of them) in the County's MS4 permit.

Because the Virginia State Water Board has never approved the Accotink Creek Benthic TMDL, EPA stands alone as the author of the TMDL and any mandates flowing from it. This constitutes commandeering in violation of the U.S. Constitution, its structure, its intent and as specifically precluded by the 10<sup>th</sup> Amendment. The Court has articulated the applicable law with regard to supremacy, at least under the Commerce Clause – the federal government may not compel the states or arms of the states to enact or administer a federal program.<sup>158</sup>

The EPA TMDL and its companion direction mandating incorporation of the TMCL into Fairfax County permits is no more than a naked effort to compel the County to administer a federal program.

#### **7.4. The Inadequacies of EPA's Flow Control Legal Argument**

EPA can be expected to include in its arguments that it has the authority to regulate both the quality and the quantity of water. Under the Clean Water Act, Congress gave EPA the authority to regulate point source pollution that diminishes water quality, but that is as far as they went. Congress never gave EPA authority to regulate water quantity in States' waters.

The quantity issue involves two different conditions, high water and low water. Because water is highly prized and carefully allocated in the western United States, Congress has left it to the states to determine how to manage the quantity of water withdrawn from rivers and streams. Notably, when there is little rainfall and the quantity in a river is low, the impact of pollutants can be larger than when more diluted by a larger river flow. Hence, EPA backs into addressing water quantity, but only by establishing pollution discharge limits that are sensitive to low river flow conditions. High flows are a completely different situation.

High flows cause concern generally only because of potential flooding. This is a state issue not in any form within any mandate of EPA. Because EPA wishes to force its way into controlling water flows into state waters, it has attempted to argue that because it has had to address low flows to ensure discharges do not harm water quality, it also has the authority to take the same approach for high water flows. EPA cites to former policies and case law to support its arguments. As discussed in this section, their arguments are fundamentally flawed and inapposite.

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<sup>158</sup> *New York* 505 U.S. at 188, *Printz* 521 U.S. at 933.

#### **7.4.1. The difference between High and Low Flow conditions.**

In order to tease out the distinction between high and low flow conditions, as they relate to protection of water quality under the Clean Water Act, it will be helpful to briefly examine a parallel situation regarding air pollution and air flow.

Like the benthic organisms living on the bottom of a stream, humans live on the surface of the earth. The air above us is usually flowing much like water in a stream or lake. Occasional, the air stops moving. On October 26, 1948, a cold blanket of air settled over Donora, Pennsylvania, trapping sulfur dioxide from five industrial mills. By noon on October 30, the yellow smog was so thick that residents could not see their hands in front of them and cars were driven with their headlights on. The air burned the throats and caused breathing difficulties. Within three days of the event, eleven people had died and thousands of others had fallen ill.

In Donora, pollution continued to flow into the air, but the air did not move, causing the air to become more and more polluted. In a similar manner, when water flow in a stream is low, or if upstream water is diverted, leaving less water in the watercourse, then the discharges into the water are more concentrated, putting the fish, shellfish, wildlife and their food chain at greater risk.

In each case, the amount of pollution allowed into the air or the water should reflect the potential for a low flow condition. The Clean Air Act and the Clean Water Act, respectively, provide a regulatory means to control such pollution, as it may be affected by low flows.

High flows of air and water, tornados, hurricanes, storm water and floods, are a different matter altogether.

The deadliest single tornado in U.S. history was the "Tri-state" tornado that killed 695 people along a 219 mile long track across parts of Missouri, Illinois and Indiana on March 18, 1925. The 1900 Galveston hurricane was the deadliest weather disaster in United States history. Storm tides of 8 to 15 feet inundated the whole of Galveston Island, as well as other portions of the nearby Texas coast. These tides were largely responsible for the 8,000 deaths (estimates range from 6,000 to 12,000) attributed to the storm. The damage to property was estimated at \$30 million.

