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Federalism-Based Limitations on Congressional Power: An Overview

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SUMMARY

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Federalism-Based Limitations on Congressional Power: An Overview

The U.S. Constitution establishes a system of dual sovereignty between the states and the federal government, with each state having its own government, endowed with all the functions essential to separate and independent existence. Although the Supremacy Clause of the Constitution designates "the Laws of the United States" as "the supreme Law of the Land," other provisions of the Constitution—as well as legal principles undergirding those provisions—nonetheless prohibit the national government from enacting certain types of laws that impinge upon state sovereignty. The various principles that delineate the proper boundaries between the powers of the federal and state governments are collectively known as "federalism." Federalism-based restrictions that the Constitution imposes on the national government's ability to enact legislation may inform Congress's work in any number of areas of law in which the states and the federal government dually operate.

There are two central ways in which the Constitution imposes federalism-based limitations on Congress's powers. First, Congress's powers are restricted by and to the terms of express grants of power in the Constitution, which thereby establish internal constraints on the federal government's authority. The Constitution explicitly grants Congress a limited set of carefully defined enumerated powers, while reserving most other legislative powers to the states. As a result, Congress may not enact any legislation that exceeds the scope of its limited enumerated powers. That said, Congress's enumerated powers nevertheless do authorize the federal government to enact legislation that may significantly influence the scope of power exercised by the states. For instance, subject to certain restrictions, Congress may utilize its taxing and spending powers to encourage states to undertake certain types of actions that Congress might otherwise lack the constitutional authority to undertake on its own. Similarly, the Supreme Court has interpreted the Constitution's Commerce Clause to afford Congress substantial (but not unlimited) authority to regulate certain purely intrastate economic activities that substantially affect interstate commerce in the aggregate. Congress may also enact certain types of legislation in order to implement international treaties. Additionally, pursuant to a collection of constitutional amendments ratified shortly after the Civil War, Congress may directly regulate the states in limited respects in order to prevent states from depriving persons of certain procedural and substantive rights. Finally, the Necessary and Proper Clause augments Congress's enumerated powers by empowering the federal government to enact laws that are "necessary and proper" to execute its express powers.

In addition to the *internal* constraints on Congress's authority, the Constitution also imposes *external* limitations on Congress's powers vis-à-vis the states—that is, affirmative prohibitions on certain types of federal actions found elsewhere in the text or structure of the Constitution. The Supreme Court has recognized, for instance, that the national government may not commandeer the states' authority for its own purposes by forcing a state's legislature or executive to implement federal commands. Nor may Congress apply undue pressure to coerce states into taking actions they are otherwise disinclined to take. Furthermore, the principle of state sovereign immunity—which limits the circumstances in which a state may be forced to defend itself against a lawsuit against its will—imposes significant constraints on Congress's ability to subject states to suit. Finally, the Supreme Court has recognized limits to the extent to which Congress may subject some states to more onerous regulatory burdens than other states.

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The Constitution establishes a "system of dual sovereignty between the States and the Federal Government,"[1] with each state having its "own government," "endowed with all the functions essential to separate and independent existence."[2] As the Supreme Court has recognized, states "possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause,"[3] the provision of the Constitution that makes federal law the "supreme Law of the Land" and prohibits states from contravening lawful enactments of Congress.[4] Although the Supremacy Clause grants Congress a degree of authority to "impose its will on the States," the federal government may not exceed "the powers granted it under the Constitution."[5] The Constitution only endows the federal government with a "limited" and "defined" set of enumerated powers,[6] while reserving most other powers to the states.[7] As a consequence, "States retain broad autonomy in structuring their governments and pursuing legislative objectives."[8]

The various principles that delineate the proper boundaries between the powers of the federal and state governments are collectively known as "federalism,"[9] a doctrine based on the Framers' conclusion that allocating "powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived."[10] Federalism has informed modern understandings of the limits on Congress's authority in a number of areas. For instance, the Supreme Court has identified limits on Congress's enumerated powers, such as its power to regulate interstate commerce under Article I, Section 8 of the Constitution.[11] The Court has also recognized other federalism-based doctrines that constrain Congress's power, such as the anti-commandeering doctrine—that is, the prohibition against the national government demanding that a state use its own governmental system to implement federal commands.[12]

Because the various jurisprudential developments that limit the power of the federal government are important considerations whenever Congress legislates, federalism is a "closely watched" and "ever-present" issue for Congress.[13] This report thus provides a broad overview of the various legal doctrines that inform the boundaries of Congress's authority vis-à-vis the states under the

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[1] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[2] Lane Cty. v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869).

[3] Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

[4] *See* U.S. CONST. art. VI, cl. 2.

[5] *Gregory*, 501 U.S. at 460.

[6] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). *See generally infra* "Internal Federalism Limitations on Congress's Powers."

[7] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively . . . .").

[8] Shelby Cty. v. Holder, 133 S. Ct. 2612, 2623 (2013).

[9] *See Federalism*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "federalism" as "the legal relationship and distribution of power . . . between the federal government and the state governments.").

[10] Bond v. United States, 564 U.S. 211, 221 (2011).

[11] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 557 (1995) (noting that the commerce power is "subject to outer limits"). *See also infra* "Commerce Clause."

[12] *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). *See also infra* "The "Anti-Commandeering" Doctrine."

[13] *See* CHRISTOPHER P. BANKS & JOHN C. BLAKEMAN, THE U.S. SUPREME COURT AND NEW FEDERALISM: FROM THE REHNQUIST TO THE ROBERTS COURT 2 (2012).

Constitution. The report begins by addressing several general principles that undergird modern legal debates over federalism. The report then discusses "internal" limitations on Congress's exercise of several of its enumerated powers, including its spending and commerce powers, its authority to enact certain types of legislation to implement international treaties, its enforcement authority under the Civil War Amendments, and its powers under the Necessary and Proper Clause. The report concludes by discussing several "external" federalism-based limitations on Congress's powers, such as the anti-commandeering, anti-coercion, state sovereign immunity, and equal sovereignty doctrines.

General Principles

The Constitution imposes two broad limitations on the powers of Congress.[14] First, the concept of enumerated powers creates what is often referred to as an "internal limit" on Congress's powers[15]—that is, Congress's powers are restricted by and to the terms of their express grant.[16] To illustrate, as one commentator has noted, while Congress can exercise its power over federal enclaves[17] to prescribe a fire code for the District of Columbia, the terms of that power are internally limited by the terms of the Enclave Clause; thus, Congress could not, for example, invoke the Enclave Clause to write a fire code for the State of Delaware.[18] Second, beyond the internal limits on Congress's powers, the Constitution also imposes "external" constraints on congressional action—that is, affirmative prohibitions found elsewhere in the text or structure of the document.[19] In other words, even if Congress is acting consistent with the terms of an enumerated power—say, by prescribing a fire code for the District of Columbia pursuant to the Enclave Clause—external limits on that power would necessarily prohibit Congress from inserting certain terms into that code—such as by withholding fire protection from individuals of a particular race in contravention of the equal protection component of the Fifth Amendment's Due Process Clause.[20]

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[14] One commentator has suggested that there may also exist a third category of limitations on Congress's powers: "process limits," wherein requirements such as "the bicameral legislature, the requirement of presidential presentment, and frequent democratic elections" constrain the process—but not the substantive outcome—of congressional action. *See* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 578 (2014).

[15] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 794-95 (3d ed. 2000) (distinguishing internal and external limitations on the federal legislative power).

[16] *See, e.g.*, United States v. Dewitt, 76 U.S. (9 Wall.) 41, 43-44 (1869) ("That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms.").

[17] *See* U.S. CONST. art. I, § 8, cl. 17 (granting Congress the power "to exercise exclusive Legislation" over "the Seat of the Government of the United States").

[18] *See* Primus, *supra* note 14, at 578.

[19] *See, e.g.*, United States v. Comstock, 560 U.S. 126, 135 (2010) (noting that a "a federal statute, in addition to being authorized by Art. I, § 8, must also 'not [be] prohibited' by the Constitution.") (citing McCulloch v. Maryland, 17 U.S. (Wheat.) 316, 421 (1819)); *see also* Saenz v. Roe, 526 U.S. 489, 508 (1999) ("[L]egislative powers are, however, limited not only by the scope of the Framers' affirmative delegation, but also by the principle "that they may not be exercised in a way that violates other specific provisions of the Constitution.").

[20] *Cf.* Primus, *supra* note 14, at 578 ("External limits, in contrast, are affirmative prohibitions that prevent Congress from doing things that would otherwise be permissible exercises of its powers. Thus, the Fifteenth Amendment prevents Congress from conducting whites-only elections in the District of Columbia, despite Congress's power to govern the District.").

As relevant here, the Supreme Court's federalism jurisprudence sets forth both internal and external constraints on Congress's power vis-à-vis the states.[21] The internal federalism-based limitations on Congress's powers are "embedded within the clauses that grant enumerated powers to the national government," [22] such as Article I's Commerce Clause[23] or the Fourteenth Amendment's Enforcement Clause.[24] The external federalism-based constraints on Congress's powers generally arise from the Tenth Amendment or structural features of the Constitution,[25] which recognize that, as part of the "constitutional design," "both the National and State Governments have elements of sovereignty the other is bound to respect."[26]

Before discussing the various internal and external federalism-based limits on Congress's powers, it is important, as a threshold matter, to note how these limitations are enforced. In the modern era, there have been two "competing conceptions of federalism."[27] Exemplifying one viewpoint is the Court's 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*, which held that the Constitution does not insulate state governments from the reach of generally applicable laws enacted pursuant to Congress' power under the Commerce Clause.[28] In so holding, the Court concluded that the "principal and basic limit" on Congress's powers vis-à-vis the states is "the built-in restraints that our system provides through state participation in federal governmental action."[29] Put another way, the *Garcia* Court concluded that the "political processes" (i.e., Congress's and the President's discretion), and not the Court, would be the primary means to enforce the federalism-based limits on Congress's powers.[30] However, the political process conception of federalism embraced in *Garcia* has largely been supplanted in more recent years with the view that the judiciary must safeguard state governments from federal overreach.[31] For instance, in 1995, the Court in *United States v. Lopez* struck down a federal law that forbade possessing a gun within 1,000 feet of a school, holding that the law exceeded Congress's powers under the Commerce Clause.[32] In concluding as such, the *Lopez* Court described the federalism-based limitations on Congress's commerce power as limits that '"the Court has ample power' to enforce."[33] Nonetheless, while the modern Court has recognized that the judiciary can police the limits of Congress's powers vis-à-vis the states, as Justice Kennedy noted in his concurrence in *Lopez*, the political branches continue to have a central role in recognizing the limits on Congress's powers to enact legislation that potentially intrude on areas reserved to state governments.[34] Specifically, Justice Kennedy noted the following:

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[21] *See* David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 411 (2001) ("The Court's recent decisions set forth two important federalism-based limits on federal power: external constraints on congressional power and internal ones.").

[22] *Id.*

[23] *See infra* "Commerce Clause."

[24] *See infra* "Congress's Powers Under the Civil War Amendments."

[25] Barron, *supra* note 21, at 411.

[26] *See* Arizona v. United States, 567 U.S. 387, 398 (2012).

[27] Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1768 (2006).

[28] *See* 469 U.S. 528, 547 (1985).

[29] *Id.* at 556.

[30] *Id.*

[31] *See* Chemerinsky, *supra* note 27, at 1768-69 (describing the shifting views on the Court concerning federalism).

[32] *See* 514 U.S. 549, 552 (1995).

[33] *See id.* at 557 (quoting Maryland v. Wirtz, 392 U.S. 183, 196 (1968)).

[34] *See id.* at 577 (Kennedy, J., concurring).

> Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance. For these reasons, it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.[35]

As a result, the federalism-based limits on Congress's power discussed in the remainder of this report are not only significant considerations for Congress to ensure that a court does not invalidate legislation on federalism grounds; in addition, the doctrine of federalism may be an important background principle for legislators to consider to help ensure that the political process respects state sovereign interests.[36]

Internal Federalism Limitations on Congress's Powers

The Constitution confers certain enumerated powers upon Congress, many of which are beyond the scope of this report.[37] However, some of Congress's powers—namely, its powers under the Spending Clause,[38] the Commerce Clause,[39] the Treaty Power,[40] the Civil War Amendments,[41] the Necessary and Proper Clause,[42] and—are particularly relevant to defining the appropriate allocation of power between the federal government and the states. The following subsections of the report accordingly discuss internal limitations the Constitution imposes on Congress's exercise of those particular powers.

Spending Clause

One source of congressional authority to enact legislation that may potentially impact the powers of the states is the Spending Clause, which empowers Congress 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."[43] The breadth of Congress's Spending Clause authority, along with the question of whether the Clause imposed any internal limitations on Congress's authority, were the subject of much debate for the first 150 years of the nation's history. The debate over the meaning

[35] *Id.* at 577-78.

[36] *Id.*

[37] *See generally* U.S. CONST. art. I, § 8.

[38] *See infra* "Spending Clause."

[39] *See infra* "Commerce Clause."

[40] *See infra* "Treaty Power."

[41] *See infra* "Congress's Powers Under the Civil War Amendments."

[42] *See infra* "Necessary and Proper Clause."

[43] U.S. CONST. art. I, § 8, cl. 1. Because the Clause empowers Congress to "lay and collect Taxes," the Spending Clause is sometimes called the "Taxing and Spending Clause." *See, e.g.*, David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 581 (2017). Congress's power to tax may be limited by other provisions of the Constitution that are not directly related to principles of federalism. *See* United States v. Kahriger, 345 U.S. 22, 28 (1953) ("[T]he constitutional restraints on taxing are few . . . Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity.") (internal citations and quotations omitted).

of the Spending Clause centered on two Framers of the Constitution: James Madison and Alexander Hamilton. Madison, fearing the potential scope of Congress's power, argued for a more limited view of Congress's power under the Spending Clause, contending that Congress's power to spend money for the "general welfare" was restricted to expenditures under the enumerated powers in Article I, Section 8 of the Constitution.[44] In contrast, Hamilton viewed the Spending Clause as conferring an independent power for Congress to raise and spend money to promote the national welfare.[45]

The Supreme Court resolved the debate over the scope of the spending power in the 1936 case of *United States v. Butler*, in which the Court concluded that the Hamiltonian interpretation of the Clause was "the correct one."[46] Specifically, the Court held that the "confines" on the Spending Clause are "not limited by the direct grants of legislative power found in" the remainder of Article I, Section 8 of the Constitution.[47] The Court then reaffirmed *Butler*'s holding regarding the spending power[48] in two subsequent decisions that upheld the Social Security Act of 1935's unemployment insurance and pension system.[49] The Court has not reversed course on its adoption of the Hamiltonian view of the Spending Clause, with the result that Congress may attain certain "objectives not thought to be within Article I's 'enumerated legislative fields,' . . . through the use of the spending power."[50]

That said, even though *Butler* adopted a relatively broad view of the spending power, that decision nonetheless acknowledged that Congress's power under the Spending Clause is "not unlimited."[51] In several cases following *Butler*, the Court has articulated restraints on Congress's spending power derived from both the text of the Spending Clause and from principles "emanating from the very structure of our system of governance."[52] The central *internal* limitation on Congress's spending power is that the power must be exercised in pursuit of the "general Welfare."[53] While one might reasonably interpret this limitation to prohibit Congress from using its spending power to aid "particular" groups as opposed to the public as a whole,[54] in

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[44] *See* 30 Annals of Congress 1059-62 (1817) (Madison Veto Message); Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), reprinted in 2 THE FOUNDERS' CONSTITUTION 453, 456 (Philip B. Kurland & Ralph Lerner eds., 1987).

[45] Alexander Hamilton, Report on Manufacturers (Dec. 5, 1791), reprinted in 2 THE FOUNDERS' CONSTITUTION, *supra* note 44, at 446.

[46] 297 U.S. 1, 66 (1936).

[47] *Id.*

[48] The *Butler* Court, while embracing a broad view of the spending power, struck down the challenged law (the Agricultural Adjustment Act of 1933) on Tenth Amendment grounds, concluding that permitting Congress to regulate state police powers indirectly through the Spending Clause would undesirably allow Congress to "become the instrument for total subversion of the governmental powers reserved to the individual states." *Id.* at 75. The following year, however, the Court reversed course on *Butler*'s Tenth Amendment holding, concluding that Congress, when properly exercising its broad power under the Spending Clause, could apply that power to matters that the states historically controlled. *See* Helvering v. Davis, 301 U.S. 619, 640 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548, 585 (1937).

[49] *See Helvering*, 301 U.S. at 640-41; *Steward Mach. Co.*, 301 U.S. at 585-87.

[50] *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987).

[51] *See Butler*, 297 U.S. at 66.

[52] Madison v. Virginia, 474 F.3d 118, 125 (4th Cir. 2006).

[53] *See* U.S. CONST. art. I, § 8, cl. 1.

[54] *See Helvering*, 301 U.S. at 640 (noting that the Spending Clause's general welfare limitation requires a line being "drawn between one welfare and another, between particular and general."). *See also* John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 72 (2001) ("But the Spending Clause also contains an explicit limitation, albeit one that is not readily apparent to the modern reader. Spending had to be for the 'general,' or

practice the "general welfare" limitation on the Spending Clause is quite minimal.[55] As the Supreme Court has held, in "considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress."[56] Only where Congress has made a decision that is "clearly wrong, a display of arbitrary power, not an exercise of judgment" will a court strike down Spending Clause legislation for failing to promote the general welfare.[57] Moreover, the Court has noted that the "concept of the general welfare" is not static, meaning Congress has discretion to determine and expand on what constitutes the general welfare.[58] As a result, since *Butler* and its progeny, the Supreme Court "has never held that a federal expenditure was not 'for the general welfare.'"[59]

Consequently, the most significant limitations upon the exercise of the spending power are "found elsewhere in the Constitution."[60] These external limitations on the Spending Clause are particularly important when Congress attempts to influence the policy objectives of the states by imposing conditions on the provision of federal funds.[61] These external limitations on the scope of the spending power—which generally all derive from understandings of the Tenth Amendment—are discussed below.[62]

Commerce Clause

Perhaps the most consequential of Congress's enumerated powers is the Commerce Clause,[63] which grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"[64] and thereby authorizes Congress to regulate a wide range of economic and social activities.[65] The Supreme Court's views on the breadth of Congress's commerce powers have vacillated throughout the nation's history.[66] During the Progressive Era, the Court embraced a relatively narrow view of the Commerce Clause, holding

national welfare, not for regional or local welfare.").

[55] Indeed, in *Buckley v. Valeo*, the Court went so far as to describe the view that the General Welfare Clause serves as a limitation on congressional power as being "erroneous[]," noting that the concept of general welfare is a "a grant of power, the scope of which is quite expansive." *See* 424 U.S. 1, 90 (1976) (per curiam).

