

# A NEW TYPE OF COMMANDEERING: The Bypass Clause of the American Recovery and Reinvestment Act of 2009 (Stimulus Package)

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## I. INTRODUCTION

On February 17, 2009, President Barack Obama signed the American Recovery and Reinvestment Act of 2009 (“Stimulus Package”), injecting \$787 billion dollars into the struggling United States economy.<sup>1</sup> Congress directed much of the stimulus money to states, with various conditions attached.<sup>2</sup> Voicing concern over such conditions, many state executives claimed they would not accept federal funds.<sup>3</sup> One such state executive was Mark Sanford, Governor of South Carolina.<sup>4</sup> His vocal opposition to the stimulus package and continual assertions that he would refuse stimulus money met with objections from members of Congress who supported the stimulus.<sup>5</sup> Faced with the possibility that Sanford, among others, might

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1. Sheryl Gay Stolberg, *Signing Stimulus, Obama Doesn’t Rule out More*, N.Y. TIMES, Feb. 17, 2009, available at <http://www.nytimes.com/2009/02/18/us/politics/18web-stim.html> (The economic crisis of 2008–2009 led to a heated debate regarding the most effective way to pull the nation out of a recession). See David M. Herszenhorn, *Recovery Bill Gets Final Approval*, N.Y. TIMES, Feb. 13, 2009, available at <http://www.nytimes.com/2009/02/14/us/politics/14web-stim.html> (noting that “not a single House Republican voted for the bill”).

2. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

3. *Governors v. Congress: The Stimulus Sets a Long-Term Budget Trap for States*, WALL ST. J., Feb. 23, 2009, at A14, available at <http://online.wsj.com/article/SB123535040968044863.html>.

4. Phillip Rucker, *GOP Governors Spar Over Stimulus Money*, WASH. POST, Feb. 22, 2009, available at [http://voices.washingtonpost.com/44/2009/02/22/gop\\_governors\\_spar\\_over\\_stimul.html](http://voices.washingtonpost.com/44/2009/02/22/gop_governors_spar_over_stimul.html). See *infra* Part II.B for a full account of Governor Sanford’s refusal.

5. Teddy Davis & Ariane De Vogue, *Can States Circumvent Anti-Stimulus Guvs?*, ABC NEWS, Mar. 11, 2009, <http://abcnews.go.com/Politics/Story?id=7062288&page=1>. In fact, one of South Carolina’s own Congressmen, Jim Clyburn, was Governor Sanford’s loudest critic. *Id.*

refuse funds, Congress got creative: it inserted a section into the bill that allowed state legislatures to accept stimulus funds if the state's governor rejected them.<sup>6</sup>

While novel, this “bypass” clause is constitutionally dubious.<sup>7</sup> The power to accept federal funds is a question of state law, and the state executive is usually the entity empowered to accept such funds.<sup>8</sup> On its face, the bypass clause is a direct attempt by the Federal Government to alter the inner-workings of state government with the ultimate goal of promoting federal policy under the stimulus.<sup>9</sup> These attempts have encountered an unsympathetic Supreme Court in the last few decades, where a majority of the Court has struck down similar congressional legislation on the grounds that it violates the Tenth Amendment.<sup>10</sup> The most recent and prominent examples of this are *New York v. United States* and *Printz v. United States*, where the Court held that the Tenth Amendment (among other things) barred Congress from “commandeering” state legislatures and executive officials into implementing or administering a federal program.<sup>11</sup>

However, legal concepts such as preemption, conditional non-preemption, and conditions on spending (though still involving federalism issues) allow Congress to achieve similar results without violating the Tenth

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6. *Id.*; American Recovery and Reinvestment Act §1607, 123 Stat. at 304. *See infra* Part II.A for a full discussion of the “bypass” clause of the stimulus package.

7. I refer to the clause as the “bypass” clause because it essentially gets around a gubernatorial rejection of stimulus funds by allowing a state legislature to accept. *See* Davis & De Vogue, *supra* note 5 (noting that Yale law professor Jack Balkin has questioned the constitutionality of the clause). Interestingly, Congressman Clyburn has expressed disinterest about the clause's constitutionality. *See id.*

8. *See* Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1257 (1999) (noting that “state legislatures typically play little role in the grant application process”).