Neither the Clean Air Act nor the Clean Water Act could do anything to prevent the horrific flow of air and/or water associated with these "high flow" conditions. Neither is associated with human sources of pollutants or pollution. The same is true for smaller storms. They are beyond the reach of environmental law, but not beyond the reach of local land use planning.

Local and state laws address the potential harm from high flows of air and water through land-use controls. Buildings must be constructed to withstand high winds. People are

not permitted to build within flood plains. Rather than think of high flow air or water as “pollution”, governments have always considered them as “weather” and recognize that long-term variability in the weather requires some limitations on land-uses. Thus, governments have taken high water flow situations into account when making land-use decisions such as defining the size of retention ponds and building other storm water facilities.

#### **7.4.2. EPA reinterpretations of its policies and the law allow additional arguments**

The U.S. Congress has never contemplated use of the Clean Water Act as a means to deal with excessive storm water, much less impermeable surfaces. Nor is there any official EPA policy statement that suggests otherwise.

In a memorandum covered by a note from EPA employee Greg Voigt and prepared by staff in EPA’s Office of Water and Office of General Counsel, the Agency lays out the law related to water quality and water in quantity.<sup>159</sup> The memorandum identifies thirteen sections of the Clean Water Act, four cases at law and six EPA policy statements as the basis for regulating high water flow under a TMDL and resultant implementation plan. In not one of these citations does the law, a court of law or the EPA provide reference to high water flow conditions. Rather, in every case, law, the courts and EPA refer exclusively to the low flow situation where pollutant discharges could concentrate and become harmful to fish, shellfish, wildlife and their food chain.

The U.S. Supreme Court provides an example of the treatment of water quality and quantity issues:

Petitioners also assert more generally that the CWA is only concerned with water ‘quality,’ and does not allow the regulation of water ‘quantity.’ This is an artificial distinction. In many cases, water quantity is closely related to water quality; *a sufficient lowering of the water quantity* in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the CWA itself that *reduced stream flow*, i.e., diminishment of water quantity, can constitute water pollution. First, the Act’s definition of pollution as ‘the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water’ encompasses the effects of *reduced water quantity*. [CWA 502(19)] This broad conception of pollution – one which expressly evinces Congress’ concern with the physical and biological integrity of water – refutes petitioners’ assertion that the Act draws a sharp distinction between the regulation of water ‘quantity’ and water ‘quality.’ Moreover, § 304 of the Act expressly recognizes that water ‘pollution’ may result from ‘changes in the movement, flow, or circulation of any navigable waters . . ., including changes caused by the construction of dams.’ [CWA

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<sup>159</sup> U.S. EPA (undated) “Flow: Relevant Statutory and Regulatory Provisions, Caselaw, and Previous EPA Statements”

304(f)] *This concern with the flowage effects of dams and other diversions* is also embodied in the EPA regulations, which expressly require existing dams to be operated to attain designated uses. 40 CFR 131.10(g)(4) (1992).<sup>160</sup>

Note carefully, that the Supreme Court specifically explains that the Clean Water Act's Section 502(19), cited in the EPA memo, and Section 302(f) of the act address reduced water quantity. Not a single citation provided in the EPA memorandum addresses anything other than reduced water quantity.

EPA does, however, address water quantity issues in general. In an August 5, 2005, "Agency Interpretation on Applicability of Section 402 of the CWA to Water Transfers" memorandum from EPA's General Counsel to EPA's Assistant Administrator for Water, a memo creating EPA's official policy, states:

"The question touches on the delicate balance created in the statute between protection of water quality to meet federal water quality goals, and the management of water quantity left by Congress in the hands of States and water resource management agencies."<sup>161</sup>

The memorandum continues:

"While section 304(f) does not exclusively address nonpoint sources of pollution, it nonetheless 'concerns nonpoint sources' (Miccousukee, 541 U.S. at 106) and reflects an understanding by Congress that water movement could result in pollution, and that such pollution would be managed by States under their nonpoint source program authorities, rather than the NPDES program."<sup>162</sup>

And the official EPA policy concludes with the following statement:

"Thus, these sections of the Act together demonstrate that Congress was aware that there might be pollution associated with water management activities, but chose to defer to comprehensive solutions developed by State and local agencies for controlling such pollution."<sup>163</sup>

This is an unequivocal statement containing no ambiguity whatever. The law office within EPA responsible for providing the rest of the Agency interpretations of controlling law states that

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<sup>160</sup> PUD No. 1 of Jefferson County, et al. v. Washington Department of Ecology, 511 U.S. 700, 719-21 (1994) (emphasis added).