[56] South Dakota v. Dole, 483 U.S. 203, 207 (1987); *Buckley*, 424 U.S. at 90 ("It is for Congress to decide which expenditures will promote the general welfare"); United States v. Kahriger, 345 U.S. 22, 28 (1953) (holding that the remedy for Congress exceeding its power under the Spending Clause is in "the hands of Congress, not the courts.").

[57] *Helvering*, 301 U.S. at 640.

[58] *Id.* at 641.

[59] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 674 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

[60] *See Buckley*, 424 U.S. at 91.

[61] *See infra* "Limits on the Spending Power."

[62] *See infra* "Limits on the Spending Power."

[63] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 174 (1997) (arguing that of the eighteen clauses enumerated in Article I, Section 8 detailing Congress's powers, the "most important" is the Commerce Clause); EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 54 (13th ed. 1973) ("[T]he commerce clause comprises, however, not only the direct source of the most important peace-time powers of the National Government; it is also, except for the due process of law clause of Amendment XIV, the most important basis for judicial review in limitation of State power.").

[64] U.S. CONST. art. I, § 8, cl. 3.

[65] *See, e.g.*, Paul Boudreaux, *A Case for Recognizing Unenumerated Powers of Congress*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 551, 555 (2006) ("Th[e] authority to regulate interstate commerce . . . forms the constitutional basis for nearly all modern social legislation, from the civil rights laws, to employment statutes, to environmental legislation.").

[66] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549 (2012) (Roberts, C.J.) ("The path of our Commerce Clause decisions has not always run smooth.")

that Congress lacked the constitutional authority to regulate subjects like manufacturing[67] or child labor.[68] Beginning in 1937 until nearly the end of the 20th Century, by contrast, the Court adopted a nearly boundless view of the Commerce Clause, going so far in the 1942 case of *Wickard v. Filburn* to hold that Congress may validly regulate virtually any activity as long as the legislature rationally believes that the activity, in the aggregate, has a non-trivial effect on commerce.[69] The *Wickard* Court maintained that conflicts over the scope of Congress's commerce power were best "left under our system to resolution by Congress" rather than the courts.[70] In response to this shift in the Court's Commerce Clause jurisprudence, Congress invoked its commerce powers as the constitutional basis for federal legislation on a wide variety of subjects throughout the 20th Century,[71] including criminal,[72] civil rights,[73] and environmental statutes.[74] Beginning in the mid-1990s, however, a majority of the Court concluded in various rulings that certain federal legislation exceeded Congress's commerce power.[75]

Regulating the Channels of Interstate Commerce

The Supreme Court's 1995 opinion in *United States v. Lopez* sets forth the modern test for determining whether a federal statute exceeds the scope of Congress's Commerce Clause authority.[76] The Court held in *Lopez* that there are "three broad categories of activity that Congress may regulate under its commerce power."[77] First, Congress may regulate the "channels of interstate commerce."[78] Under this category, Congress is permitted to regulate not only the traditional "channels" of commerce, such as the nation's highways, railroads, navigable waterways, or airspace, but also the movement of goods flowing across state lines through such

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[67] *See* United States v. E.C. Knight Co., 156 U.S. 1, 13-14 (1895).

[68] *See* Hammer v. Dagenhart, 247 U.S. 251, 276 (1918), *overruled by* United States v. Darby, 312 U.S. 100, 117 (1941).

[69] 317 U.S. 111, 127-29 (1942).

[70] *Id.* at 129.

[71] *See* Boudreaux, *supra* note 65, at 555 ("Th[e] authority to regulate interstate commerce . . . forms the constitutional basis for nearly all modern social legislation, from the civil rights laws, to employment statutes, to environmental legislation.").

[72] United States v. Glover, 842 F. Supp. 1327, 1332 (D. Kan. 1994) ("Congress generally relies upon the Commerce Clause to enact federal criminal laws.").

[73] *See* Stephen R. McAllister, *Is There A Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 U. KAN. L. REV. 217, 224-25 (1996) ("[T]he Commerce Clause, not the Fourteenth Amendment, was deemed the primary source of constitutional authority supporting the major civil rights statutes of the 1960s.").

[74] *See* Blake Hudson, *Reconstituting Land-Use Federalism to Address Transitory and Perpetual Disasters: The Bimodal Federalism Framework*, 2011 B.Y.U. L. REV. 1991, 2044 (2011) ("In the United States, the Commerce Clause is the primary constitutional provision under which most environmental legislation is passed.").

[75] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 558 (2012) (Roberts, C.J.) & *id.* at 649-50 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (collectively concluding that a requirement that an individual purchase health insurance exceeded Congress's authority under the Commerce Clause); United States v. Morrison, 529 U.S. 598, 617 (2000) (holding that Congress lacked the authority under the Commerce Clause to create a federal civil remedy for the victims of gender-motivated violence); United States v. Lopez, 514 U.S. 549, 558 (1995) (invalidating a law prohibiting possessing a gun within 1,000 feet of a school).

[76] *See Lopez*, 514 U.S. at 558.

[77] *See id.*

[78] *Id. See also* Pierce Cty. v. Guillen, 537 U.S. 129, 146-47 (2003) (upholding, as a proper exercise of Congress's Commerce Clause authority, a federal statute that protected certain highway safety information from evidentiary discovery and admission, and, in so doing, aimed to "improv[e] safety in the channels of commerce and increas[e] protection for the instrumentalities of interstate commerce").

channels.[79] Congress's authority to regulate the channels of interstate commerce is not confined to activities that have an economic purpose; instead, Congress is "free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare."[80] Applying this principle, the Court has upheld Congress's authority to prohibit the interstate shipment of stolen goods or kidnapped persons;[81] the interstate shipment of goods produced without minimum-wage and maximum-hour protections;[82] the interstate transportation of a woman or girl for prostitution;[83] and the interstate mailing or transportation of lottery tickets.[84] Significantly, however, the Court has also held that Congress may generally only "regulate interstate transportation itself" pursuant to this aspect of its Commerce Clause authority; Congress generally may not regulate "manufacture before shipment or use after shipment."[85]

Protecting the Instrumentalities, Persons, or Things in Interstate Commerce

Second, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce."[86] The instrumentalities of interstate commerce refer to the means of interstate commerce, such as an airplane or a train,[87] whereas the "persons or things in interstate commerce" refer to the persons or things transported by the instrumentalities among the states.[88] Significantly, the Supreme Court has recognized that Congress possesses the authority to address threats to the instrumentalities of commerce or to persons or things in commerce even if those threats "come only from *intra*state activities."[89] The Court has therefore held that Congress may validly criminalize the destruction of an aircraft that was used in interstate commerce or the theft of goods moving interstate.[90] The Supreme Court has likewise upheld the regulation of intrastate railroad rates where the regulation was necessary to prevent "common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce."[91] The Court has similarly upheld federal legislation prohibiting the theft of goods from shipwrecked vessels.[92] Critically, however, this aspect of Congress's commerce power extends only to the protection of the

[79] *See* United States v. Faasse, 265 F.3d 475, 490 (6th Cir. 2001).

[80] *See* United States v. Darby, 312 U.S. 100, 114 (1941).

[81] Perez v. United States, 402 U.S. 146, 150 (1971).

[82] *Darby*, 312 U.S. at 112-14.

[83] Caminetti v. United States, 242 U.S. 470, 491-92 (1917).

[84] Champion v. Ames (*The Lottery Case*), 188 U.S. 321, 354-55 (1903).

[85] United States v. Patton, 451 F.3d 615, 621 (10th Cir. 2006).

[86] *See* United States v. Lopez, 514 U.S. 549, 558 (1995).

[87] *See* Mitchell v. H.B. Zachry Co., 362 U.S. 310, 323 (1960) (describing railroads, truck companies and airlines as instrumentalities of interstate commerce).

[88] *See Patton*, 451 F.3d at 621.

[89] *See Lopez*, 514 U.S. at 558 (emphasis added).

[90] Perez v. United States, 402 U.S. 146, 150 (1971).

[91] Hous., E. & W. Tex. Ry. Co. v. United States (*The Shreveport Rate Cases*), 234 U.S. 342, 351-53 (1914). *See also* S. Ry. Co. v. United States, 222 U.S. 20, 56 (1911) (upholding federal safety regulations as applied to trains and railroad cars travelling intrastate on a railroad line because the "absence of appropriate safety appliances" from the intrastate trains and cars was "a menace" to those moving in interstate commerce).

[92] United States v. Coombs, 37 U.S. (12 Pet.) 72, 78 (1838).

instrumentalities or persons or things being moved in interstate commerce and "not all people and things that have ever moved across state lines."[93]

Regulating Activities that Substantially Affect Interstate Commerce

Finally, Congress possesses the constitutional authority to regulate "activities that substantially affect interstate commerce."[94] This category, which one court described as the "most unsettled" and "most frequently disputed" of the three *Lopez* categories,[95] authorizes Congress to "regulate purely local activities" as long as they are "part of an economic 'class of activities' that have a substantial effect on interstate commerce."[96] In this vein, the Court has stressed that the underlying test for whether Congress has authority to regulate *intrastate economic activity* is a "modest" one, wherein a "rational basis" needs to exist for Congress's conclusion that the activities in question, taken in the aggregate, would substantially affect interstate commerce.[97] At the same time, however, the Court has explained that Congress may not regulate purely intrastate activity that is not clearly connected to any larger regulation of economic activity; nor may Congress pass a federal law that lacks any jurisdictional element to tie the activity being regulated to interstate commerce.[98] To determine whether an activity has a "substantial effect" on interstate commerce, courts generally consider four non-dispositive factors:

1. whether the activity itself "has anything to do with commerce or any sort of economic enterprise, however broadly one might define those terms";
2. "whether the statute in question contains an express jurisdictional element";
3. "whether there are express congressional findings or legislative history regarding the effects upon interstate commerce of the regulated activity"; and
4. "whether the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial."[99]

The Supreme Court, applying these factors, has periodically ruled that Congress may not invoke the Commerce Clause to regulate certain purely intrastate non-economic activities. In *United States v. Lopez*, for instance, the Court invalidated a law prohibiting the possession of a gun near a school zone on the ground that the law (1) regulated purely non-economic activity; (2) lacked any jurisdictional element related to interstate commerce; (3) was unsupported by any congressional findings concerning interstate commercial activity; and (4) could only be viewed as regulating activity affecting commerce if the Court were to "pile inference upon inference."[100] Similarly, in *United States v. Morrison*, the Court struck down legislation creating a federal civil remedy for the victims of gender-motivated violence despite the existence of "numerous" congressional findings concluding that gender-motivated crimes had an effect on interstate commerce.[101] The *Morrison* Court, noting the lack of a jurisdictional element in the law at

[93] *See Patton*, 451 F.3d at 622; *cf. Lopez*, 514 U.S. at 559 (rejecting the argument that prohibiting the possession of a gun near a school could "be justified as a regulation by which Congress has sought to protect . . . a thing in interstate commerce").

[94] *Lopez*, 514 U.S. at 558-59.

[95] *See Patton*, 451 F.3d at 622.

[96] Gonzales v. Raich, 545 U.S. 1, 17 (2005).

[97] *See id.* at 22.

[98] *See Lopez*, 514 U.S. at 559-62.

[99] Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1068-69 (D.C. Cir. 2003).

[100] *See Lopez*, 514 U.S. at 561-67.

[101] 529 U.S. 598, 614 (2000) ("The existence of congressional findings is not sufficient, by itself, to sustain the

issue,[102] instead concluded that Congress may "not regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[103]

By contrast, the Court has generally upheld legislation regulating *economic* activity—that is, activity pertaining to the "production, distribution, and consumption of commodities"[104]—that "substantially affects interstate commerce."[105] For example, in *Gonzales v. Raich*, the Court upheld the application of the federal Controlled Substances Act to the cultivation of marijuana for personal, entirely intrastate medical use under the Commerce Clause, on the grounds that the "failure to regulate that class of activity would undercut the regulation of the interstate market" in marijuana.[106]

Regulating Inactivity

The litigation over the Patient Protection and Affordable Care Act (ACA) resulted in a majority of the Court agreeing on another discrete limitation on Congress's commerce powers in the case of *National Federation of Independent Business* (*NFIB*) *v. Sebelius*—namely, that the Commerce Clause cannot compel individuals to engage in commercial activity.[107] Among other issues, *NFIB* concerned whether the Commerce Clause authorized Congress to require "most Americans to maintain 'minimum essential' health care coverage."[108] Writing for himself, Chief Justice Roberts interpreted this "individual mandate" provision of the ACA to require "individuals not engaged in commerce to purchase an unwanted product."[109] Noting that the Court's Commerce Clause jurisprudence presupposed that the power "reach[ed] 'activity,'"[110] the Chief Justice concluded that the Commerce Clause did not empower Congress "to regulate individuals precisely because they are doing nothing," warning that such an interpretation would "open a new and potentially vast domain to congressional authority."[111] In so concluding, Chief Justice Roberts rejected the government's argument that there were "no temporal limitations in the Commerce Clause," allowing Congress to regulate individuals who would one day enter the market.[112] While the

constitutionality of Commerce Clause legislation.").

[102] *Id.* at 613.

[103] *Id.* at 617.

[104] *See* Gonzales v. Raich, 545 U.S. 1, 25-26 (2005) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

[105] *See Lopez*, 514 U.S. at 560.

[106] *See* 545 U.S. at 16.

[107] *See* 567 U.S. 519, 558 (2012) (opinion of Roberts, C.J.) ("The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to 'regulate Commerce.'"); *see also id.* at 649 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[O]ne does not regulate commerce that does not exist by compelling its existence.").

[108] *See id.* at 539 (majority opinion).

[109] *Id.* at 549 (opinion of Roberts, C.J.). In so viewing the individual mandate, Chief Justice Roberts rejected the argument that there is no distinction between activity and inactivity for purposes of determining whether an individual is having a substantial effect on interstate commerce, as the commerce power concerns the power to regulate classes of activities, not individuals. *Id.* at 555-56.

[110] *Id.* at 551 (citing *Lopez*, 514 U.S. at 560; Perez v. United States, 402 U.S. 146, 154 (1971); Wickard v. Filburn, 317 U.S. 111, 125 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

[111] *Id.* at 551.

[112] *Id.* at 557 ("The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. We have said that Congress can anticipate the effects on commerce of an economic activity. But we have never permitted Congress to anticipate that activity itself to regulate individuals not currently engaged in commerce.").

Chief Justice, joined by four other members of the Court, upheld the individual mandate under Congress's power to "lay and collect taxes,"[113] the four dissenters in *NFIB* largely echoed Chief Justice Roberts's view of the Commerce Clause, concluding that "[i]f Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power."[114]

Because no single opinion in *NFIB* enjoyed a majority of five Justices, it is uncertain whether the Chief Justice's and the dissenters' conclusions regarding the Commerce Clause constitute binding precedent.[115] In any event, however, lower courts following *NFIB* have very rarely invalidated Commerce Clause legislation on "inactivity" grounds, largely because much of what Congress regulates can be described as a form of "activity."[116] For instance, in rejecting a challenge to another provision of the ACA—namely, the "employer mandate," which requires certain employers to offer a minimum level of health insurance coverage to their employees and dependents—the Fourth Circuit[117] distinguished the employer mandate from the individual mandate.[118] Specifically, the appellate court concluded that, unlike the individual mandate, the employer mandate does not "create commerce to regulate it" because employers, "by their very nature," are already "engaged in economic activity."[119] The Fourth Circuit thus held that the employer mandate does not compel employers "to become active in commerce," but rather "merely 'regulate[s] existing commercial activity.'"[120]

Outside of the context of the ACA, Commerce Clause challenges predicated on *NFIB*'s inactivity principle have likewise been largely unsuccessful. For instance, in *United States v. Roszkowski,* the First Circuit rejected the argument that 18 U.S.C. § 922(g), a law that forbids convicted felons from possessing a firearm "in or affecting commerce," exceeded Congress's commerce powers under the logic of *NFIB*'s Commerce Clause holding.[121] Specifically, the First Circuit concluded that Section 922(g) was in "stark contrast to the individual mandate" at issue in *NFIB*, in that the former statute did not compel individuals to become active in commerce, but instead *prohibited* "affirmative conduct that has an undeniable connection to interstate commerce."[122] In another

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[113] *See id.* at 574 (majority opinion) ("The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.").

[114] *Id.* at 652-53 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

[115] *See, e.g.*, United States v. Robbins, 729 F.3d 131, 135 (2d Cir. 2013) ("It is not clear whether anything said about the Commerce Clause in NFIB's primary opinion—that of Chief Justice Roberts—is more than dicta, since Part III-A of the Chief Justice's opinion was not joined by any other Justice and, at least arguably, discussed a bypassed alternative, rather than a necessary step, in the Court's decision to uphold the Act."); United States v. Henry, 688 F.3d 637, 641 n.5 (9th Cir. 2012) ("There has been considerable debate about whether the statements about the Commerce Clause [in *NFIB*] are dicta or binding precedent.").

[116] *See, e.g.*, United States v. McLean, 702 F. App'x 81, 87-88 (3d Cir. 2017) ("*NFIB* concerned Congress' authority to compel commercial activity, not its ability to proscribe attempted or planned criminal activity."); Mason v. Warden, Fort Dix FCI, 611 F. App'x 50, 53 (3d Cir. 2015) ("Contrary to Mason's contention, that Commerce Clause ruling does not undermine his Hobbs Act convictions, for neither the Hobbs Act itself, nor the facts of his case, involve compelling commerce.").

[117] This report periodically references decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Fourth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[118] Liberty Univ., Inc. v. Lew, 733 F.3d 72, 93 (4th Cir. 2013).

[119] *Id.*

[120] *Id.* (quoting Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 552 (2012) (opinion of Roberts, C.J.)).

[121] *See* 700 F.3d 50, 58 (1st Cir. 2012).

[122] *Id.* For other unsuccessful challenges to 18 U.S.C. § 922(g) based on *NFIB*, see United States v. Bron, 709 F. App'x

context, the Second Circuit, in *United States v. Robbins*, held that the Sex Offender Registration and Notification Act (SORNA) did not impermissibly regulate non-economic inactivity by making it a crime for a sex offender to travel in interstate commerce and knowingly fail to update his offender registration.[123] The *Robbins* court reasoned that unlike those subject to the individual mandate under the ACA, "sex offenders who are subjected to SORNA's requirements have all, in a sense, 'opted in' to the regulated group through their prior criminal activity."[124] As a consequence, lower courts have not interpreted *NFIB*'s limitation on the scope of Congress's commerce power to impose a considerable limitation on Congress's regulatory authority.