9. Congressman Clyburn admitted that the reason for inserting the clause was to get around Governor Sanford, so that stimulus funds could reach South Carolina. *See* Davis & De Vogue, *supra* note 5.

10. The Tenth Amendment reserves to the States powers not granted to Congress. U.S. CONST. amend. X. *See infra* Part III for a broader discussion of the Court's Tenth Amendment jurisprudence. *But see, e.g.*, Jack M. Balkin & Sanford Levinson, *The Process of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 509 (2006) (arguing that, as of 2006, the ‘federalism revolution’ began to slow); Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1764 (2006) (noting that the federalism revolution waned during the last few years of the Rehnquist court).

11. *New York v. United States*, 505 U.S. 144 (1992) (holding that the Tenth Amendment bars Congress from forcing state legislatures to enact federal policy which will affect how they regulate private citizens); *Printz v. United States*, 521 U.S. 898 (1997) (holding that the Tenth Amendment bars Congress from forcing state executives to administer a federal policy).

Amendment.<sup>12</sup> The Court has dealt separately with each concept.<sup>13</sup> Acting under an enumerated power, Congress may preempt a field of regulation, thus removing a State's power to regulate in that specific area.<sup>14</sup> Or, Congress may simply threaten to preempt an area of regulation unless the State regulates according to federal policy.<sup>15</sup> Congress may also condition receipt of federal funds on compliance with federal policies.<sup>16</sup> Congress may not, however, simply "commandeer" state legislative or executive officers by forcing them to implement or enact federal programs.<sup>17</sup>

The question is this: does the bypass clause constitute an attempt to commandeer the inner workings of state government regarding acceptance of federal funds, or is it a valid attempt to implement federal policy via preemption, conditional non-preemption, or conditions on spending?<sup>18</sup> Resolving this question is complicated further by the fact that state law varies as to the power to accept federal funds.

This article argues that the bypass clause likely violates the anti-commandeering doctrine laid out by the Supreme Court in *New York* and *Printz* by removing the state executive's power to reject federal funds, and ultimately forcing the executive to administer federal policies which he or she is empowered to reject and unwilling to implement.<sup>19</sup> I will use Arizona as a case study, comparing its state law and precedent to that of South Carolina.

Part II will provide background information on the stimulus package, the insertion of the bypass clause, and Governor Sanford's protests and litigation. It will also discuss South Carolina and Arizona state law regarding the acceptance of federal funds. Part III will provide a brief overview of the Supreme Court's Tenth Amendment jurisprudence,

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12. *New York*, 505 U.S. at 166–67 (holding that Congress may threaten preemption or condition receipt of federal funds on compliance with federal policies as a means to achieve regulation in the states).

13. I discuss each of these areas of law in more detail in Part IV.

14. See *infra* Part IV.A for a broader discussion of preemption.

15. See *infra* Part IV.B for a broader discussion of conditional non-preemption.

16. See *infra* Part IV.C for a broader discussion of conditions on spending.

17. See *infra* Part III for a broader discussion of the anti-commandeering doctrine.

18. Indeed, in reference to the bypass clause, one law blogger noted that he is "still trying to wrap his head around" the constitutional issues presented. Posting of Jonathan Adler to The Volokh Conspiracy, The Stimulus and Spending Clause <http://lists.powerblogs.com/pipermail/volokh/2009-March/016131.html> (Mar. 3, 2009, 18:29 EST).

19. My hesitance to categorically assert the unconstitutionality of the bypass clause is two-fold: First, state law varies on the subject of acceptance of federal funds. Where the bypass clause may unconstitutionally alter the inner-mechanisms of one state, it may have little impact on another. Second, the novelty of this issue (and the corresponding lack of scholarly material on the subject) cautions against broad, categorical assertions where time, litigation, and additional scholarship may clear the fog.

including the emergence of the anti-commandeering doctrine. Part IV will summarize Constitutional avenues for the implementation of federal policy in the states, including preemption, conditional non-preemption, and conditions on spending. Part V will analyze the bypass clause in reference to each aforementioned area of law, with the goal of finding the best fit. Finally, Part VI will offer a word of caution to Congress; such novel attempts to implement federal policy in the states may invoke a Court response that is unfriendly to federal power.