<sup>161</sup> U.S. EPA, *Agency Interpretation on Applicability of Section 402 of the CWA to Water Transfers*, Memorandum from Ann Klee, General Counsel, and Benjamin Grumbles, Assistant Administrator for Water, to Regional Administrators, August 5, 2005 (emphasis added).

<sup>162</sup> *Id.* (emphasis added).

<sup>163</sup> *Id.* (emphasis added).



pollution, including sediment caused by high water flow, associated with water management activities, including retention ponds required by TMDLs, are beyond EPA's authority and must, by Congressional intent, be left to "comprehensive solutions developed by State and local agencies."

If EPA attempts to establish a legal context using the laws and policies cited above, it opens EPA to dispositive arguments on summary judgment, to wit, that they are attempting to legislate through regulation; and, that they are regulating in a manner not in accord with the law (an Administrative Procedures Act violation).

### **7.5. Alternative Plaintiffs**

The focus of this discussion has been on Fairfax County and claims it might make. Under *Bond*, however, if a private citizen can show individualized injury due to the implementation of the TMDL, they have standing to argue the 10<sup>th</sup> amendment violations.

As discussed above, *Bond*<sup>164</sup> rejects the Circuit Courts holdings that where burden falls on an individual, a commandeering claim cannot stand.<sup>165</sup> Rather, the *Bond* court ruled that a petitioner could assert her own injury resulting from governmental action that exceeded the authority that federalism defined, finding that federalism's limitations were not a matter of rights belonging only to the states. Petitioner also was not precluded from arguing that a statute interfered with a specific aspect of state sovereignty, as the principles of limited national powers and state sovereignty were intertwined. Thus, the *Bond* Court concluded, a petitioner, as a party to an otherwise justiciable case or controversy, could assert that her injury resulted from disregard of the federal structure of the government

Under this rule of law, a Fairfax County citizen owning land that serves as a watercourse for some stream other than Accotink Creek, and for which the County has planned to make physical improvements that will limit damage to her land would have standing to bring the Constitutional commandeering claims because the EPA TMDL and mandate letter would force Fairfax County to shift to Accotink Creek all watershed management funds, including those that were to be used to address the citizen's property and property interests.

A similar argument might be made for citizens who use streams other than Accotink for purposes aligned with the State's designated purposes, but which would be frustrated by lack of funding to maintain or improve those streams.

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<sup>164</sup> *Bond v. United States*, 131 S. Ct. 2355, 2361 (U.S. 2011).

<sup>165</sup> Note, *Lomont v. Summers*, 135 F. Supp. 2d 23, 26 (D.D.C. 2001) cites to *Fraternal Order of Police v. United States* for the same principle, one now overtaken by *Bond*.

## Chapter 8 – Concluding Remarks

The authors wish to thank the Thomas Jefferson Institute for Public Policy and the American Tradition Institute for the support used to prepare this report. They, and their sponsors, share a strong commitment to Federalism and strategic litigation used to protect the rights and privileges of the many states and localities.

As the case law discussed herein testifies, use of political means to protect federalism has failed, no doubt something that would surprise James Madison were he amongst us today. Under our Constitution, the only effective means available today to push back the over-reach of the federal government, and by that I include both the executive and legislative branches, is litigation.

We are seeing growth in the number of federalism-oriented groups prepared to engage in public interest law. We hope this short treatise will provide an additional tool that will allow expanded litigation that can return a stronger role to the states and localities where government better responds to citizens' fair needs.