Treaty Power

At least since the Supreme Court's 1920 ruling in *Missouri v. Holland*,[125] courts have recognized that Congress has considerable power, even beyond the scope of its enumerated powers under Article I, when legislating to implement a treaty ratified pursuant to Article II, Section 2 of the Constitution. In *Holland*, the Supreme Court upheld a federal law regulating the killing of migratory birds that had been adopted pursuant to a treaty between the United States and Great Britain, even though a lower court had concluded that a similar statute enacted in the absence of a treaty was beyond the scope of Congress's enumerated powers and therefore unconstitutional on Tenth Amendment grounds.[126] As the Court explained, to evaluate the statute's constitutionality, it was

> not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land.[127]

The *Holland* Court thus concluded that as long as the treaty was valid, there could "be no dispute about the validity of the statute . . . as a necessary and proper means to execute the powers of Government."[128] *Holland* therefore stands for the proposition that Congress generally has the power to enact legislation to implement a treaty even where it would lack such power in the treaty's absence.[129] However, the complete extent to which Congress may intrude upon traditional

551, 554 (11th Cir. 2017); United States v. Alcantar, 733 F.3d 143, 146 (5th Cir. 2013).

[123] *See* 729 F.3d 131, 135-36 (2d Cir. 2013).

[124] *Id.* at 136. In addition, the Second Circuit noted that SORNA was properly applied to the defendant in *Robbins*, as the registration requirement "Robbins himself failed to meet was triggered by activity: his change of residence and travel across state lines." *Id.* For other unsuccessful challenges to SORNA based on *NFIB*, see, e.g., *Bron*, 709 F. App'x at 554; United States v. Sullivan, 797 F.3d 623, 632 (9th Cir. 2015); United States v. White, 782 F.3d 1118, 1125 (10th Cir. 2015); United States v. Howell, 557 F. App'x 579, 580 (7th Cir. 2014); United States v. Anderson, 771 F.3d 1064, 1070 (8th Cir. 2014).

Another federal statute that has been the subject of several unsuccessful Commerce Clause challenges based on *NFIB*'s inactivity principle is 18 U.S.C. § 2251, which, among other things, prohibits the production of child pornography. *See, e.g.*, United States v. Humphrey, 845 F.3d 1320, 1323 (10th Cir. 2017) (upholding a federal law prohibiting the production of child pornography because producing pornography made the defendant "akin to the farmer in *Wickard*, not the uninsured individuals in *NFIB*"); *Sullivan*, 797 F.3d at 632 (similar); United States v. Parton, 749 F.3d 1329, 1331 (11th Cir. 2014) (similar).

[125] Missouri v. Holland, 252 U.S. 416 (1920).

[126] *See id*. at 432.

[127] *Id.*

[128] *Id.*

[129] Since *Holland*, reviewing courts have deemed a number of federal statutes implementing treaty requirements

state authority through treaty-implementing legislation remains unclear, and some scholars have suggested that there is reason to believe that Congress could not enact legislation that infringed upon the essential character of U.S. states, such as through legislation that commandeered state executive and legislative authorities.[130]

Notably, the petitioner in *Bond v. United States* asked the Court to reconsider the extent to which the Tenth Amendment constrains Congress's ability to enact treaty-implementing legislation.[131] The petitioner in *Bond* had been convicted under the Chemical Weapons Convention Implementation Act of 1998 (CWCIA)[132] for attempting to poison her husband's paramour with toxic chemicals.[133] She argued that the act, as applied to her, impermissibly intruded upon matters falling under traditional state authority,[134] and that Congress may not act beyond the scope of its enumerated powers to implement a treaty.[135] However, the Court ultimately opted not to revisit its earlier statement in *Missouri v. Holland* regarding the scope of the treaty power, or provide any clear signal as to whether it agreed with the earlier Court's characterization.[136] Over a separate opinion for three Justices that would have held that the scope of Congress's power to implement a treaty does not extend beyond its enumerated authority,[137] the Court declined to reach the constitutional issue.[138] The Court instead determined that the criminal provisions of the CWCIA should "be read consistent with the principles of federalism inherent in our constitutional structure," and therefore should not be interpreted to cover the petitioner's conduct.[139] *Holland* remains good law;[140] however, *Bond* makes clear that, irrespective of related treaties, statutes

constitutionally permissible under the Necessary and Proper Clause. *See, e.g.*, United States v. Ferreira, 275 F.3d 1020, 1027-28 (11th Cir. 2001) (upholding Hostage Taking Act, 18 U.S.C. § 1203, as necessary and proper to implement the International Convention Against the Taking of Hostages); United States v. Wang Kun Lue, 134 F.3d 79, 84 (2d Cir. 1998) (same). *See also* United States v. Lara, 541 U.S. 193, 200 (2004) (citing to the Indian Commerce Clause and Treaty Clause as providing Congress with power to legislate on Indian tribe issues, and stating that "treaties . . . can authorize Congress to deal with matters with which otherwise Congress could not deal") (internal quotations omitted).

[130] *See generally* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003). For criticism of the Supreme Court's decision in *Missouri v. Holland*, and arguments that the treaty power may not expand Congress's legislative power, see Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1868 (2005).

[131] 134 S. Ct. 2077, 2087 (2014).

[132] 18 U.S.C. § 229.

[133] 134 S. Ct. at 2083.

[134] *Id.* at 2087.

[135] *Id*.

[136] *Id*.

[137] *See id*. at 2098-2102 (Scalia, J., concurring in the judgment).

[138] *Id*. at 2087 (majority opinion).

[139] Id. at 2088. For further discussion of the Bond ruling, see CRS Report R42968, *Bond v. United States: Validity and Construction of the Federal Chemical Weapons Statute*, by Charles Doyle.

[140] In the aftermath of *Bond*, the Ninth Circuit rejected a constitutional challenge to the CWCIA, finding that the statute, when applied to a crime that was not "purely local" in nature,was "within the constitutional powers of the federal government under the Necessary and Proper Clause and the Treaty Power." United States v. Fries, 781 F.3d 1137, 1148 (9th Cir. 2015). *See also* United States v. Mikhel, 889 F.3d 1003, 1023-24 (9th Cir. 2018) (upholding Hostage Taking Act under the treaty power and noting that "[a]lthough this broad reading of the Necessary and Proper Clause has been criticized and debated . . . the Supreme Court has never undertaken to clarify or correct our understanding. We are thus bound by our prior cases.") (citing United States v. Wang Kun Lue, 134 F.3d 79, 82 (2d Cir. 1998)).

must be interpreted consistent with the understanding that "Congress normally preserves the constitutional balance between the National Government and the States."[141]

Congress's Powers Under the Civil War Amendments

The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution—referred to collectively as the "Civil War Amendments" or "Reconstruction Amendments"[142]—grant Congress additional powers beyond those set forth in the original Constitution. The United States ratified each of these Amendments after the Civil War to end slavery and secure equal rights for former slaves.[143] Thus, the Thirteenth Amendment prohibits slavery and involuntary servitude within the United States.[144] The Fourteenth Amendment, among other things, provides that no state shall "deprive any person of life, liberty, or property, without due process of law" or "deny to any person within its jurisdiction the equal protection of the laws."[145] Finally, the Fifteenth Amendment guarantees that the right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[146] The Civil War Amendments significantly altered the balance of power between the states and the federal government[147] by limiting state authority and granting Congress new powers to "secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion."[148]

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[141] *Bond*, 134 S. Ct. at 2091.

[142] This shorthand reflects the fact that the three amendments were ratified between 1865 and 1870 in the wake of the Union's victory in the Civil War. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976) (using the term "Civil War Amendments"); Oregon v. Mitchell, 400 U.S. 112, 126 (1970) (same); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 223 (2009) (Thomas, J., concurring in part and dissenting in part) (using the term "Reconstruction Amendments"). It should be noted, however, that these three amendments were neither drafted nor enacted as a package. *See generally* John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209, 1211-15 (1997) (overviewing history of the passage and ratification of the Civil War Amendments).

[143] *See Ex parte* Virginia, 100 U.S. 339, 344-45 (1879) ("One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States.").

[144] U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[145] *Id.* amend. XIV, § 1.

[146] *Id.* amend. XV, § 1.

[147] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996) ("[T]he Fourteenth Amendment, by expanding federal power at the expense of state autonomy . . . fundamentally altered the balance of state and federal power struck by the Constitution."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) ("The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race."); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1195 (1991) ("[The Civil War Amendments] radically transform[ed] the nature of American federalism."). One such fundamental change is that, prior to the Civil War Amendments, the Supreme Court had held that the protections in the Bill of Rights did not apply to the actions of the states. *See, e.g.*, Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243, 247 (1833) (holding that the Fifth Amendment does not apply to the states). Following the enactment of the Fourteenth Amendment, however, the Court has held that many of the protections of the Bill of Rights are applicable to the states. *See* McDonald v. City of Chicago, 561 U.S. 742, 765 n.13, (2010) (noting the few provisions of the Bill of Rights that the Court has not held to be incorporated against the states).

[148] *Ex parte Virginia*, 100 U.S. at 346. *See also id.* at 345 ("[The Civil War Amendments] were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress.").

Each of the Civil War Amendments gives Congress the "power to enforce" its provisions "by appropriate legislation."[149] Congress's power to enforce the Civil War Amendments goes beyond legislation that simply prohibits unconstitutional conduct; rather, Congress may legislate prophylactically to deter or remedy constitutional violations "even if in the process it prohibits conduct which is not itself unconstitutional."[150] For example, to enforce the Thirteenth Amendment's prohibition on slavery, Congress possesses constitutional authority to eliminate the "badges and the incidents of slavery," such as by banning racial discrimination in the sale of real property.[151] Similarly, to enforce the Fifteenth Amendment's prohibition on racially discriminatory voting restrictions, Congress may ban the use of literacy tests in state and national elections,[152] even though literacy tests are not themselves always unconstitutional.[153]

Although Congress's power under the Civil War Amendments is broad, "it is not unlimited."[154] In particular, the Supreme Court has recognized two major limitations to Congress's power under the Fourteenth Amendment.[155] First, Congress may legislate only against "state action"; it may not rely on the Fourteenth Amendment to regulate the conduct of private (i.e., non-state) actors.[156] Second, Congress may legislate only "remedially" under the Fourteenth Amendment; it may not change the substantive scope of the rights guaranteed.[157] In other words, enforcement legislation must be "targeted at 'conduct transgressing the Fourteenth Amendment's substantive

[149] U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

[150] City of Boerne v. Flores, 521 U.S. 507, 518 (1997).

[151] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-43 (1968) (holding that statute banning "racial discrimination, private as well as public, in the sale or rental of property" was "a valid exercise of the power of Congress to enforce the Thirteenth Amendment"); The Civil Rights Cases, 109 U.S. 3, 21 (1883) ("[Under the Thirteenth Amendment,] Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents . . . .").

[152] *See* Oregon v. Mitchell, 400 U.S. 112, 118 (1970) (opinion of Black, J.) ("Congress, in the exercise of its power to enforce the Fourteenth and Fifteenth Amendments, can prohibit the use of literacy tests or other devices used to discriminate against voters on account of their race in both state and federal elections."); *accord* Katzenbach v. Morgan, 384 U.S. 641, 649 (1966).

[153] *See* Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 50-53 (1959) (holding that use of literacy test for voters, if "fair on its face" and "neutral[ly]" applied, is constitutional).

[154] *City of Boerne*, 521 U.S. at 518 (quoting *Mitchell*, 400 U.S. at 128 (opinion of Black, J.)).

[155] Likely because of its broad, general guarantee of "due process" and "equal protection of the laws," see U.S. CONST. amend. XIV, § 1, issues concerning Congress's power under the Fourteenth Amendment arise more frequently than the other two Civil War Amendments.

[156] *See* United States v. Morrison, 529 U.S. 598, 621 (2000) ("The language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. . . . Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."). The Fifteenth Amendment, too, is also generally understood to require state action. *See, e.g.*, Smith v. Allwright, 321 U.S. 649, 664 (1944) (holding that racial discrimination by political party in primary elections constitutes "state action within the meaning of the Fifteenth Amendment"). *But see* Note, *The Strange Career of 'State Action' Under the Fifteenth Amendment*, 74 YALE L.J. 1448, 1449 (1965) (noting that early Supreme Court cases "construe[d] congressional enforcement power under the fifteenth amendment to reach private individuals"). Notably, the Thirteenth Amendment lacks a state action requirement. *See* Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) (upholding, under the Thirteen Amendment, federal cause of action for victims of racially discriminatory conspiracies committed by private citizens).

[157] *See City of Boerne*, 521 U.S. at 519 ("The design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."). In addition, when legislating under the Fourteenth and Fifteenth Amendments, Congress may not violate "the fundamental principle of equal sovereignty" by treating states unequally without sufficient reason. *See* Shelby Cty. v. Holder, 570 U.S. 529, 542 (2013). This equal sovereignty limit is explained in more detail in a separate section of this report. *See infra* "Equal Sovereignty Doctrine."

provisions,'"[158] such that there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[159]

The State Action Requirement

The first limitation—the "state action requirement"—derives from the text of Section One of the Fourteenth Amendment, which explicitly proscribes only certain actions undertaken by "State[s]."[160] The Supreme Court has interpreted this language to mean that Congress may only legislate to combat discrimination by or through state governments; it may not rely on the Fourteenth Amendment to regulate "merely private conduct, however discriminatory or wrongful."[161] The state action requirement thus "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."[162] It also avoids imposing liability on state agencies and officials "for conduct for which they cannot fairly be blamed."[163]

For example, in the 1883 *Civil Rights Cases*, the Supreme Court concluded that Congress had no authority under the Fourteenth Amendment to prohibit racial discrimination in places of public accommodation (such as inns, theaters, and railroads) because such laws targeted discrimination by private citizens.[164] Much more recently, the Supreme Court reaffirmed the state action requirement in *United States v. Morrison*, holding that Congress could not create a federal remedy for victims of gender-motivated violence because the law "is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."[165]

Conduct by ostensibly private actors will be deemed to be a state action only if "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"[166] Such a close nexus requires that (1) "the claimed constitutional deprivation . . . resulted from the exercise of a right or privilege having its source in state authority";[167] and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor."[168] For example, if a private citizen is a "willful participant in joint activity with the State or its agents" he may be held to account under the Fourteenth

[158] Coleman v. Court of Appeals of Md., 566 U.S. 30, 36 (2012) (plurality opinion) (quoting Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999)).

[159] *City of Boerne*, 521 U.S. at 508.

[160] *See* U.S. CONST. amend. XIV, § 1 ("No *State* shall make or enforce any law which shall abridge . . . .") (emphasis added).

[161] Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[162] Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982).

[163] *Id.*

[164] *See* 109 U.S. 3, 11 ("Individual invasion of individual rights is not the subject-matter of the amendment."); *id.* at 13 ("[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity . . . ."). As a result of the state action limit on its Fourteenth Amendment powers, Congress has instead relied on its Commerce Clause powers to prohibit discrimination in public accommodations. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (holding that Congress has authority to prohibit racial discrimination in hotels under the Commerce Clause); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (holding that Congress has power to prohibit racial discrimination in restaurants under the Commerce Clause). *See generally supra* "Commerce Clause."

[165] 529 U.S. 598, 626 (2000).

[166] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)).

[167] *Lugar*, 457 U.S. at 939.

[168] *Id.* at 937.

Amendment as if he were a state official.[169] Whether an individual may fairly be said to be a state actor is a "necessarily fact-bound inquiry."[170] Significantly, however, discriminatory state legislation or conduct by individual state officials acting in their official capacity will satisfy the state action requirement.[171]

"Congruence and Proportionality" for Remedial Legislation

The second major limitation on Congress's Fourteenth Amendment power is that enforcement legislation must be "remedial" in nature.[172] Congress is not limited to legislating against actual constitutional violations; it may go further "to remedy and to deter violation of [constitutional rights] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden" by the Fourteenth Amendment.[173] Nonetheless, Congress can only *enforce* the rights guaranteed by the Amendment; it may not alter the substantive scope of the rights themselves.[174]

In the landmark case *City of Boerne v. Flores*, the Supreme Court crafted a test to determine when legislation to enforce the Fourteenth Amendment sweeps so broadly as to be unconstitutional. *Boerne* addressed the constitutionality of the Religious Freedom Restoration Act (RFRA) as it applied to the states.[175] RFRA prohibited governments from substantially burdening any person's exercise of religion unless it was "in furtherance of a compelling governmental interest" and used "the least restrictive means" of furthering that interest.[176] Congress enacted RFRA in response to an earlier Supreme Court decision, *Employment Division v. Smith*, which held that neutral, generally applicable state laws were not subject to heightened scrutiny under the First Amendment, even when such laws were applied to religiously motivated practices.[177] Thus, in *Smith*, Oregon could enforce its general criminal prohibition on peyote use against the sacramental use of that drug in Native American churches without running afoul of the First Amendment.[178] Through RFRA, Congress attempted to invoke its Fourteenth Amendment powers to establish a stricter test for religious liberty claims than the legal standard articulated by the *Smith* Court. However, *Boerne* held that RFRA exceeded Congress's power because Congress could not "decree the substance of the Fourteenth Amendment's restrictions on the States."[179] Although Congress can act to "remedy or prevent unconstitutional actions," the Supreme Court explained that "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" must exist.[180] The Court concluded that RFRA failed the

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[169] United States v. Price, 383 U.S. 787, 794 (1966).

[170] *Lugar*, 457 U.S. at 939.

[171] *See, e.g.*, *Ex parte* Virginia, 100 U.S. 339, 346 (1879) ("Congress is empowered to enforce [the Fourteenth Amendment], and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial."); United States v. Raines, 362 U.S. 17, 25 (1960) ("[D]iscrimination by state officials, within the course of their official duties . . . is certainly, a[] 'state action' and the clearest form of it . . . .").

[172] *See* Tennessee v. Lane, 541 U.S. 509, 520 (2004) (distinguishing between "appropriate remedial" legislation enforcing the Fourteenth Amendment and unconstitutional "substantive redefinition" of the Amendment).

[173] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000).

[174] City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("[Congress] has been given the power "to enforce" [the Fourteenth Amendment,] not the power to determine what constitutes a constitutional violation.").

[175] *Id.* at 511.

[176] *Id.* at 516 (quoting 42 U.S.C. § 2000bb-1).

[177] 494 U.S. 872, 880-85 (1990).

[178] *Id.* at 874, 890.

[179] *Boerne*, 521 U.S. at 519.