## II. BACKGROUND

Determining the constitutionality of the bypass clause involves a review of the clause itself within the broader context of the enactment of the stimulus package. Additionally, because state law regarding the acceptance of federal funds is crucial to determining the clause's constitutionality, this section will explore the state law of Arizona and South Carolina.

### A. *The Stimulus Package and the Bypass Clause*

Faced with an economic crisis, President Obama encouraged Congress to pass a stimulus package large enough to pump new life into the struggling economy.<sup>20</sup> The House adopted and signed the stimulus package quickly (about one month into the President's term), in spite of staunch, vocal opposition, both from internal and external parties.<sup>21</sup> South Carolina's governor, Mark Sanford, publicly opposed the stimulus package and even stated that he would not accept certain federal funds.<sup>22</sup> Sanford's opposition met with harsh criticism from a congressman within his own state: Representative Jim Clyburn.<sup>23</sup> Accordingly, Representative Clyburn oversaw the insertion of an amendment to the stimulus package—one that could effectively get around the Governor.<sup>24</sup>

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20. CNNPolitics.com, Obama Outlines Ambitious Agenda for 'Lasting Prosperity,' <http://www.cnn.com/2009/POLITICS/02/24/obama.speech/> (last visited Oct. 12, 2009).

21. See Stolberg, *supra* note 1 (noting that not one House Republican voted for the stimulus package); *Governors v. Congress: The Stimulus Sets a Long-Term Budget Trap for States*, *supra* note 3 (noting that many state governors opposed the stimulus package).

22. Matt Kelley & John Fritz, *Governors Reject Stimulus Money for Unemployment*, USA TODAY, Mar. 15, 2009, [http://www.usatoday.com/news/nation/2009-03-15-unemployment\\_N.htm](http://www.usatoday.com/news/nation/2009-03-15-unemployment_N.htm) (noting that Governor Sanford led the charge of other Republican governors in "rejecting or considering rejected" federal funds under the stimulus package).

23. See Davis & De Vogue, *supra* note 5.

24. *Id.*

Indeed, section 1607(b) of the stimulus package (the bypass clause) vests state legislatures with power to accept federal funds if that state's governor rejects the funds.<sup>25</sup> Section 1607(b) states that "if funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance by the State Legislature, by means of the adoption of a concurrent resolution, shall be sufficient to provide funding to such State."<sup>26</sup> The constitutionality of the bypass clause came to the forefront when Governor Sanford continued to refuse stimulus money over the objections and concurrent resolution of the South Carolina State Legislature.<sup>27</sup>

*B. The Sanford Litigation and South Carolina State Law Regarding Acceptance of Federal Funds*

Though he had continually voiced his plan to refuse stimulus money, Governor Sanford completed the certification process outlined in section 1607(a)<sup>28</sup> for application of federal funds.<sup>29</sup> However, his refusal to formally apply for and actually accept certain funds spurred a dispute between himself and the state legislature, which was ultimately resolved by the South Carolina Supreme Court.<sup>30</sup>

In *Edwards v. State*, the South Carolina Supreme Court held that the state legislature had the power to require Governor Sanford to apply for and accept federal funds under South Carolina law.<sup>31</sup> It reasoned that South Carolina law granted all appropriation powers to the state legislature and that the Governor's certification was sufficient to bring the funds within the general appropriation powers of the state legislature.<sup>32</sup>

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25. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §1607, 123 Stat. 115, 304 (2009).

26. *Id.* Section 1607(a) requires state Governors who wish to accept funds under the stimulus package to certify within 45 days of enactment of the stimulus package. *Id.* at 303.

27. *Edwards v. State*, 678 S.E.2d 412 (S.C. 2009) (litigation involving the dispute between Governor Sanford and the state legislature).

28. American Recovery and Reinvestment Act §1607, 123 Stat. at 303–04.

29. *See Edwards*, 678 S.E.2d at 416 (noting that Governor Sanford certified under 1607(a) in spite of his objections to the stimulus funds). In his certification letter, Governor Sanford applied for general funds under the stimulus package, but stated that he was not applying for funds under the "State Fiscal Stabilization" portion of the package, under which section 1607 was written. *Id.* at 421 (Pleicones, J., concurring). Whether stimulus funds must be accepted wholesale or in part is not made clear by the terms of the statute itself, and is not discussed in this Comment.