[180] *Id.* at 520.

proportionality requirement because the legislative record lacked "examples of modern instances of generally applicable laws passed because of religious bigotry," and the statute's sweeping coverage threatened general state laws "of almost every description and regardless of subject matter."[181]

Courts applying *Boerne*'s "congruence and proportionality" test typically utilize a three-step approach. First, the court "identif[ies] with some precision the scope of the constitutional right" that the legislation is intended to remedy.[182] Second, the court examines "whether Congress identified a history and pattern of unconstitutional [violations] by the States" with respect to the constitutional right at issue.[183] Finally, the court compares the scope of the law to the history of violations to determine if the legislation is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[184]

Nearly all of the Supreme Court decisions applying *Boerne* arise in the context of congressional attempts to abrogate state immunity to suit under the Eleventh Amendment. As discussed in more detail below, states generally cannot be sued unless Congress validly revokes their Eleventh Amendment immunity.[185] Moreover, Congress cannot use its Article I powers, such as its Commerce Clause power, to abrogate the states' Eleventh Amendment immunity.[186] Instead, Congress must often rely on its enforcement power under the Fourteenth Amendment if it seeks to pass legislation that subjects states to suit in federal court.[187]

The decisions applying *Boerne* to purported abrogations of Eleventh Amendment immunity have sharply divided the Supreme Court.[188] As a result, it can be difficult to predict how the Court will rule in any particular case,[189] and the decisions can be highly fact-bound. For example, in the context of the Americans with Disability Act (ADA), the Court has held that Congress cannot abrogate state immunity with respect to Title I of the ADA (which prohibits disability discrimination in employment),[190] but that it *can* abrogate state immunity with respect to some applications of Title II of the ADA (which prohibits disability discrimination in the provision of public services).[191] In the context of the Family Medical Leave Act (FMLA), the Court has held that Congress may validly abrogate state immunity with respect to FMLA's guarantee of leave for

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[181] *Id.* at 530-34.

[182] Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001).

[183] *Id.* at 368. *See also* Coleman v. Court of Appeals of Md., 566 U.S. 30, 37 (2012) (plurality opinion) (holding that remedial legislation requires "evidence of a pattern of state constitutional violations").

[184] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000) (quoting *Boerne*, 521 U.S. at 532 (1997)).

[185] *See infra* "The Eleventh Amendment and State Sovereign Immunity" (explaining constitutional basis and scope of state sovereign immunity).

[186] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996).

[187] *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (permitting congressional abrogation of state sovereign immunity pursuant to Section Five of the Fourteenth Amendment). *See also infra* "The Eleventh Amendment and State Sovereign Immunity."

[188] *See, e.g.*, *Coleman*, 566 U.S. 30 (holding abrogation of immunity invalid by a 5-4 decision with two separate concurrences); Tennessee v. Lane, 541 U.S. 509 (2004) (holding abrogation of immunity valid by a 5-4 decision with two separate concurring opinions and three separate dissenting opinions); *Garrett*, 531 U.S. 356 (holding attempted abrogation of immunity invalid by a 5-4 decision).

[189] *See Coleman*, 566 U.S. at 44 (Scalia, J., dissenting) ("[T]he varying outcomes we have arrived at under the 'congruence and proportionality' test make no sense.").

[190] *Garrett*, 531 U.S. at 360-61.

[191] *Lane*, 541 U.S. at 533-34.

an employee to take care of ill family members (the "family-care" provisions),[192] but not with respect to FMLA's guarantee of leave when the employee herself is sick (the "self-care" provisions).[193]

Generally speaking, these cases often turn on whether the legislative record demonstrates a history or pattern of state violations of the constitutional right at issue.[194] For example, in *Tennessee v. Lane*, the Supreme Court found that the legislative record showed a pattern of "unconstitutional discrimination against persons with disabilities in the provision of public services" that justified congressional abrogation of state immunity with respect to Title II of the ADA.[195] In contrast, in *Board of Trustees of the University of Alabama v. Garrett*, the Court struck down legislation that applied the ADA to state government employment decisions based (in part) on its finding that there was no "history and pattern of unconstitutional employment discrimination by the States against the disabled."[196]

Another important consideration concerning Congress's power under the Fourteenth Amendment is the particular constitutional right at issue. Courts have tended to be more deferential to uses of Congress's Fourteenth Amendment power when the violations involve a suspect classification (such as race or sex) or a fundamental right. For example, one reason that the Supreme Court found a valid abrogation with respect to FMLA's family-care leave provisions was that the legislation was designed to combat sex discrimination in the workplace, and courts typically subject distinctions based on sex to heightened scrutiny.[197] In contrast, the Court found a purported abrogation invalid with respect to the ADA's employment disability discrimination provisions in part because disability classifications are subject only to rational-basis review.[198] The Court subsequently limited that holding with respect to Title II of the ADA, however, largely because the particular variety of disability discrimination at issue—denial of courthouse access—involved not just discrimination but also the fundamental right of due process of law.[199]

Courts applying the *Boerne* test also evaluate the breadth of the congressional remedy in relation to the severity of the constitutional violation that Congress seeks to prevent.[200] Thus, in *Tennessee v. Lane*, the Court held that there was a valid abrogation of immunity in part because Congress chose a "limited" remedy of affording reasonable accommodations to the disabled.[201] In contrast, *Boerne* itself found that RFRA lacked congruence and proportionality because the Act would

[192] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 725 (2003).

[193] *Coleman*, 566 U.S. at 33-34.

[194] *Compare Garrett*, 531 U.S. at 370 (finding that "Congress assembled only . . . minimal evidence of unconstitutional state discrimination in employment against the disabled") *with id.* at 377-79 (Breyer, J., dissenting) (finding that "Congress compiled a vast legislative record documenting 'massive, society-wide discrimination' against persons with disabilities" including "roughly 300 examples of discrimination by state governments themselves") (quoting S. REP. NO. 101-116, pp. 8-9 (1989)).

[195] *See Lane*, 541 U.S. at 525-28.

[196] 531 U.S. at 369.

[197] *Hibbs*, 538 U.S. at 728.

[198] *See Garrett*, 531 U.S. at 366-67.

[199] *See Lane*, 541 U.S. at 522-23.

[200] *See* City of Boerne v. Flores, 521 U.S. 507, 530 (1997) ("Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.").

[201] 541 U.S. at 532.

subject states to "the most demanding test known to constitutional law" even when the conduct at issue did not violate the Constitution.[202]

Significantly, however, a court need only assess whether a challenged statute satisfies the congruence and proportionality test if the legislation is "prophylactic"; that is, if it purports to regulate conduct beyond actual violations of the Fourteenth Amendment.[203] To the extent that Congress merely creates a cause of action for activity that "actually violates the Fourteenth Amendment," Congress may abrogate state sovereign immunity without a showing of congruence and proportionality.[204]

As a practical matter, there are two main steps that legislators can take to decrease the likelihood that a court will conclude that a given piece of legislation exceeds Congress's Fourteenth Amendment power and is therefore invalid. First, Congress can develop a substantial legislative record that demonstrates a "history and pattern" of constitutional violations justifying the remedial legislation.[205] Congress will have more leeway to craft a legislative remedy when the history of constitutional violations is severe,[206] implicates a fundamental right,[207] or involves a suspect classification.[208] Second, Congress could ensure that its remedy is "drawn in narrow terms to address or prevent" those constitutional violations.[209] Although Congress has power to regulate conduct that does not itself violate the Fourteenth Amendment, it arguably should avoid sweeping too broadly in crafting a remedy.[210]

Necessary and Proper Clause

Supplementing Congress's enumerated powers is the Necessary and Proper Clause, which grants Congress the power to "make all Laws which shall be necessary and proper for carrying into

[202] 521 U.S. at 534-35; *see also id.* at 532 ("Sweeping coverage ensures [RFRA's] intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.").

[203] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003) (defining "prophylactic legislation" as a law that "proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct").

[204] *See* United States v. Georgia, 546 U.S. 151, 159 (2006) (concluding that Congress may validly abrogate state sovereign immunity to the extent a law merely "creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment").

[205] *See, e.g.*, *Lane*, 541 U.S. at 530 (finding Title II of the ADA an "appropriate response" to a "history and pattern of unequal treatment" of persons with disabilities).

[206] *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (approving "stringent new remedies" to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century"), *abrogated in part by* Shelby Cty. v. Holder, 570 U.S. 529 (2013); Oregon v. Mitchell, 400 U.S. 112, 132 (1970) (opinion of Black, J.) (relying on the "long history of the discriminatory use of literacy tests to disfranchise voters on account of their race" to uphold congressional ban on literacy tests for voting).

[207] *See, e.g.*, *Lane*, 541 U.S. at 522-23 (observing that Title II of the ADA combats both "irrational disability discrimination" and rights, like access to the courts under the Due Process Clause, that are "subject to more searching judicial review").

[208] *Compare* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (holding that Congress's purported abrogation under the Age Discrimination in Employment Act was invalid in part because "[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest"), *with Hibbs*, 538 U.S. at 728 (holding that Congress validly abrogated state sovereign immunity pursuant to FMLA family-care leave provisions in part because "statutory classifications that distinguish between males and females are subject to heightened scrutiny").

[209] Coleman v. Court of Appeals of Md., 566 U.S. 30, 37 (2012).

[210] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 535 (1997) ("[RFRA] is broader than is appropriate if the goal is to prevent and remedy constitutional violations.").

Execution the" powers enumerated in Article I of the Constitution, as well as "all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."[211] The Necessary and Proper Clause[212] is typically understood not as an independent grant of congressional power, but as an extension of all the other powers vested in the federal government, especially Congress's enumerated Article I powers.[213] Thus, explicitly or implicitly, when a court addresses the outer limits of Congress's power under, for example, the Commerce Clause, it necessarily considers the challenged statute's validity under the Necessary and Proper Clause, as well.[214] In a few cases, however, the Supreme Court has analyzed Congress's power under the Necessary and Proper Clause independently from any specific enumerated power. Typically, these cases involve either multiple enumerated powers,[215] or congressional actions that are many steps removed from the exercise of the underlying enumerated federal power.[216] Because the extent of the Necessary and Proper Clause defines the outer reaches of Congress's legislative power, these cases delineate the boundary between the authority of the federal government and those areas reserved to the states.[217]

The Supreme Court's 1819 opinion in *McCulloch v. Maryland* provides the canonical interpretation of the Necessary and Proper Clause.[218] *McCulloch* resolved the then-controversial issue of whether Congress had the power to incorporate a national bank.[219] Because the enumerated powers of Article I do not explicitly include the power to establish a bank, *McCulloch* addressed whether creating a national bank was a necessary and proper means of effectuating Congress's powers "to lay and collect taxes; to borrow money; to regulate commerce; to declare

[211] U.S. CONST. art. I, § 8, cl. 18.

[212] Although "Necessary and Proper Clause" is the modern term for this constitutional provision, historically it was often called the "Sweeping Clause." *See, e.g.*, THE FEDERALIST No. 33 (Alexander Hamilton); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1132 & n. 47 (2014) ("[The Framers] referred to the last clause of Article I, Section 8 as the 'Sweeping Clause.'").

[213] *See* Kinsella v. U.S. *ex rel.* Singleton, 361 U.S. 234, 247 (1960) ("The [Necessary and Proper Clause] is not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of [Article I, section 8] 'and all other Powers vested by this Constitution."). *But see* Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2062-67 (2014) (arguing that the Necessary and Proper Clause is most accurately characterized as a separate enumerated power, even if "it is auxiliary rather than primary").

[214] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 5 (2005) (addressing whether the prohibition of local use and cultivation of marijuana was necessary and proper to Congress's power to regulate interstate commerce); Missouri v. Holland, 252 U.S. 416, 432 (1920) ("If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.").

[215] *See, e.g.*, McCulloch v. Maryland, 17 U.S. 316, 407 (1819) (considering whether Congress's powers "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies" implied the power to establish a national bank under the Necessary and Proper Clause).

[216] *See, e.g.*, United States v. Comstock, 560 U.S. 126, 148 (2010) (considering whether "the enumerated power that justifies the creation of a federal criminal statute" further justifies indefinite civil commitment of a federal prisoner after the expiration of their criminal sentence).

[217] *See* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 584 (2002) ("Because the Necessary and Proper Clause delineates the outer boundary of congressional authority, interpretation of that provision also permits identification of reserved state powers."); Stephen Gardbaum, *The Federalism Implications of* Flores, 39 WM. & MARY L. REV. 665, 682 (1998) ("[T]he Necessary and Proper Clause . . . operates at the boundaries of federal and reserved state power . . . .").

[218] LaCroix, *supra* note 213, at 2061 (describing *McCulloch* as "the lodestar for understanding the [Necessary and Proper] clause"); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 814 (1996) ("Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch* . . . .").

[219] *McCulloch*, 17 U.S. at 401.

and conduct a war; and to raise and support armies and navies."[220] The decision thus hinged on how broadly to construe the Necessary and Proper Clause. The *McCulloch* Court emphatically rejected the argument that Congress's powers under the Clause are limited to those that are "indispensibl[e]" or "absolutely" necessary.[221] Rather, the Court held that "necessary" was better understood to mean "conducive to" or "needful."[222] As the Court concluded: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[223]

Many federal laws rest on the foundation established by *McCulloch*'s broad interpretation of the Necessary and Proper Clause. For example, "the Necessary and Proper Clause provides the constitutional authority for most federal criminal statutes."[224] The Constitution expressly empowers Congress to punish only four crimes: counterfeiting, piracies, offenses against the law of nations, and treason.[225] The remainder of the federal criminal code—including prohibitions on tax evasion, racketeering, mail fraud, drug possession, and other crimes[226]—rests on a determination that criminalization is necessary to effectuate congressional power to regulate interstate commerce, collect taxes, establish post offices, spend for the general welfare, or some other enumerated power.[227]

Since *McCulloch*, the Supreme Court has continued to follow an expansive interpretation of the Necessary and Proper Clause, holding that the Clause permits any federal legislation that is "convenient" or "useful" to the exercise of federal power and is thereby "rationally related to the implementation of a constitutionally enumerated power."[228] The leading modern case interpreting the Clause is *United States v. Comstock*, which concerned a law that provided for indefinite civil commitment of certain persons in federal custody who were shown to be "sexually dangerous" and accordingly authorized detention of such prisoners even after they had served their sentences.[229] The difficulty with the law, as a matter of congressional power, was that the offenders' sexual dangerousness did not have an explicit tie to any enumerated federal power.[230] Moreover, the Court's 2000 decision in *United States v. Morrison* foreclosed the argument that Congress could regulate general sexual violence pursuant to the Commerce Clause.[231] *Comstock* nonetheless upheld the civil commitment provision under the Necessary and Proper Clause.

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[220] *Id.* at 406-07.

[221] *Id.* at 414-17.

[222] *Id.* at 418.

[223] *Id.* at 421.

[224] United States v. Comstock, 560 U.S. 126, 156 (2010) (Alito, J., concurring in the judgment).

[225] *See* U.S. CONST. art. I, § 8, cls. 6, 10; *id.* art. III, § 3, cl. 2.

[226] *See, e.g.*, 18 U.S.C. §§ 1341-1351 (mail fraud and wire fraud); *id.* §§ 1951-1968 (racketeering); 21 U.S.C. § 844 (drug possession); 27 U.S.C. § 7201 (tax evasion).

[227] *See Comstock*, 560 U.S. at 156 (Alito, J., concurring in the judgment) ("Most federal criminal statutes rest upon a congressional judgment that, in order to execute one or more of the powers conferred on Congress, it is necessary and proper to criminalize certain conduct.").

[228] *Id*. at 134 (opinion of the Court) (citations omitted).

[229] *Id*. at 130-31. For a fuller analysis of the *Comstock* decision, see CRS Report R40958, *United States v. Comstock: Legislative Authority Under the Necessary and Proper Clause*, by Charles Doyle.

[230] *See* 18 U.S.C. § 4247(a)(6) (defining a "sexually dangerous person" as one who "suffers from a serious mental illness . . . as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released").

[231] 529 U.S. 598, 617 (2000) (holding that Congress may not regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce").

Writing for the majority, Justice Breyer held that whichever enumerated power justified the prisoner's crime of conviction[232] also permitted Congress "to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others," including through post-sentence civil commitment.[233] The Court concluded that the following five factors rendered the challenged law a valid exercise of Congress's Necessary and Proper Clause authority:

> (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.[234]

A few years later, the Supreme Court reaffirmed *Comstock*'s broad reading of the Necessary and Proper Clause in *United States v. Kebodeaux*.[235] *Kebodeaux* concerned another federal regulation of sex offenders: namely, the registration requirements of the 2006 Sex Offender Registration and Notification Act (SORNA).[236] Anthony Kebodeaux, a member of the U.S. Air Force, was convicted by a court martial of a sex crime in 1999; he served a three-month sentence and received a bad conduct discharge.[237] In 2007, Kebodeaux was convicted of violating SORNA when he moved from El Paso to San Antonio but failed to update his registration.[238] Although Congress had not enacted SORNA until well after Kebodeaux's court martial and discharge, the Supreme Court upheld SORNA's application to Kebodeaux as necessary and proper to Congress's power to "make Rules for the . . . Regulation of the land and naval Forces."[239] Key to that conclusion was the Court's finding that Kebodeaux's release from federal custody was not "unconditional" because he was subject to an earlier federal statute, the Wetterling Act, which imposed "very similar" registration requirements to those of SORNA.[240] The Court explained that, as applied to Kebodeaux, the Wetterling Act was necessary and proper to Congress's power to regulate the military because it was imposed as part of Kebodeaux's original punishment by the court martial.[241] The Court thus framed the case as presenting a narrow question of whether Congress could later "modify" those registration requirements through SORNA.[242] Applying the five *Comstock* factors discussed above, the Court found that the breadth of the Necessary and

[232] Notably, the civil commitment provisions applied to any person in federal custody, regardless of whether his conviction was for a sex-related crime or not. *See* 18 U.S.C. §§ 4247(a)(5), 4248(a). In practice, however, many of the individuals committed under the statute were in federal custody for a sex crime that fell within federal jurisdiction, such as possession of child pornography that "has been shipped or transported in or affecting interstate or foreign commerce . . . by any means including by computer." *See id.* § 2252(a)(2); *Comstock*, 560 U.S. at 131 ("Three of the five [petitioners] had previously pleaded guilty in federal court to possession of child pornography . . . .").

[233] *Comstock*, 560 U.S. at 149.

[234] *Id.*

[235] 570 U.S. 387 (2013).

[236] *See* 34 U.S.C. §§ 20911-20932; 18 U.S.C. § 2250(a).

[237] *Kebodeaux*, 570 U.S. at 389-90.

[238] *Id.* at 390.

[239] U.S. CONST. art. I, § 8, cl. 14; *Kebodeaux*, 570 U.S. at 399.

[240] *Kebodeaux*, 570 U.S. at 391.

[241] *Id.* at 393.

[242] *Id.* at 393-94.

Proper Clause and the reasonableness of Congress's registration requirements justified SORNA's application to Kebodeaux.[243]

Though *Comstock* and *Kebodeaux* embrace a broad understanding of the Necessary and Proper Clause, Congress's powers under this provision are not unlimited. For example, as discussed above with respect to the Commerce Clause, a majority of the Supreme Court has concluded that federal laws forbidding gun possession near schools, creating a civil remedy for victims of gender-motivated violence, and compelling the purchase of health insurance are not necessary and proper to the exercise of Congress's power to regulate interstate commerce.[244] Nevertheless, following *Comstock* and *Kebodeaux*, lower courts have been deferential to Congress's power under the Necessary and Proper Clause. Many of the reported cases address various as-applied challenges to SORNA; the courts of appeals have repeatedly rejected such challenges, even when the defendant "neither served in the military, nor committed an offense or lived on federal property, nor moved within interstate or foreign commerce."[245] Courts have likewise relied on the Necessary and Proper Clause to uphold Congress's power to criminalize hostage taking;[246] exercise supplemental jurisdiction over state law claims;[247] criminalize theft from organizations receiving federal funds;[248] criminalize bribery of state and local officials receiving federal funds;[249] establish military commissions to try conspiracy to commit war crimes;[250] and criminalize sexual abuse in federal prisons.[251]

External Federalism Limitations on Congress's Powers

In addition to the "internal" limitations on Congress's powers discussed above, the Supreme Court has recognized a variety of federalism doctrines that affirmatively prohibit Congress from taking certain actions even if Congress would otherwise be authorized to act pursuant to one of its enumerated powers. This section of the report accordingly discusses these "external" limitations on Congress's authority. First, the report discusses the "anti-commandeering" doctrine,[252] before

[243] *See id.* at 395-99.

[244] *See supra* "Commerce Clause."

[245] United States v. Thompson, 811 F.3d 717, 723 (5th Cir. 2016) (collecting cases). *See also, e.g.*, United States v. Brune, 767 F.3d 1009, 1017 (10th Cir. 2014) (rejecting as-applied challenge to SORNA); United States v. Coppock, 765 F.3d 921, 925 (8th Cir. 2014) (same); United States v. Elk Shoulder, 738 F.3d 948, 957-59 (9th Cir. 2013) (same); United States v. Carel, 668 F.3d 1211, 1218-24 (10th Cir. 2011) (same).

[246] *See, e.g.*, United States v. Mikhel, 889 F.3d 1003, 1023-24 (9th Cir. 2018) (upholding Hostage Taking Act as necessary and proper to Congress's Treaty Power); United States v. Shibin, 722 F.3d 233, 247 (4th Cir. 2013) (same); United States v. Ferreira, 275 F.3d 1020, 1027-28 (11th Cir. 2001) (same).

[247] *See* Artis v. District of Columbia, 138 S. Ct. 594, 606-07 (2018) (rejecting argument that tolling the statute of limitations for any state-law claim joined with a claim in federal court under supplemental jurisdiction would exceed Congress's power under the Necessary and Proper Clause).

[248] *See* United States v. Edgar, 304 F.3d 1320, 1325-27 (11th Cir. 2002) (upholding 18 U.S.C. § 666(a)(1) as necessary and proper to Congress's Spending Power).

[249] *See* Sabri v. United States, 541 U.S. 600, 606 (2004) (upholding 18 U.S.C. § 666(a)(2) as necessary and proper to Congress's Spending Power).

[250] Al Bahlul v. United States, 840 F.3d 757, 758 (D.C. Cir. 2016) (per curiam); *see also id.* at 761-62 (Kavanaugh, J., concurring).

[251] United States v. Mujahid, 799 F.3d 1228, 1233-35 (9th Cir. 2015).

[252] *See infra* "The "Anti-Commandeering" Doctrine."

addressing the limitations on Congress's authority under the Spending Clause.[253] The report then discusses the Eleventh Amendment and state sovereign immunity, before concluding with a review of the equal sovereignty doctrine[254] the Supreme Court recognized in its 2013 decision in *Shelby County v. Holder*.[255]

The "Anti-Commandeering" Doctrine

The "anti-commandeering" doctrine generally prohibits the federal government from requiring states and localities to adopt or enforce federal policies.[256] The Supreme Court has explained that this principle derives from the "fundamental structur[e]" of the Constitution, which "withholds from Congress the power to issue orders directly to the States" and reserves all legislative power not granted to Congress to the states via the Tenth Amendment.[257]

The anti-commandeering doctrine has its origins in the Court's 1992 decision in *New York v. United States*, which struck down a provision of a federal statute that required states to either (1) regulate low-level radioactive waste generated within their borders according to the instructions of Congress, or (2) take title to and possession of such waste.[258] In striking down the provision, the Court reasoned that in light of the absence of an enumerated constitutional power to issue commands to state governments and the Tenth Amendment's reservation of state sovereignty, Congress may not "commandeer" or "conscript" state governments into implementing federal policies by "directly compelling them to enact and enforce a federal regulatory program."[259] The Court explained that this limitation on Congress's authority "follows from an understanding of the fundamental purpose served by our Government's federal structure" to "secure[] to citizens the liberties that derive from the diffusion of sovereign power."[260] The Court also reasoned that the anti-commandeering doctrine is necessary to ensure political accountability because "[w]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[261]

The Court again applied the anti-commandeering doctrine five years later in *Printz v. United States*.[262] In *Printz*, the Court struck down a provision of the Brady Handgun Violence Prevention Act that required state law enforcement officers to perform background checks on prospective gun purchasers.[263] In striking down the challenged provision, the Court concluded that Congress cannot require states to enforce or implement federal policies, even where the relevant federal

[253] *See infra* "Limits on the Spending Power."

[254] *See infra* "Equal Sovereignty Doctrine."

[255] 570 U.S. 529 (2013).

[256] Printz v. United States, 521 U.S. 898, 921, 929-30 (1997); New York v. United States, 505 U.S. 144, 175, 176-78 (1992).

[257] Murphy v. NCAA, 138 S. Ct. 1461, 1475 (2018). The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[258] 505 U.S. at 177.

[259] *Id*. at 175, 176-78 (internal quotation marks and citation omitted).

[260] *Id*. at 181 (internal quotation marks and citation omitted).

[261] *Id*. at 169.

[262] Printz v. United States, 521 U.S. 898, 917, 925, 929 (1997).

[263] *Id*. at 935.

legislation merely requires state officials to perform "discrete, ministerial tasks."[264] As in *New York*, the Court explained that this principle follows from the Constitution's "structural protections of liberty," and that a contrary rule would diminish the political accountability of government officials.[265] The Court also gestured toward a related but separate rationale for the anti-commandeering doctrine, reasoning that allowing Congress to "forc[e] state governments to absorb the financial burden of implementing a federal regulatory program" would permit federal officials to "take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."[266]

Nevertheless, the Supreme Court has explained that the anti-commandeering doctrine recognized in *New York* and *Printz* has important limits. First, the Court has explained that the doctrine "does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage."[267] The Court invoked this "exception" to the anti-commandeering doctrine in *Reno v. Condon*, where it rejected a Tenth Amendment challenge to a federal law that restricted the states' ability to disclose personal information contained in the records of their motor vehicle departments (DMVs).[268] The Court upheld the challenged law—which also restricted the ability of *private* actors to disclose personal information they obtained from state DMVs—because the law "regulate[d] the States as the owners of" databases, but did not impinge states' "sovereign capacity to regulate their own citizens" by requiring the states to enact specific regulations or assist in the enforcement of federal statutes regulating private individuals.[269]

Second, the anti-commandeering doctrine does not prohibit Congress from requiring state *courts* to enforce federal causes of action.[270] The Court arrived at this conclusion in its 1947 decision in *Testa v. Katt*, where it held that Rhode Island courts were required to enforce the federal Emergency Price Control Act.[271] The Act established a cause of action against persons who sold certain goods above a prescribed price ceiling and provided that state courts shared concurrent jurisdiction with federal courts to adjudicate claims brought under the Act.[272] In *Testa*, the Court rejected the argument that Rhode Island courts were not required to enforce the Act because they were not required to enforce the statutes of other sovereigns, explaining that under the Supremacy Clause, "the policy of the federal Act is the prevailing policy in every state."[273] Accordingly, while the anti-commandeering doctrine prohibits Congress from conscripting state legislatures and executive officials to adopt or enforce federal policy, it does not prevent Congress from requiring state courts to enforce federal causes of action.

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[264] *Id*. at 929.

[265] *Id*. at 921, 929-30.

[266] *Id*. at 930.

[267] Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018).

[268] 528 U.S. 141, 143-44, 151-52 (2000).

[269] *Id*. at 151. In *Condon*, the Court relied in part on its 1988 decision in *South Carolina v. Baker*, which similarly rejected a Tenth Amendment challenge to a statute removing a federal tax exemption for interest earned on state and local bonds unless they were issued in registered (as opposed to bearer) form. 485 U.S. 505, 515 (1988). Operating under the assumption that the challenged law "effectively prohibit[ed] issuing [bearer] bonds," the Court upheld the law on the grounds that it applied to both state governments and private corporations, and therefore did not "seek to control or influence the manner in which States regulate private parties." *Id*. at 514.

[270] Testa v. Katt, 330 U.S. 386, 394 (1947).

[271] *Id*.

[272] *Id*. at 387.

[273] *Id*. at 393.

Third, the Supreme Court has "long recognized" that Congress can displace (or "preempt") otherwise valid but conflicting state laws under the Constitution's Supremacy Clause so long as it does so pursuant to its enumerated powers.[274] The Court has held that Congress's power to preempt state law includes the power "to offer States the choice of regulating . . . according to federal standards or having state law pre-empted by federal regulation."[275] As discussed below, these sorts of "conditional preemption" schemes are a ubiquitous feature of what have been called "cooperative federalism" programs, and are particularly common in federal environmental law.[276] The Court has held that conditional preemption schemes are permissible as long as they do not "require the States to enforce federal law,"[277] even going so far as to hold that Congress may demand that states "consider" federal standards as a precondition to continued state regulation of a field so long as it does not *require* states to adopt federal standards.[278]

In 2018, the Court considered the relationship between "commandeering" and preemption in *Murphy v. NCAA*.[279] *Murphy* involved New Jersey's effort to legalize sports gambling and the federal Professional and Amateur Sports Protection Act of 1992 (PASPA), which made it unlawful for most states to (among other things) "authorize by law" sports gambling.[280] In 2014, New Jersey enacted a statute partially repealing its prohibition on sports gambling, allowing gambling to occur at most casinos and racetracks in the state, but maintaining restrictions on (1) gambling at other locations, (2) gambling on New Jersey sporting events and collegiate teams, and (3) gambling by persons under the age of 21.[281] The National Collegiate Athletic Association (NCAA) and other sports leagues (which PASPA empowered to bring civil actions to enjoin violations of the statute) challenged the New Jersey law as an "authorization" of sports gambling

[274] Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008). While the Court has not yet directly addressed Congress's Fourteenth Amendment powers in its anti-commandeering decisions, other decisions arguably suggest (and a number of commentators have assumed) that another "exception" to the anti-commandeering doctrine exists in cases where Congress legislates pursuant to its power to enforce the Fourteenth Amendment "by appropriate legislation." *See* U.S. CONST. amend. XIV, § 5; Milliken v. Bradley, 433 U.S. 267, 291 (1977) (holding that the "Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment"); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that the Fourteenth Amendment grants Congress the authority to abrogate the Eleventh Amendment sovereign immunity of states on the grounds that "when Congress acts pursuant to [section 5 of the Fourteenth Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority"); Daniel Hemel, Murphy*'s Law and Economics*, MEDIUM (May 16, 2018), https://medium.com/whatever-source-derived/murphys-law-and-economics-3c0974e21ac8 (explaining that under "a reasonable interpretation" of the Court's anti-commandeering cases, Congress can compel states to adopt and enforce federal policies when it is "acting pursuant to its authority under the Reconstruction Amendments"); Ronald D. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289, 298-99 (1984) (discussing the proposition that the Tenth Amendment's limitations on Congress's authority do not apply when Congress legislates pursuant to its Fourteenth Amendment powers).

[275] New York v. United States, 505 U.S. 144, 174 (1992). *See also* FERC v. Mississippi, 456 U.S. 742, 764-65 (1982); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981).

[276] *See* Alfred R. Light, *He Who Pays the Piper Should Call the Tune: Dual Sovereignty in U.S. Environmental Law*, 4 ENVTL. LAW. 779, 783 (1998) (noting that all of the major environmental statutes pass during the late 1960s and early 1970s "contemplated some form of intergovernmental cooperation between the states and the federal government in implementing the statutory program").

[277] Printz v. United States, 521 U.S. 898, 925 (1997) (citing *FERC*, 456 U.S. 742; *Hodel*, 452 U.S. 264).

[278] *See FERC*, 456 U.S. at 764-65.

[279] 138 S. Ct. 1461 (2018).

[280] 28 U.S.C. § 3702(1).

[281] *Murphy*, 138 S. Ct. at 1472.

that violated PASPA.[282] In response, New Jersey argued (among other things) that PASPA unconstitutionally commandeered state authority by prohibiting it from repealing its ban on sports gambling.[283]

The Court sided with New Jersey and struck down PASPA's prohibition of state "authorization" of sports gambling under the anti-commandeering doctrine.[284] The Court concluded that this provision in PASPA was unconstitutional because it "unequivocally dictate[d] what a state legislature may and may not do," and accordingly placed states "under the direct control of Congress."[285] In arriving at this conclusion, the Court rejected the NCAA's argument that PASPA's "anti-authorization" provision represented a valid exercise of Congress's power to preempt state law.[286] The Court rejected this argument on the grounds that "valid preemption" occurs only when federal law is "best read as . . . regulat[ing] private actors," as opposed to state governments.[287] According to the Court, a federal statute is "best read as . . . regulat[ing] private actors" when it "imposes restrictions or confers rights on private actors," thereby preempting state laws that impose restrictions or confer rights that conflict with the federal statute.[288] Because PASPA's "anti-authorization" provision did not "confer any federal rights on private actors interested in conducting sports gambling operations" or "impose any federal restrictions on private actors," the Court concluded that it could not be interpreted "as anything other than a direct command to the States," which the anti-commandeering doctrine forbids.[289]

Limits on the Spending Power

While the anti-commandeering doctrine prohibits Congress from *requiring* states and localities to adopt or enforce federal policies, Congress retains the power to *encourage* states and localities to adopt or enforce federal policies by paying them to do so pursuant to its Spending Clause authority.[290] However, the Supreme Court has held that this power to attach conditions to federal spending is not unlimited. As discussed above,[291] the Court has held that based on the language of the Spending Clause, Congress's exercise of its Spending Power "must be in pursuit of 'the

[282] *Id*.

[283] *Id*. at 1478.

[284] *Id*.

[285] *Id*.

[286] *Id*. at 1479-81.

[287] *Id*. at 1479.

[288] *Id*. at 1480.

[289] *Id*. at 1481.

[290] *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999) (noting that Congress "may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take"); Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (noting that Congress may "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives").

[291] *See supra* "Spending Clause."

general welfare.'"[292] The Court has also recognized the following four additional limitations on Congress's Spending Clause authority.[293]

Clear Notice

First, the Court has held that if Congress intends to place conditions on the receipt of federal funds by states, it "must do so unambiguously," thereby "enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."[294] The Court announced this limitation on Congress's Spending Clause authority in *Pennhurst State School & Hospital v. Halderman*, where it rejected the argument that states receiving federal funds under the Developmentally Disabled Assistance and Bill of Rights Act were required to abide by the statute's "bill of rights" for the developmentally disabled as a condition of accepting the funds.[295] In the statute's "bill of rights," Congress set forth a number of "findings" regarding the rights of the developmentally disabled, including findings that (1) developmentally disabled persons have "a right to appropriate treatment, services, and habilitation for [their] disabilities," and (2) treatment for such disabilities "should be provided in the setting that is least restrictive of the person's individual liberty."[296] In *Pennhurst*, a developmentally disabled resident of a Pennsylvania hospital filed a lawsuit challenging his conditions of confinement, arguing that the hospital had violated its duty under the federal statute to provide him with the "least restrictive" treatment possible.[297] The Supreme Court rejected this argument, concluding that the statute's "bill of rights" did not create substantive rights that states receiving federal funds were required to respect.[298] In arriving at this conclusion, the Court explained that because "legislation enacted pursuant to the spending power is much in the nature of a contract," Congress must provide clear notice of any conditions it attaches to federal grants so that states are able to accept those conditions "voluntarily and knowingly."[299] The Court concluded that Congress had not provided states with the required clear notice in the relevant statute because "nothing in the Act or its legislative history" suggested that Congress intended to condition funding on states' assumption of the "high cost" of compliance with the Act's "bill of rights."[300]

The Court arrived at a similar conclusion in its 2006 decision in *Arlington Central School District Board of Education v. Murphy*.[301] *Arlington Central* involved a fee-shifting provision in the Individuals with Disabilities Education Act (IDEA), which provides federal funds to assist state

[292] South Dakota v. Dole, 483 U.S. 203, 207 (1987). *See also* Helvering v. Davis, 301 U.S. 619, 640-41 (1937); United States v. Butler, 297 U.S. 1, 65 (1936). The Court has explained that in considering whether a federal expenditure is intended to serve the general welfare, courts "should defer substantially to the judgment of Congress." *Dole*, 483 U.S. at 207. Indeed, the Court has even questioned whether the "general welfare" requirement "is a judicially enforceable restriction at all." *Id*. at 207 n.2 (citing Buckley v. Valeo, 424 U.S. 1, 90-1 (1976)). *See also* "Spending Clause" *supra*.

[293] *See Dole*, 483 U.S. at 207-08. While the "clear notice" and "relatedness" principles discussed *infra* appear to stem from broader constitutional principles concerning the nature of state sovereignty as opposed to anything found in the text of the Spending Clause, whether those principles qualify as "internal" or "external" limitations on federal power is open to debate. *Cf. id*. This report addresses the "clear notice" and "relatedness" doctrines with the other limits not found directly within the text of the Spending Clause for ease of discussion.

[294] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[295] *Id*. at 11.

[296] *Id*. at 13.

[297] *Id*. at 9-10.

[298] *Id*. at 11.

[299] *Id*. at 17.

[300] *Id*. at 18.