30. *Id.* at 416.

31. *Id.* at 417, 419.

32. *Id.* at 418.

As a safeguard measure, the state legislature had also passed a concurrent resolution to apply for the funds under the bypass clause and argued that doing so was sufficient to accept the funds.<sup>33</sup> However, the South Carolina Supreme Court did not reach the constitutionality of the bypass clause, avoiding the question of whether a concurrent resolution *alone* would be sufficient to accept federal funds.<sup>34</sup> Yet, the Court deemed this argument a “substantive contention” in light of the plenary appropriation powers granted to the legislature under South Carolina law, which grants the legislature the power to: (1) anticipate federal funding and include such anticipated funds in its appropriations; (2) mandate that the Governor apply for funds which it has appropriated; and (3) override gubernatorial budget vetoes with a two-thirds vote from both chambers.<sup>35</sup> The Governor may recommend a budget to the legislature and veto any provisions with which he disagrees, subject to legislative override.<sup>36</sup>

Governor Sanford argued that section 14005 of the stimulus package granted him total control over the application and acceptance process, as a condition for the receipt of federal funds, and that the stimulus package trumps state law under the Supremacy Clause.<sup>37</sup> Under the canon of constitutional avoidance, the court interpreted the stimulus package as granting the state legislature a “meaningful voice in the decisional process” so as to avoid a conflict between federal law and the South Carolina Constitution, which did not grant the Governor unfettered control over appropriation.<sup>38</sup> It cited the bypass clause as evidence of congressional intent to include the state legislature in the overall process.<sup>39</sup>

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33. *Id.* at 416, 418.

34. *Id.* at 418. *But see id.* at 421 (Pleicones, J., concurring) (finding state legislature’s concurrent resolution under 1607(b) sufficient for acceptance of funds). While a petition to the United States Supreme Court would undoubtedly cast light on the novel constitutional issues presented, Governor Sanford stated that he would not appeal the State Supreme Court decision. Rick Brundrett & John O’Connor, *South Carolina’s Gov. Sanford Won’t Appeal Stimulus Ruling*, MIAMI HERALD, June 2, 2009, available at <http://www.miamiherald.com/2009/06/01/1076873.html>.

35. *Edwards*, 678 S.E.2d at 416–17.

36. *Id.* at 417.

37. *Id.* at 418. Section 14005 of the stimulus package states, “The Governor of a State desiring to receive an allocation . . . shall submit an application . . .” American Reinvestment and Recovery Act of 2009, Pub. L. No. 111-5, § 14005, 123 Stat. 115, 282 (2009). The Supremacy Clause of the Constitution states that “[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land.” U.S. CONST. art. VI, § 1, cl. 2.

38. *Edwards*, 678 S.E.2d at 418 (noting that “[f]ederal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power, in

In practical effect, South Carolina law seems to allow the Governor to accept or reject federal funds, subject to approval by the state legislature. If the Governor refuses to accept federal funds on which the legislature has relied in its appropriations, then the legislature may still appropriate such funds, subject to gubernatorial veto and the requirement of a two-thirds vote to overcome the veto. While the Governor is given a meaningful voice in the acceptance of federal funds, through his ability to apply for and veto certain funds, the legislature seems to have the final say regarding the application for federal funds. Thus, the South Carolina legislature may indirectly accept federal funds under state law by forcing the Governor to apply for such funds, so long as the anticipated funds are part of a legislative budget which survives gubernatorial veto.

C. *Arizona State Law Regarding the Acceptance of Federal Funds*

Arizona law provides a useful comparison to that of South Carolina because it is, quite nearly, the polar opposite. First, Arizona law names the Governor as the “sole official means of communication” between the State and the Federal Government.<sup>40</sup> Second, it grants the Governor power to *accept* and *expend* funds from any federal grant.<sup>41</sup> Though the Arizona Constitution grants the state legislature “supreme power” over matters of appropriation, the Arizona Supreme Court has held that such power does not extend over federal funds.<sup>42</sup> In fact, the legislature introduced a ballot proposition in 1983, which would have granted the state legislature the power to approve and appropriate federal funds, but it failed to pass.<sup>43</sup> To this day, Arizona remains one of a handful of states that does not allow the state’s legislature to accept, appropriate, or even review applications for federal funds.<sup>44</sup>

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the absence of the plain statement.” (quoting *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) (internal citations omitted))).