[301] 548 U.S. 291 (2006).

and local agencies in educating children with disabilities and conditions such funding on compliance with certain requirements, including requirements related to litigation commenced to enforce the IDEA.[302] The case required the Court to determine whether the IDEA's fee-shifting provision—which provides that courts "may award reasonable attorneys' fees as part of the costs" to parents who prevail in litigation brought under the IDEA—authorizes prevailing parents to recover fees for services rendered by experts in IDEA litigation.[303] The Court held that the IDEA's fee-shifting provision did not authorize prevailing parents to recover expert fees from states and municipalities, reasoning that the provision did not provide states and localities with the required "clear notice" that acceptance of IDEA funding would result in potential liability for such fees.[304]

One commentator has observed that lower courts have applied the "clear notice" requirement to conditional spending schemes "with great frequency."[305] According to this commentator, courts have interpreted the "clear notice" requirement as "demanding that funding recipients receive three different types of notice before being held liable for violation of a funding condition: (a) notice of the *remedy* for violation of a funding condition, (b) notice of how the substantive rule imposed by that condition *applies* to particular facts, and (c) notice of the *facts* in a given case that violate that condition."[306] Nevertheless, courts have held that where "the plain language" of a federal statute imposes a condition on the receipt of federal funds, the condition does not exceed the scope of Congress's Spending Clause authority under the "clear notice" doctrine.[307] In *Madison v. Virginia*, for example, the Fourth Circuit rejected the argument that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) fails to provide "clear notice" that recipients of federal prison funds are required to abide by the statute's protections of religious liberty.[308] The court rejected this argument because "the plain language" of RLUIPA—which (1) provides that "[n]o government" shall substantially burden prisoners' religious exercise absent a compelling governmental interest, (2) defines "government" as including states and their agencies and departments, and (3) provides that its religious liberty protections apply to any "program[s] or activit[ies] that receive[] Federal financial assistance"—gives states "clear notice" that they are required to abide by RLUIPA's religious liberty protections as a condition of receiving federal prison funds.[309]

Relatedness

Second, the Supreme Court's cases have also "suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs."[310] The Court briefly discussed this limitation on Congress's Spending Clause authority in its 1987 decision in *South Dakota v. Dole*.[311] In that case, the Court rejected a challenge to a federal statute that withheld five percent of federal

[302] *Id*. at 295-96.

[303] *Id*. at 296-97.

[304] *Id*. at 300-03.

[305] Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L. J. 345, 385 (2008).

[306] *Id*. at 394.

[307] Madison v. Virginia, 474 F.3d 118, 125 (4th Cir. 2006).

[308] *Id*.

[309] *Id*.

[310] South Dakota v. Dole, 483 U.S. 203, 207 (1987) (internal quotation marks and citation omitted).

[311] *Id*. at 212.

highway funds otherwise allocable to states from those states that did not adopt a legal drinking age of at least 21 years.[312] In outlining the limitations on Congress's Spending Clause authority, the Court acknowledged the "relatedness" requirement, but noted that South Dakota (the state challenging the condition) had not disputed the connection between the drinking-age condition and the purpose behind the federal highway funds.[313] Because South Dakota had not challenged the drinking-age condition on "relatedness" grounds, the Court quickly disposed of the issue, concluding that the drinking-age condition was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel."[314]

While the Court acknowledged the "relatedness" limitation on Congress's Spending Clause authority in *Dole*, it has yet to overturn Spending Clause legislation on "relatedness" grounds.[315] In examining lower court decisions applying the limitation, two commentators have noted that most lower courts have given the "relatedness" requirement "only cursory attention," and "have had little difficulty upholding a wide range of funding conditions without a clearly explained relationship to the underlying legislation."[316]

Independent Constitutional Bar

Third, the Supreme Court has explained that constitutional provisions other than the Spending Clause "may provide an independent bar to the conditional grant of federal funds."[317] To illustrate, in *Dole*, the Court considered whether the Twenty-First Amendment[318] prohibited Congress from withholding federal funds from states that did not adopt the federally favored minimum drinking age.[319] The State of South Dakota argued that (1) because the Twenty-First Amendment conditioned the legality of the transportation of alcoholic beverages on their status under state law, it prohibited the federal government from *directly* establishing a federal minimum drinking age; and (2) the Spending Clause should not be interpreted as allowing Congress to *indirectly* regulate matters that it is prohibited from regulating directly.[320] The Court rejected this understanding of the "independent constitutional bar" limitation on Congress's Spending Clause authority, explaining that the limitation "is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly."[321] Rather, the Court concluded that the "independent constitutional bar" limitation "stands for the unexceptionable proposition that" Congress's Spending Clause "power may not be used to induce the States to engage in activities that would themselves be unconstitutional," such as engaging in "invidiously discriminatory state action" or "inflict[ing] . . . cruel and unusual punishment."[322]

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[312] *Id*. at 205.

[313] *Id*. at 208.

[314] *Id*. In a footnote, the *Dole* Court declined to "define the outer bounds of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power." *Id*. at 208 n.3.

[315] Barbour v. Wash. Metro. Transit Auth., 374 F.3d 1161, 1168 (D.C. Cir. 2004).

[316] Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L. J. 459, 466 (2003).

[317] *Dole*, 483 U.S. at 208.

[318] The Twenty-First Amendment repealed the Eighteenth Amendment's prohibition of the manufacture, sale, and transportation of alcoholic beverages, replacing it with a prohibition of "[t]he transportation or importation into any State . . . of intoxicating liquors, in violation of the laws thereof." U.S. CONST. amend. XXI.

[319] *Dole*, 483 U.S. at 208-10.

[320] *Id*. at 209.

[321] *Id*. at 210.

[322] *Id*.

Because South Dakota "would not violate the constitutional rights of anyone" were it to "succumb to the blandishments offered by Congress and raise its drinking age to 21," the Court explained, conditioning federal funding on South Dakota's decision to raise its drinking age did not exceed the scope of Congress's Spending Clause authority.[323]

The "Anti-Coercion" Doctrine

Finally, the Supreme Court has explained that just as Congress may not *require* states to adopt or enforce federal policy under the anti-commandeering doctrine, Congress may not attach conditions to the receipt of federal funding when "the financial inducement" offered by such funding is "so coercive as to pass the point at which pressure turns into compulsion."[324] The Court acknowledged this limitation on Congress's Spending Clause authority in *Dole*, where it rejected the argument that withholding the relevant federal highway funds from states that refused to adopt a federally favored drinking age qualified as overly "coercive."[325] In rejecting this argument, the Court concluded that because the challenged statute threatened non-compliant states with the loss of only five percent of their federal highway funds, it offered only "relatively mild encouragement" to states to adopt federal policy and accordingly represented a valid use of Congress's Spending Clause authority.[326]

In the years following *Dole*, lower courts applying that decision rejected a number of "coerciveness" challenges to statutes attaching conditions to the receipt of federal funds.[327] Commentators therefore generally assumed that the Court's identification of an "anti-coercion" limitation on Congress's Spending Clause authority did not in practice amount to a meaningful constraint on federal power.[328] However, the Court upended this consensus in the *NFIB* case discussed above,[329] where it held for the first (and to date only) time[330] that a federal statute crossed the line separating permissible "pressure" from impermissible "coercion."[331] In addition to rejecting a constitutional challenge to the ACA's "individual mandate,"[332] the Court also

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[323] *Id*. at 211.

[324] *Id*. (internal quotation marks and citation omitted).

[325] *Id*. at 211-12.

[326] *Id*.

[327] *See* Madison v. Virginia, 474 F.3d 118, 122 (4th Cir. 2006) (rejecting a challenge to the Religious Land Use and Institutionalized Persons Act); Cutter v. Wilkinson, 423 F.3d 579, 590 (6th Cir. 2005) (same); Barbour v. Wash. Metro. Area Transit Auth., 374 F.3d 1161, 1170 (D.C. Cir. 2004) (rejecting a challenge to the Civil Rights Remedies Equalization Act); Kansas v. United States, 214 F.3d 1196, 1203 (10th Cir. 2000) (rejecting a challenge to the Personal Responsibility and Work Opportunity Reconciliation Act). *But see* Commonwealth of Va., Dep't of Educ. v. Riley, 106 F.3d 559, 561 (4th Cir. 1997) (noting that "[a] substantial constitutional question under the Tenth Amendment would be presented" if a provision in the Individuals with Disabilities Education Act were interpreted to permit the Secretary of Education to withhold federal funds for the education of disabled students from states that refused to provide private tutors to disabled students suspended or expelled for serious misconduct unrelated to their disabilities).

[328] *See* Andrew B. Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2013 WIS. L. REV. 339, 348 (describing the consensus among commentators that *Dole* represented "a blank check to Congress"); Bagenstos, *supra* note 305, at 355 (concluding that "[n]one of [*Dole*'s] direct limitations on the spending power has had any real bite in the cases"); Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 113 n.18 (2001) (characterizing the "anti-coercion" limitation on Congress's Spending Power identified in *Dole* as "toothless").

[329] *See supra* "Commerce Clause."

[330] Eric Turner, *Protecting from Endless Harm: A Roadmap for Coercion Challenges After* N.F.I.B. v. Sebelius, 89 CHI.-KENT L. REV. 503, 503 (2014).

[331] 567 U.S. 519 (2012).

[332] *See supra* "Commerce Clause."

considered whether an ACA provision allowing the Secretary of Health and Human Services to withhold all Medicaid grants from states that refused to accept expanded Medicaid funding and comply with the conditions attached to it unconstitutionally coerced states into accepting federal policy.[333] The Court ultimately concluded that this provision in the ACA violated the Tenth Amendment.[334] In addressing the coerciveness issue, Chief Justice Roberts (who was joined by Justices Breyer and Kagan)[335] explained that as in *Dole*, the challenged conditions did not govern the use of new funding provided to states, but instead represented a "threat[] to terminate other significant independent grants" already provided to states.[336] Because the provision threatened to terminate other "independent" grants, the Chief Justice reasoned, it was "properly viewed as a means of pressuring the States to accept policy changes," requiring the Court to evaluate whether it was overly coercive.[337] Chief Justice Roberts explained that the provision was indeed overly coercive because the threat to withhold all of a state's Medicaid funding operated as a "gun to the head" that left states "with no real option but to acquiesce in the Medicaid expansion."[338] Specifically, the Chief Justice noted that while the federal funds at issue in *Dole* represented less than half of one percent of South Dakota's budget at the time, the relevant ACA provision threatened states with the loss of funds representing over ten percent of their budgets.[339] Chief Justice Roberts concluded that a threat to withhold federal funds of this magnitude was an unacceptably coercive means of incentivizing states to adopt federal policy.[340]

Lower courts are still working through the implications of the Court's "anti-coercion" decision in *NFIB*. In *Mississippi Commission on Environmental Quality v. EPA*, for instance, the D.C. Circuit rejected a "coerciveness" challenge to a provision in the Clean Air Act (CAA) allowing the Environmental Protection Agency (EPA) to prohibit the approval of federal funding for state transportation projects in areas that failed to attain compliance with national air quality standards.[341] The court concluded that the provision was not unduly coercive because (1) like the

[333] 567 U.S. at 575.

[334] *Id*. at 581-85.

[335] Applying the test for determining a case's holding when a majority of the Supreme Court agrees on a result but "no single rationale explaining the result enjoys the assent of five Justices," see Marks v. United States, 430 U.S. 188, 193 (1977) (internal quotation marks and citations omitted), the First and D.C. Circuits have concluded that because Chief Justice Roberts's opinion rested on narrower grounds than did an opinion reaching the same result joined by Justices Scalia, Kennedy, Thomas, and Alito, the portion of Chief Justice Roberts's *NFIB* opinion addressing the "anti-coercion" issue is controlling. Miss. Comm'n on Envtl. Quality v. EPA, 790 F.3d 138, 176 n.22 (D.C. Cir. 2015); Mayhew v. Burwell, 772 F.3d 80, 88-89 (1st Cir. 2014).

[336] *NFIB*, 567 U.S. at 580. In arriving at this conclusion, the Court rejected the federal government's argument that conditioning the continuation of pre-existing Medicaid funding on compliance with the ACA's Medicaid expansion was permissible because in imposing that condition, Congress had not threatened to withhold funds earmarked for any other programs. *Id*. at 582-82. Specifically, the federal government had argued that (1) Congress can place conditions on how federal funds are to be used, and (2) conditioning Medicaid funding on compliance with the Medicaid expansion amounted to placing conditions on how Medicaid funds were to be used. *Id*. The Court rejected this argument on the grounds that the Medicaid expansion "transformed" Medicaid from a program designed to cover discrete categories of needy persons into a more comprehensive program covering "the entire nonelderly population with income below 133 percent of the poverty level," thereby "accomplish[ing] a shift in kind, not merely degree." *Id*. at 583. Because the ACA's Medicaid expansion effectuated this type of change, the Court reasoned, the challenged provision was properly viewed as threatening to deprive states of an "independent" federal grant (pre-existing Medicaid funding), requiring the Court to evaluate whether that threat was overly coercive. *Id*. at 580.

[337] *Id*. at 580.

[338] *Id*. at 580-82.

[339] *Id*.

[340] *Id*.

[341] 790 F.3d 138, 175 (D.C. Cir. 2015).

statute upheld in *Dole*, but unlike the ACA provision struck down in *NFIB*, the relevant CAA provision did not threaten states with a loss of all federal funding for an existing program, but only with a loss of funding for transportation projects in certain geographic areas; (2) Texas (one of the states challenging the provision) failed to demonstrate that a significant number of its counties were non-compliant with national air quality standards and accordingly stood to lose funds; and (3) even if all of the relevant funds were withheld, those funds totaled less than four percent of Texas's budget.[342] In light of these considerations, the court concluded that the challenged CAA provision was not unduly coercive because the loss of funding threatened by the provision did "not even approach the over 10 percent of a State's overall budget at issue in *NFIB*."[343] Although the *Mississippi Commission* court rejected a "coerciveness" challenge to the CAA, two observers have argued that the D.C. Circuit's decision is "not likely to be the final word on the constitutionality of the CAA sanctions," as another CAA provision allows the EPA to withhold federal highway funding more broadly than the provision at issue in *Mississippi Commission* and may accordingly present a closer constitutional question.[344]

Some litigants and commentators have also argued that the anti-coercion doctrine should not be limited to cases where the federal government offers financial inducements to states and localities.[345] These observers contend that other means of pressuring states and localities to adopt federal policies—in particular, certain conditional preemption schemes—pose the same risk of federal coercion as the ACA provision the Supreme Court struck down in *NFIB*.[346] In *West Virginia v. EPA*, for instance, a coalition of 24 states offered an argument of this sort in challenging an EPA rule setting standards for carbon dioxide emissions from certain power plants, colloquially known as the "Clean Power Plan" (CPP).[347] Among other things, the CPP requires

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[342] *Id*. at 178.

[343] *Id*. (internal quotation marks and citation omitted).

[344] Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional? Cooperative Federalism and Conditional Spending After* NFIB v. Sebelius, 43 ECOLOGY L. Q. 671, 710 (2017). *See also* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L. J. 861, 920 (2013) (arguing that if the EPA "were to shut off *all* federal highway funds to a state based on the state's failure to provide a sufficient response to *stationary* sources of pollution," it would face "serious questions" based on the Court's decision in *NFIB*).

Two commentators have also argued that a provision in the CAA that requires states to (1) adopt plans to improve their air quality that meet certain standards, or (2) face stricter federal emission "offset" requirements than they would otherwise face, raises concerns under the anti-coercion doctrine. Adler & Stewart, *supra* note 344, at 714-15. While acknowledging that the Court's decision in *New York* appears to accept the permissibility of federal statutes that impose heightened regulatory burdens on states that fail to cooperate with federal policy as long as the additional burdens fall on private citizens and not the states themselves, these commentators have noted that during the oral argument for a case involving the ACA, Justice Kennedy expressed disagreement with that proposition. *Id*.; Transcript of Oral Argument at 19, King v. Burwell, 135 S. Ct. 2480 (2015) ("In *South* [*Dakota*] *v. Dole* where . . . the matter of funding for the highway, suppose Congress said, and if you don't build the highways, you have to go 35 miles an hour all over the State. We wouldn't allow that."). However, the Court's opinion in *King* did not ultimately address the anti-coercion issue that Justice Kennedy raised at oral argument. *See King*, 135 S. Ct. 2480.

[345] *See* Adler & Stewart, *supra* note 344, at 713-21; Opening Brief of Petitioners on Core Legal Issues at 78-86, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Feb. 16, 2016); Testimony of Laurence H. Tribe, EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues, House Comm. on Energy and Commerce (Mar. 17, 2015) at 23-26, https://docs.house.gov/meetings/IF/IF03/20150317/103073/HHRG-114-IF03-Wstate-TribeL-20150317-U1.pdf; David B. Rivkin, Jr., Andrew M. Grossman, & Mark W. DeLaquil, *Does EPA's Clean Power Plan Proposal Violate the States' Sovereign Rights?*, 16 ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 36 (Feb. 2015).

[346] As discussed, see *supra* "The 'Anti-Commandeering' Doctrine," the federal government conditionally preempts state law when it "offer[s] States the choice of regulating . . . according to federal standards or having state law pre-empted by federal regulation." New York v. United States, 505 U.S. 144, 174 (1992). *See also* FERC v. Mississippi, 456 U.S. 742, 764-65 (1982); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981).

[347] Opening Brief of Petitioners on Core Legal Issues, *supra* note 345, at 78-86.

states to submit plans to reduce carbon emissions from the relevant plants that meet certain federal standards.[348] The CPP further provides that if states fail to submit adequate plans, the EPA will impose a federal plan implementing the relevant standards.[349] In challenging these provisions in the CPP, the states argued that because the EPA lacks the authority to directly impose certain requirements that *states* would have the authority to impose in developing emission reduction plans (specifically, requirements concerning operational efficiency at individual plants), a federal plan implementing the CPP would necessarily involve federal rules that would result in the closure of all fossil-fuel fired power plants.[350] According to the states, these rules would in turn require state regulators to facilitate the availability of other power sources (e.g., natural gas and renewable energy) to maintain functioning electric systems.[351] The states contended that this "threat[] to disrupt the electric systems of States that do not carry out federal policy" violates the anti-coercion doctrine by leaving states "with no real option but to acquiesce to federal demands."[352]

In February 2016, the Supreme Court stayed the implementation of the CPP,[353] potentially suggesting that a majority of the Court had concerns about its legality.[354] However, after the Trump Administration assumed office, the EPA issued a proposal to repeal the CPP and is currently in the process of developing a rule to replace it, likely mooting the litigation over the lawfulness of the CPP.[355]

The Eleventh Amendment and State Sovereign Immunity

In addition to the aforementioned external constraints on Congress's power, the Eleventh Amendment to the United States Constitution—which states that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State"—establishes additional limitations on the federal government's power vis-à-vis the states.[356] Subject to certain exceptions discussed below, if a litigant initiates a lawsuit against a state against that state's wishes, the court must generally dismiss the case.[357]

The Eleventh Amendment thereby implicates federalism by limiting the federal government's ability to regulate the states and thereby restricting Congress's authority to enact statutes that subject states to suit.[358] In the seminal 1890 case *Hans v. Louisiana*, the Supreme Court affirmed

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[348] 40 C.F.R. § 60.5855(a).

[349] *Id*. § 60.5720.

[350] Opening Brief of Petitioners on Core Legal Issues, *supra* note 345, at 85.

[351] *Id*.

[352] *Id*. (internal quotation marks and citation omitted).

[353] Order, Chamber of Commerce, et al. v. EPA, et al., No. 15A787 (Feb. 9, 2016).

[354] *See* Jonathan H. Adler, *Supreme Court puts the brakes on the EPA's Clean Power Plan*, WASH. POST (Feb. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?utm_term=.bca3d9f80694.

[355] See CRS Legal Sidebar LSB10198, *EPA Proposes the Affordable Clean Energy Rule to Replace the Clean Power Plan*, by Linda Tsang (Sept. 26, 2018).

[356] U.S. CONST. amend XI.

[357] *See, e.g.*, Colby v. Herrick, 849 F.3d 1273, 1281 (10th Cir. 2017) ("The Eleventh Amendment applies, foreclosing suit against the Division. Thus, the district court was right to dismiss the claims against the Division.").

[358] *See, e.g.*, Dellmuth v. Muth, 491 U.S. 223, 227 (1989) (discussing "principles of federalism that inform Eleventh Amendment doctrine") (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984)).

the principle that states generally enjoy immunity from private suits arising under federal statutory or constitutional law.[359] Because judicial adjudication is the primary means by which the federal government may enforce its legal mandates, and because the Eleventh Amendment insulates states from many types of lawsuits to enforce federal laws, the Eleventh Amendment imposes significant constraints on the national government's power *vis-à-vis* the states.[360]

The Court has interpreted the Eleventh Amendment against the broader background principle, inherent in the Constitution's structure, that the states, as separate and independent sovereigns, enjoy immunity from suit.[361] Thus, although the Supreme Court has "sometimes referred to the States' immunity from suit as 'Eleventh Amendment immunity,'" that phrase is "something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."[362] As the Supreme Court has explained, "each State is a sovereign entity in our federal system," and "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the sovereign's] consent."[363] According to the Supreme Court, state sovereign immunity "serves two fundamental imperatives: safeguarding the dignity of the states and ensuring their financial solvency."[364] As to the first of those two principles, the Court has stated that "making one sovereign appear against its will in the courts of" another sovereign—as would occur if a state were forced to litigate a case commenced against it in federal court—would impinge the former sovereign's dignity.[365] The doctrine of state sovereign immunity accordingly "confirms the sovereign status of the States by shielding them from suits by individuals absent their consent."[366] With regards to the second principle, the Supreme Court has emphasized that "the allocation of scarce resources among competing needs and interests lies at the heart of the political process."[367] The Court has therefore reasoned that granting "an unlimited congressional power to authorize suits" for monetary damages against the states "would pose a severe and notorious danger to the States and their resources" and thereby afford "Congress a power and a leverage over the States that is not contemplated by our constitutional design."[368]

Because "the Eleventh Amendment is but one particular exemplification of" the broader principle of state sovereign immunity,[369] the Supreme Court "has repeatedly held that the sovereign

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[359] 134 U.S. 1, 1-21 (1890).

[360] *See* Louise Weinberg, *Of Sovereignty and Union: The Legends of* Alden, 76 NOTRE DAME L. REV. 1113, 1123 (2001) (opining that the Supreme Court's Eleventh Amendment jurisprudence "frustrates judicial enforcement against the states of federal constitutional and legal norms").

[361] *See, e.g.*, Beaulieu v. Vermont, 807 F.3d 478, 483 (2d Cir. 2015) ("The concept of state sovereign immunity encompasses different species of immunity. The Eleventh Amendment . . . identifies a single species: immunity of a state's treasury from claims for damages brought by private entities in federal court . . . States also enjoy a broader sovereign immunity, which applies against *all* private suits, whether in state or federal court . . . The Eleventh Amendment is but one particular exemplification of that immunity.") (internal citations, quotation marks, and ellipses omitted).

[362] Alden v. Maine, 527 U.S. 706, 713 (1999).

[363] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (quoting *Hans*, 134 U.S. at 13).

[364] Karns v. Shanahan, 879 F.3d 504, 512 (3d Cir. 2018).

[365] Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (quoting Emps. Of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 294 (1973) (Marshall, J., concurring in the result)).

[366] Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 437 (2004).

[367] *Alden*, 527 U.S. at 751.

[368] *Id*. at 750.

[369] *E.g.*, Beaulieu v. Vermont, 807 F.3d 478, 483 (2d Cir. 2015).

immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment."[370] For instance, even though the text of the Eleventh Amendment would appear to only prohibit federal courts from adjudicating lawsuits against states filed by citizens of *another* state or a *foreign* state,[371] the Supreme Court has nonetheless "extended the Amendment's applicability to suits by citizens against their *own* states."[372] Additionally, even though the text of the Eleventh Amendment appears to only prohibit suits against the states themselves,[373] courts have interpreted the Amendment to also preclude lawsuits against certain state officials and state agencies.[374] Similarly, even though the text of the Eleventh Amendment only purports to limit the power of the *federal* courts,[375] the Supreme Court has ruled that states also "retain immunity from private suit in their *own* courts."[376] According to the Court, "an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States" would undesirably give "Congress a power and a leverage over the States that is not contemplated by our constitutional design."[377] Relatedly, although the Eleventh Amendment's text only appears to constrain the "*Judicial* power of the United States,"[378] the Supreme Court has ruled that the doctrine of state sovereign immunity generally prohibits federal *administrative agencies* from adjudicating disputes against nonconsenting states.[379]

That is not to say, however, that states are categorically immune from suit. Even though courts have interpreted the Eleventh Amendment more broadly than its language would suggest in some ways, in other respects courts have interpreted the Eleventh Amendment more *narrowly* than its text would suggest. In other words, even though the Eleventh Amendment categorically states

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[370] *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 754 (2002).

[371] *See* U.S. CONST. amend XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States *by Citizens of another State, or by Citizens or Subjects of any Foreign State*.") (emphasis added). *See also, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) ("By its terms the Amendment applies only to suits against a State by citizens of another State.").

[372] *Garrett*, 531 U.S. at 363 (emphasis added).

[373] *See* U.S. CONST. amend XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against one of the United States* by Citizens of another State, or by Citizens or Subjects of any Foreign State.") (emphasis added).

[374] *See, e.g.*, Regents of Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997) ("It has long been settled that the reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities."). The Eleventh Amendment does not, however, protect municipal entities. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977). Moreover, as discussed below, courts have recognized exceptions where it is permissible to sue a state official in his official capacity in federal court.

[375] U.S. CONST. amend XI ("The Judicial power *of the United States* shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States . . .") (emphasis added). *See also* Alden v. Maine, 527 U.S. 706, 730 (1999) (stating that "the fact that the Eleventh Amendment by its terms limits only '[t]he Judicial power of the United States'" does not delimit the Eleventh Amendment's breadth).

[376] *Alden*, 527 U.S. at 754 (emphasis added).

[377] *Id.* at 750. That said, the Supreme Court held in the 1979 case of *Nevada v. Hall* that the Eleventh Amendment does not necessarily prohibit a litigant from suing a state in *another* state's courts. *See* 440 U.S. 410, 421 (1979) (concluding that a California court could validly enter a judgment against the State of Nevada). The Supreme Court granted certiorari to decide whether to overrule *Nevada v. Hall*. *See* Order Granting Petition for Writ of Certiorari, Franchise Tax Bd. of State of Cal. v. Hyatt, No. 17-1299 (June 28, 2018).

[378] U.S. CONST. amend XI.

[379] Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) ("Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency . . . The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court.").

that the federal judicial power "shall not be construed to extend to *any* suit . . . commenced or prosecuted against one of the United States,"[380] the Supreme Court has nonetheless recognized circumstances in which a court may validly adjudicate a lawsuit against a state.[381] For one, the Supreme Court has recognized that "nothing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States" itself.[382] Moreover, beyond the context of a suit by a federal entity against a state, a litigant generally may permissibly hale a state (or one of its officials or instrumentalities) into court in three instances.[383]

First, the Supreme Court has recognized "that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'"[384] Thus, a litigant may permissibly sue a state if that state has voluntarily "allow[ed] a federal court to hear and decide a case commenced or prosecuted against it."[385] Courts "will find a waiver" of a state's Eleventh Amendment immunity "either if the State voluntarily invokes [the court's] jurisdiction, or else if the State makes a clear declaration that it intends to submit itself to [the court's] jurisdiction."[386] Significantly, the state's "consent to suit against it" must "be unequivocally expressed."[387] The Supreme Court has therefore rejected the theory that a state may "'impliedly' or 'constructively'" waive its sovereign immunity by merely engaging in a field of interstate commerce that Congress has deemed fit to regulate.[388] However, under limited circumstances, Congress can incentivize a state to subject itself to suit by "requir[ing] a waiver of state sovereign immunity as a condition for receiving federal funds."[389] To illustrate, because Congress has unambiguously required states to consent to

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[380] *See* U.S. CONST. amend XI (emphasis added).

[381] *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997) ("[The text of the Eleventh Amendment] could suggest that the Eleventh Amendment . . . is cast in terms of reach or competence, so that the federal courts are altogether disqualified from hearing certain suits brought against a State. This interpretation, however, has been neither our tradition nor the accepted construction of the Amendment's text . . . The Amendment . . . enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject matter jurisdiction."). Additionally, the Supreme Court has also recognized that multi-state entities created pursuant to compacts between states are ordinarily "not cloaked with the Eleventh Amendment immunity that a State enjoys" on its own. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 32-33 (1994).

[382] United States v. Mississippi, 380 U.S. 128, 140 (1965).

[383] *See, e.g.*, Boler v. Earley, 865 F.3d 391, 410 (6th Cir. 2017) ("There are three exceptions to sovereign immunity."). There are also other limited circumstances in which a litigant may hale a state into a federal court against its will that do not fit neatly within the three exceptions discussed herein. *See, e.g.*, Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 359, 379 (2006) (concluding that, notwithstanding the Eleventh Amendment, a bankruptcy trustee may pursue certain types of bankruptcy-related claims against a state agency); Kansas v. Colorado, 533 U.S. 1, 7 (2001) ("We have decided that a State may recover monetary damages from another State in an original action, without running afoul of the Eleventh Amendment."); S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 165-66 (1999) (reaffirming "that '[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts'" to which the state is a party, even if the state objects to the Supreme Court adjudicating the case) (quoting McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 31 (1990)); California v. Deep Sea Research, Inc., 523 U.S. 491, 494-95 (1998) ("The Eleventh Amendment does not bar the jurisdiction of a federal court over an *in rem* admiralty action where the *res* is not within the State's possession.").

[384] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675-87, 691 (1999) (quoting Clark v. Barnard, 108 U.S. 436, 447 (1883)).

[385] *Coeur d'Alene Tribe*, 521 U.S. at 267.

[386] *Coll. Sav. Bank*, 527 U.S. at 675-76 (internal citations omitted).

[387] Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (internal citations omitted).

[388] *See Coll. Sav. Bank*, 527 U.S. at 675

[389] *E.g.*, Fryberger v. Univ. of Ark., 889 F.3d 471, 473 (8th Cir. 2018) (quoting Jim C. v. United States, 235 F.3d 1079, 1081 (8th Cir. 2000)). *But see* Hurst v. Tex. Dep't of Assistive & Rehabilitative Servs., 482 F.3d 809, 811 (5th Cir. 2007) ("A state's receipt of federal funds does not automatically constitute a waiver of its Eleventh Amendment

suit under the IDEA[390] as a condition of receiving federal funds, several courts have ruled that private plaintiffs may sue certain state educational departments and school boards under the IDEA if the state has accepted federal financial assistance.[391]

Second, in limited contexts, Congress may directly abrogate the states' Eleventh Amendment immunity by statute.[392] However,

> because abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States, and because States are unable directly to remedy a judicial misapprehension of that abrogation, the [Supreme] Court has adopted a particularly strict standard to evaluate claims that Congress has abrogated the States' sovereign immunity.[393]

Thus, Congress may not "abrogate the States' constitutionally secured immunity from suit in federal court" unless it has made its intention to do so "unmistakably clear in the language of the statute."[394] However, it is not enough for Congress to merely express an unequivocal intent to abrogate the states' Eleventh Amendment immunity;[395] Congress must also "act[] pursuant to a valid grant of constitutional authority" when it seeks to authorize suits against a state in federal court.[396] Critically, the Supreme Court has ruled that only a few of the constitutional grants of legislative power discussed above[397] provide a valid means for Congress to abrogate a state's sovereign immunity. In other words, "even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment" nevertheless generally "prevents congressional authorization of suits by private parties against unconsenting States."[398] For instance, with very limited exceptions,[399] Congress typically cannot "base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I" of the

immunity."); Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 278 (5th Cir. 2005) (en banc) (applying "a five-prong test" to assess whether Congress had validly "condition[ed] the availability of federal funds on a state's waiver of its Eleventh Amendment immunity").

[390] For additional discussion of the IDEA and funding conditions, see "Clear Notice" *supra*.

[391] *See, e.g.*, *Pace*, 403 F.3d at 275-89 (holding that, "when Louisiana accepted particular federal funds, it waived the immunity afforded it by the Eleventh Amendment to suits under . . . the IDEA"); A.W. v. Jersey City Pub. Schs., 341 F.3d 234, 236 (3d Cir. 2003) (holding that the New Jersey Department of Education and several of its officials had "waived any immunity from" claims under the IDEA "by the acceptance of federal financial assistance").

[392] *See, e.g.*, Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of Univ. Sys. of Ga., 633 F.3d 1297, 1312 (11th Cir. 2011) ("Sovereign immunity is no bar to a claim for damages when Congress validly abrogates the States' sovereign immunity through legislation.").

[393] Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990) (internal citations and quotation marks omitted).

[394] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989)).

[395] *See, e.g.*, *id*. at 67 (concluding that even though the Age Discrimination in Employment Act "contain[ed] a clear statement of Congress's intent to abrogate the States' immunity," the attempted "abrogation exceeded Congress' authority under § 5 of the Fourteenth Amendment").

[396] Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) (quoting *Kimel*, 528 U.S. at 73).

[397] *See generally supra* "Internal Federalism Limitations on Congress's Powers."

[398] *Kimel*, 528 U.S. at 78 (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996)).

[399] *But cf.* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) (concluding that the Bankruptcy Clause of Article I "authorize[s] limited subordination of state sovereign immunity in the bankruptcy arena," but emphasizing that Congress's "power to do so arises from the Bankruptcy Clause itself; the relevant 'abrogation' is the one effected in the plan of the [Constitutional] Convention, not by statute").

Constitution,[400] such as the Commerce Clause[401] or the Copyright and Patent Clause.[402] By contrast, however, "Congress *may* authorize" litigants to sue a state in federal court "in the exercise of [Congress's] power to enforce the *Fourteenth* Amendment."[403] As discussed above,[404] the Fourteenth Amendment—which was "adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution"—"alter[ed] the pre-existing balance between state and federal power"[405] by granting Congress the "power to enforce, by appropriate legislation,"[406] constitutional provisions that expressly constrain the states.[407] The Fourteenth Amendment therefore permits Congress to enact legislation that authorizes "private suits against States or state officials which" might be "constitutionally impermissible in other contexts."[408] Thus, for instance, the Supreme Court has concluded that Congress validly invoked the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity from certain employment discrimination claims under the Civil Rights Act.[409] Significantly, however, Congress may only invoke the Fourteenth Amendment to abrogate a state's immunity if the statute abrogating that immunity qualifies as "appropriate legislation" within the meaning of Section 5 of the Fourteenth Amendment.[410]

Finally, notwithstanding the Eleventh Amendment, federal courts may generally adjudicate lawsuits against individual state officers in their official capacity so long as the plaintiff seeks only prospective injunctive[411] or declaratory[412] relief to remedy continuing violations of federal statutory or constitutional law, as opposed to monetary damages.[413] Federal courts may entertain

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[400] *Garrett*, 531 U.S. at 364.

[401] *E.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727 (2003) ("Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce."). *See generally supra* "Commerce Clause."

[402] *See, e.g.*, Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of Univ. Sys. of Ga., 633 F.3d 1297, 1315 (11th Cir. 2011) ("Congress may not abrogate the States' sovereign immunity pursuant to the Copyright and Patent Clause."). *See generally* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.").

[403] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999) (emphasis added).

[404] *See supra* "Congress's Powers Under the Civil War Amendments."

[405] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 65-66 (1996).

[406] U.S. CONST. amend XIV, § 5.

[407] *See id.* § 1 ("*No state* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.") (emphasis added). *Accord* Fitzpatrick v. Bitzer, 427 U.S. 445, 453 (1976) ("The substantive provisions of [the Fourteenth Amendment] are by express terms directed at the States.").

[408] *Fitzpatrick*, 427 U.S. at 456.

[409] *Id.* at 447.

[410] *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80 (2000). For a discussion of the types of statutes that Congress may validly enact pursuant to Section 5 of the Fourteenth Amendment, see *supra* "Congress's Powers Under the Civil War Amendments."