39. *Id.*

40. ARIZ. REV. STAT. ANN. § 41-101(A)(4) (2009).

41. *Id.* § 41-101.01(A) (2009).

42. *Navajo Tribe v. Ariz. Dep’t of Admin.*, 528 P.2d 623, 624–25 (Ariz. 1975) (holding that federal funds are custodial in nature, not having arisen from the operation of state law, and as such are not under the control of the state legislature).

43. ARIZ. REV. STAT. ANN. § 35-254, Historical and Statutory Notes (2009).

44. See Hills, Jr., *supra* note 8, at 1255 n.160. For an overview of how other states allocate acceptance and appropriation powers, see *id.*

### III. THE SUPREME COURT'S TENTH AMENDMENT JURISPRUDENCE AND THE EMERGENCE OF THE ANTI-COMMANDEERING DOCTRINE

Over the past few decades, the United States Supreme Court has invalidated certain congressional legislation on the grounds that it constituted an improper intrusion into areas of state concern.<sup>45</sup> Its primary authority for doing so has been the Tenth Amendment, which reserves powers not granted to Congress to the States.<sup>46</sup> The Court's willingness to use the Tenth Amendment as an enforceable limit on congressional powers constituted a reverse-course of nearly forty years of precedent and ultimately led to the emergence of the anti-commandeering doctrine laid out in *New York* and *Printz*.<sup>47</sup>

#### A. *The Court's Tenth Amendment Jurisprudence*

The exact meaning of the Tenth Amendment has been the subject of scholarly debate for many years.<sup>48</sup> Before 1900, the Court adopted the view that the Tenth Amendment is “but a truism,” or, in other words, a reminder that Congress must act under some enumerated power when it legislates.<sup>49</sup> In contrast, from 1900–1937, the Court interpreted the Tenth Amendment as an enforceable limit on congressional power.<sup>50</sup> From 1937–1992, the

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45. See *Printz v. United States*, 521 U.S. 898 (1997) (holding that the Tenth Amendment bars Congress from forcing state executives to administer a federal policy); *New York v. United States*, 505 U.S. 144 (1992) (holding that the Tenth Amendment bars Congress from forcing state legislatures to enact federal policy which will affect how they regulate private citizens); *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that the Tenth Amendment bars Congress from imposing wage requirements on states as public employers), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

46. *Printz*, 521 U.S. at 924; *New York*, 505 U.S. at 145; *Nat'l League of Cities*, 426 U.S. at 842; see U.S. CONST. amend. X.

47. See John D. Tortorella, *Reining in the Tenth Amendment: Finding a Principled Limit to the Non-Commandeering Doctrine of United States v. Printz*, 28 SETON HALL L. REV. 1365, 1369 (noting that for forty years the Court relied on the political system as safeguard of States' rights); see also *Printz*, 521 U.S. at 899; *New York*, 505 U.S. at 161.

48. See, e.g., Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469, 470 (2008) (noting that “the key to understanding the Tenth Amendment is found in the company that it keeps”).

49. *United States v. Darby*, 312 U.S. 100, 124 (1941) (noting that Tenth Amendment is merely “declaratory of the relationship between the national and state governments”); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1636–37 (2006) (noting that during the 1800s the Court viewed the Tenth Amendment as a reminder that Congress has limited powers).

50. Siegel, *supra* note 49, at 1636 (noting that from 1900–1937, the Court viewed the Tenth Amendment as reserving to the States “a zone of exclusive regulatory authority”). The one case that invalidated federal legislation using the Tenth Amendment was *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that the Tenth Amendment bars Congress from

Court returned to the idea that the amendment is a mere reminder, and did not invalidate any legislation based on the Tenth Amendment, with one exception, later overruled.<sup>51</sup> However, the Court switched gears again in 1992, finding the Tenth Amendment to be an enforceable limit on congressional power.<sup>52</sup> Two cases brought the Tenth Amendment back to the forefront: *New York v. United States* and *Printz v. United States*.