[411] "Injunctive relief" is judicially granted relief "that has the quality of directing or ordering; of, relating to, or involving an injunction." BLACK'S LAW DICTIONARY (10th ed. 2014). An "injunction" is "a court order commanding or preventing an action." *Id.*

[412] "Declaratory relief" is a "request to a court to determine the legal status or ownership of a thing." *Id.* A "declaratory judgment" is "a binding adjudication that establishes the rights and other legal relations of the parties." *Id.*

[413] *See, e.g.*, Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 437 (2004) ("The Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law."); Green v. Mansour, 474 U.S. 64, 68 (1985) ("The Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law."); Boler v. Earley, 865 F.3d 391, 412 (6th Cir. 2017) ("The exception set

such lawsuits against state officials even though the state itself remains immune from suit.[414] This doctrine is known as the *Ex Parte Young* exception to Eleventh Amendment immunity, after the seminal Supreme Court case in which the doctrine originated.[415] *Ex Parte Young* "is based on the notion, often referred to as 'a fiction,' that a State officer who" violates the U.S. Constitution or a federal statute "is 'stripped of his official or representative character'" for Eleventh Amendment purposes.[416] As a result, a lawsuit against that officer effectively constitutes a suit against an individual rather than the state itself.[417] The Supreme Court has justified this legal fiction on the ground that "suits for declaratory or injunctive relief against state officers must . . . be permitted if the Constitution is to remain the supreme law of the land."[418] *Ex Parte Young* thereby "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law."[419]

The Supreme Court has emphasized, however, that the *Ex Parte Young* exception "is narrow."[420] For one, *Ex Parte Young* applies only to suits against specific state officers in their official capacities;[421] the doctrine "has no application in suits against the States and their agencies, which are barred regardless of the relief sought."[422] Additionally, a plaintiff cannot take advantage of the *Ex Parte Young* exception if he seeks any judicial remedy other than injunctive or declaratory relief.[423] Thus, *Ex Parte Young* does not authorize courts to "impose a liability which must be paid from public funds in the state treasury,"[424] such as monetary damages.[425] Accordingly, "relief that in essence serves to compensate a party injured in the past

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forth in *Ex Parte Young* allows plaintiffs to bring claims for prospective relief against state officials sued in their official capacity to prevent future federal constitutional or statutory violations."); Balgowan v. New Jersey, 115 F.3d 214 (3d Cir. 1997) ("The *Ex Parte Young* exception has been interpreted by courts to allow suits against state officials for both prospective injunctive *and declaratory* relief. Although *Ex Parte Young*'s exact wording allows suits for prospective injunctive relief, the 1908 opinion was issued well before declaratory relief was available.") (emphasis added; internal citations omitted). *But see* Town of Barnstable v. O'Connor, 786 F.3d 130, 138-39 (1st Cir. 2015) (emphasizing that "Congress may render the *Ex parte Young* exception inapplicable by 'prescrib[ing] a detailed remedial scheme for the enforcement against a State of a statutorily created right'") (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 74 (1996)).

[414] *E.g.*, Elephant Butte Irrigation Dist. of N.M. v. Dep't of the Interior, 160 F.3d 602, 608 (10th Cir. 1998) (stating that *Ex Parte Young* may apply "even if the state is immune").

[415] *See Ex Parte* Young, 209 U.S. 123 (1908).

[416] Antrican v. Odom, 290 F.3d 178, 184 (4th Cir. 2002) (quoting *Ex Parte Young*, 209 U.S. at 160).

[417] *Id*. (quoting *Ex Parte Young*, 209 U.S. at 160).

[418] Alden v. Maine, 527 U.S. 706, 747 (1999).

[419] Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993).

[420] *Id*. (internal citations omitted).

[421] *E.g.*, Boler v. Earley, 865 F.3d 391, 412 (6th Cir. 2017) ("The exception set forth in *Ex Parte Young* allows plaintiffs to bring claims . . . against *state officials sued in their official capacity*.") (emphasis added). Notably, the Supreme Court has also concluded that the Eleventh Amendment does not bar suits against individual officers in their *personal* capacities pursuant to 42 U.S.C. § 1983, a federal statute that authorizes certain civil lawsuits against individual state officers predicated upon alleged violations of federal constitutional or statutory law. Hafer v. Melo, 502 U.S. 21, 31 (1991).

[422] *Puerto Rico Aqueduct*, 506 U.S. at 146.

[423] *E.g.*, Mills v. Maine, 118 F.3d 37, 54 (1st Cir. 1997) ("*Ex Parte Young* allows a way around the bar to federal jurisdiction erected by the Supreme Court's Eleventh Amendment jurisprudence only in cases where prospective declaratory or injunctive relief is sought.").

[424] *Hafer*, 502 U.S. at 30 (quoting Edelman v. Jordan, 415 U.S. 651, 663 (1974)).

[425] *E.g.*, Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 437 (2004) ("Federal courts may not award . . . money damages or its equivalent[] if the State invokes its immunity.").

. . . is barred even when the state official is the named defendant."[426] Relatedly, a plaintiff may only invoke *Ex Parte Young* if he seeks prospective rather than retrospective relief.[427] In other words, *Ex Parte Young* permits a lawsuit against a state official only when "the relief 'serves directly to bring an end to a present violation of federal law.'"[428] Finally, *Ex Parte Young* applies only where the plaintiff alleges that the defendant official is violating *federal* law;[429] "the *Young* exception does not apply when a suit seeks relief under *state* law."[430]

Equal Sovereignty Doctrine

The final external constraint on Congress's authority *vis-à-vis* the states discussed in this report is the equal sovereignty doctrine, which is the "fundamental principle" that the "Nation was and is a union of states, equal in power, dignity and authority."[431] The equal sovereignty principle thereby limits Congress's ability to enact legislation that subjects different states to unequal burdens.[432] This principle was mostly dormant until the Supreme Court's 2013 decision in *Shelby County v. Holder*, where the Court invoked the equal sovereignty doctrine to strike down a portion of the Voting Rights Act.[433] Significantly, however, *Shelby County* does not conclusively resolve exactly when "disparate treatment of states" violates the equal sovereignty principle.[434] As legal commentators have noted, however, many federal laws either explicitly or implicitly treat states differently, suggesting that the equal sovereignty principle applies in limited contexts.[435] It is therefore important to examine the few cases in which the federal courts have applied the equal sovereignty doctrine to understand when a federal law cannot impose unequal burdens on the states.[436]

The text of the Constitution expressly mandates equal treatment of states in only a few discrete provisions. For example, Article I, Section 8, clause 1 states that "all Duties, Imposts and Excises

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[426] Papasan v. Allain, 478 U.S. 265, 278 (1986). That said, the Eleventh Amendment does not preclude "monetary relief that is 'ancillary' to injunctive relief." Kentucky v. Graham, 473 U.S. 159, 169 n.18 (1985). "A court may enter a prospective injunction that costs the state money" as long as "the monetary impact is . . . not the primary purpose of the suit." *E.g.*, Barton v. Summers, 293 F.3d 944, 950 (6th Cir. 2002).

[427] *E.g.*, S & M Brands, Inc. v. Cooper, 527 F.3d 500, 508 (6th Cir. 2008) ("The *Ex parte Young* exception does not, however, extend to any retroactive relief."); Porter v. Jones, 319 F.3d 483, 491 (9th Cir. 2003) ("Under the doctrine of *Ex parte Young*, suits against an official for prospective relief are generally cognizable, whereas claims for retrospective relief (such as damages) are not."). Courts have acknowledged, however, that "the distinction between prospective and retroactive relief is not always easy to discern" in practice. Armstead v. Coler, 914 F.2d 1464, 1468 (11th Cir. 1990).

[428] Town of Barnstable v. O'Connor, 786 F.3d 130, 138 (1st Cir. 2015) (quoting Whalen v. Mass. Trial Ct., 397 F.3d 19, 29 (1st Cir. 2005)).

[429] *Papasan*, 478 U.S. at 277 (emphasis added).

[430] *E.g.*, Doe v. Regents of Univ. of Cal., 891 F.3d 1147, 1153 (9th Cir. 2018) (emphasis added).

[431] Shelby Cty., Ala. v. Holder, 570 U.S. 529, 544 (2013).

[432] *Id.* at 544 (stating that equal sovereignty is "highly pertinent in assessing . . . disparate treatment of States") (citing Nw. Austin Mun. Util. Dist. v. Holder, 557 U.S. 193, 203 (2009)).

[433] *Id*. at 556-57.

[434] *See id*. at 534-57.

[435] *See, e.g.*, Leah M. Litman, *Inventing Equal Sovereignty*, 114 U. MICH. L. REV. 1207, 1243-46 (2016) (citing examples of statutes that "specifically identify particular states for differential treatment or adopt a rule that has a differential effect on different states").

[436] *See id.* at 1230-32 (acknowledging the lack of explicit textual support but arguing that the "textual argument for the state equality principle is not much worse than the textual support for other constitutional rules").

shall be uniform throughout the United States."[437] Similarly, although Congress possesses the constitutional authority to establish a "Rule of Naturalization" and "Laws on the subject of Bankruptcies," the Constitution requires such laws to be "uniform . . . throughout the United States."[438] The Constitution further prohibits the federal government from granting any "Preference . . . to the Ports of one State over those of Another."[439] However, no provision of the Constitution explicitly requires Congress to treat each state equally as a general matter.[440]

Nonetheless, the Court has, at times, recognized an implied principle requiring some measure of equal treatment since the 19th Century, especially with respect to the terms governing the admission of new states.[441] For example, in the 1845 case *Lessee of Pollard v. Hagan*,[442] which concerned the limits Congress could place over the sovereignty of the newly admitted State of Alabama, the Court held that Alabama was admitted into the union "on an equal footing with the original states."[443] The Court further explained that any condition on Alabama's entry limiting its "municipal sovereignty" would have been "void and inoperative."[444] Similarly, in *Coyle v. Smith*,[445] the Court invalidated a provision in the act of Congress admitting the State of Oklahoma, requiring the capital of the State to "temporarily be at the city of Guthrie and . . . not be changed therefrom [until 1913]."[446] The Court explained that the provision was unconstitutional because the power to locate the state capital was an "essential[] and peculiar[] state power," and Congress could not place a new state "upon a plane of inequality with its sister states" by conditioning its entry on a reduction in its sovereignty.[447] The Court concluded that any terms of admission into the "Union" that were inconsistent with a union "of states, equal in power, dignity, and authority," would be invalid.[448]

The Supreme Court extended the equal sovereignty principle in a pair of more recent cases, *Northwest Austin Municipal Utility District No. One v. Holder*[449] and *Shelby County v. Holder*,[450] in which the Court considered the continuing constitutionality of Sections 4 and 5 of the Voting Rights Act (VRA) of 1965. Section 4 of the VRA created a "coverage formula" identifying jurisdictions with a history of voter discrimination,[451] and Section 5 required those jurisdictions to obtain prior approval or "preclearance"[452] from the Department of Justice or a federal court for

[437] U.S. CONST. art. I, § 8, cl. 1.

[438] *Id.* art. I, § 8, cl. 4.

[439] *Id.* art. I, § 9, cl. 6.

[440] *See* Litman, *supra* note 435, at 12.

[441] *See* Shelby Cty., Ala. v. Holder, 570 U.S. 529, 544 (2013) (discussing prior precedent).

[442] 44 U.S. 212 (1845).

[443] *Id.* at 223.

[444] *Id*.

[445] 221 U.S. 559 (1911).

[446] *Id.* at 563-64.

[447] *Id.* at 565.

[448] *Id.* at 567. *See also* Escanaba & Lake Mich. Transp. Co. v. City of Chicago, 107 U.S. 678, 688-689 (1883) (holding that the State of Illinois "was admitted, and could be admitted, only on the same footing" as original states); Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1104-32 (2016) (reviewing history of "equal footing" doctrine).

[449] 557 U.S. 193 (2009).

[450] 570 U.S. 529, 539-40 (2013) (*citing Nw. Austin*, 557 U.S. at 201-205).

[451] 52 U.S.C. § 10303(b).

[452] "Preclearance" is defined by the Supreme Court as the process of approving voting procedures by the federal authorities under the VRA—either via the Attorney General or a court of three judges. *Shelby Cty.*, 570 U.S. at 537.

any change in voting procedures by proving that the change had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color."[453] As a result, jurisdictions covered by Section 4 were barred from making changes to their voting procedures without completing the preclearance process and were, therefore, subject to more stringent burdens than states excluded from the coverage formula. The Court first considered the constitutionality of this arrangement in the 1966 case *South Carolina v. Katzenbach*,[454] and though the Court recognized that preclearance was an "uncommon exercise of congressional power," the Court held that "exceptional conditions" in the form of states "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination" justified the procedure.[455] In the years after the VRA's passage, Congress repeatedly reauthorized the Act (most recently in 2006), but it made no changes to Section 4's coverage formula after 1975.[456]

The plaintiffs in *Northwest Austin* and *Shelby County* argued that because racial discrimination in voting had become less prevalent since 1975, there was no longer a constitutionally sufficient basis for treating certain states less favorably than others along the same dimensions that existed more than thirty years earlier.[457] Although the *Northwest Austin* Court observed that the VRA "raise[d] serious constitutional questions," it ultimately applied the doctrine of constitutional avoidance[458] and declined to resolve the equal sovereignty questions raised in that case.[459] Four years later, in *Shelby County*, the Court confronted these constitutional questions directly and ultimately invoked the equal sovereignty principle to strike down Section 4 of the VRA.[460] As the Court had previously stated in *Northwest Austin*, distinctions between states "can be justified in some cases," but "a departure from the principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[461] Although the problem Congress was trying to solve in 1975 when it reauthorized the VRA was discrimination based on race in voting procedures, the Court determined that the coverage formula was no longer "grounded in current conditions," but was instead "based on 40-year-old facts having no logical relation to the present day."[462] Based on its conclusion that Section 4's coverage formula was "based on decades-old data and eradicated practices,"[463] the Court concluded that Congress had no rational reason to impose differential burdens on the states.[464]

Since *Shelby County*, only a handful of federal courts have considered equal sovereignty challenges outside of the voting rights context, and none has struck down a federal statute or action on those grounds. For example, in the case of *NCAA v. Governor of New Jersey*, the Third

[453] 52 U.S.C. § 10304.

[454] 383 U.S. 301 (1966).

[455] *Id.* at 334-35.

[456] *Shelby Cty.*, 570 U.S. at 538-39.

[457] *Id.* at 540-41.

[458] For an explanation of the doctrine of constitutional avoidance, see CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon, at 29-31.

[459] Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009). The Court avoided the constitutional issue in the case by reversing the lower court on its statutory determination and holding that the Northwest Austin Municipal Utility District was a "political subdivision" within the meaning of the VRA and could avail itself of the statutory "bailout" provision. *Id.* at 210-11.

[460] *Shelby Cty.*, 570 U.S. at 550, 556-57.

[461] *Id.* at 542 (citing *Nw. Austin*, 557 U.S. 193, 203).

[462] *Id.* at 554.

[463] *Id.* at 551.

[464] *Id.* at 556.

Circuit considered an equal sovereignty challenge to PASPA,[465] the provisions of which are described in greater detail above.[466] Although PASPA made it unlawful for states to "sponsor, operate, advertise, promote, license, or authorize" sports gambling,[467] PASPA contained an exception for states which had legalized gambling "at any time during the period beginning September 1, 1989, and ending October 2, 1991."[468] As the Third Circuit recognized, although this exception was drafted without naming any particular state, its purpose was to permit Nevada to continue to license sports gambling.[469] New Jersey challenged PASPA, in part, on the grounds that the exception for Nevada violated equal sovereignty.[470] New Jersey argued that, after *Shelby County*, laws treating states differently can "only survive if they are meant to remedy local evils in a manner that is sufficiently related to the problem it targets."[471] New Jersey asserted that PASPA treated states differently by exempting Nevada, with no apparent justification tying the problem to the solution.[472] However, the Third Circuit ultimately rejected New Jersey's equal sovereignty challenge.[473] The court observed that the "regulation of gambling via the Commerce Clause is . . . not of the same nature as the regulation of elections pursuant to the Reconstruction Amendments."[474] In particular, the court observed that under typical regulation pursuant to the Commerce Clause, "national solutions will necessarily affect states differently" and that *Shelby* and *Northwest Austin* did not dictate a "one-size-fits-all" test for equal sovereignty in the Commerce Clause context.[475] The court seemed to doubt that equal sovereignty had any effect at all outside the "sensitive areas of state and local policymaking" that were involved in *Shelby County*.[476] Even assuming that the equal sovereignty doctrine did apply, the court had "no trouble concluding that PAPSA passes muster" because the purpose of PASPA was to stop the *spread* of sports gambling—in such a context, "regulating states in which sports wagering already existed would have been irrational."[477] However, as discussed above, the Supreme Court subsequently invalidated PASPA on other grounds.[478]

In *Mayhew v. Burwell*, the First Circuit also considered the equal sovereignty doctrine's application outside the VRA context.[479] In *Mayhew*, the State of Maine challenged a requirement in the American Recovery and Reinvestment Act of 2009 (ARRA) that offered stimulus funds to states that agreed to make no changes in their Medicaid coverage of low-income 18- to 20-year-olds.[480] Maine, which at the time provided Medicaid coverage to 18- to 20-year-olds, accepted the

[465] 730 F.3d 208 (3d Cir. 2013).

[466] *See supra* "The "Anti-Commandeering" Doctrine."

[467] 28 U.S.C. § 3702(1).

[468] *Id*. § 3704(a)(2)(B).

[469] *NCAA*, 730 F.3d at 238.

[470] *Id.* at 237-38.

[471] *Id.* at 238.

[472] *Id.*

[473] *Id.* at 238-39.

[474] *Id.* at 238.

[475] *Id.*

[476] *Id.* at 239.

[477] *Id.*

[478] *See supra* "The "Anti-Commandeering" Doctrine."

[479] 772 F.3d 80 (1st Cir. 2014).

[480] *Id.* at 83-84.

funds, but in 2012 determined that it wanted to change its policy.[481] Maine argued that the provision of ARRA locking its coverage policy in place violated equal sovereignty because it was unable to adopt a policy that other states had already adopted, resulting in "disparate treatment."[482] The First Circuit, like the Third Circuit, distinguished the VRA cases. The First Circuit concluded that ARRA, unlike the VRA's coverage formula, did not actually involve disparate treatment.[483] The court explained that in the VRA cases, the formula defining the jurisdictions covered by the limitations had been admittedly "reverse engineered" to target certain jurisdictions, singling out particular states for disfavored treatment.[484] By contrast, the rule in ARRA was applied uniformly: "Congress came up with the criteria without regard to which states would be covered by their application."[485] The First Circuit also determined, like the Third Circuit, that the equal sovereignty doctrine only applied in "extraordinary situations," like the VRA, which involved a "sensitive area of state and local policymaking."[486] The ARRA's condition on Medicaid coverage, like PASPA's regulation of gambling, did not, in the appellate court's view, involve such an area.[487] Finally, the First Circuit explained that, through the ARRA, Congress had sought to "protect low-income individuals from losing public assistance in times of transition."[488] According to the First Circuit, any differences that resulted across states were sufficiently related to that purpose to suffice for equal sovereignty purposes, when compared to the "decades-old data and eradicated practices" used to justify the VRA's coverage formula.[489] The First Circuit therefore concluded that ARRA did not violate the Constitution.[490] Thus, as *NCAA* and *Mayhew* reflect, lower courts have (at least to date) largely limited the application of the equal sovereignty doctrine to the voting rights context and have generally not invoked the doctrine to invalidate federal laws.

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[481] *Id.* at 84.

[482] *Id.* at 93-94.

[483] *Id.* at 94.

[484] *Id.*

[485] *Id.*

[486] *Id.* at 94-95.

[487] *Id.* at 95.

[488] *Id.* at 96.

[489] *Id.*

[490] *Id.* at 97 ("We . . . find no constitutional violation.").

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