### B. *The Emergence of the Anti-Commandeering Doctrine*

The Court had an opportunity to pump new life into the Tenth Amendment in *New York v. United States* and *Printz v. United States*, and it did just that by establishing the anti-commandeering doctrine: the rule that the Federal Government may not compel states to enact or administer a federal program.<sup>53</sup> Yet, the reach of the anti-commandeering doctrine needed clarification and the Court attempted to define the nature and scope of the doctrine in *Reno v. Condon*. Each case will be examined below.

#### 1. *New York v. United States*

The controversy in *New York* involved certain “take title” provisions of a federal statute regarding the disposal of radioactive waste.<sup>54</sup> The provision required New York to either implement federal policy regarding the

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imposing wage requirements on states as public employers), *overruled by* *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

51. Siegel, *supra* note 49, at 1637 (noting that in 1937, the Court adopted its nineteenth century “reminder” view of the Tenth Amendment). The lone (and later overruled) case invalidating legislation based on the Tenth Amendment during this period was *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976).

52. See *Printz*, 521 U.S. at 924 n.13 (noting, however, that the Tenth Amendment was not the sole textual source for the Court’s decision); *New York*, 505 U.S. at 188; David T. Woods, *A Step Towards Stability in Modern Tenth Amendment Jurisprudence: The Supreme Court Adopts a Workable Standard in Printz v. United States*, 42 St. Louis U. L.J. 1417, 1421 (1998) (noting that “several recent Supreme Court decisions have stressed that the Tenth Amendment serves an *active force* in limiting the scope of federal power”) (emphasis added).

53. *Printz*, 521 U.S. at 924; *New York*, 505 U.S. at 145.

54. *New York*, 505 U.S. at 152–53. The case involved the Low-Level Radioactive Waste Policy Amendments Act of 1985, which contained three incentives meant to encourage States to effectively manage their own waste. *Id.* at 149. These incentives included a monetary provision, which allowed States that created a waste-disposal facility to receive money from a federally created fund, and an access provision, which blocked states that failed to build waste disposal sites from using other operative waste sites. *Id.* Both of these provisions were upheld as a constitutional exercise of the Commerce Clause. *Id.* at 173–74. The “take title” provision, however, was ruled unconstitutional under the Tenth Amendment. *Id.* at 175–77.

disposal of waste or “take title” to (and liability for) the waste.<sup>55</sup> Writing for the majority, Justice Sandra Day O’Connor held the “take title” provision unconstitutional, reasoning that the choice between regulating according to Congress or taking title and liability to the waste was “no choice at all.”<sup>56</sup> She held that such a choice constituted an attempt by Congress to “commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,” which Congress could not do without violating (among other things) the Tenth Amendment.<sup>57</sup> In addition, Justice O’Connor articulated a political accountability argument, reasoning that allowing the Federal Government to commandeer state legislatures would cloud the source of the policy to the disadvantage of state officers:

If the citizens of New York . . . do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share [in] their view. . . . But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.<sup>58</sup>

Though Congress could not directly force state legislatures to implement a federal program, Justice O’Connor noted that Congress was hardly out of options.<sup>59</sup> Stating that Congress may offer incentives for States to implement federal policy, O’Connor mentioned two methods: First, Congress may place conditions on federal grants, thus influencing state legislative decisions.<sup>60</sup> Second, Congress may threaten to preempt an area of regulation unless the State regulates according to federal policy.<sup>61</sup> Furthermore, the logical implication of the ability to threaten preemption is that Congress also has the power to simply preempt state law.

Justice O’Connor gave a few reasons why these options are not unconstitutional. First, when the Federal Government places conditions on federal grants, the States always have the option of rejecting federal policies by simply saying no.<sup>62</sup> As to conditional non-preemption, Justice O’Connor

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55. *Id.* at 153–54.

56. *Id.* at 176.

57. *Id.* at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

58. *Id.* at 168–69.

59. *Id.* at 166.

60. *Id.* at 167.

61. *Id.* at 167–68.

62. *Id.* at 168.

argued that if a State deems a certain area of regulation unworthy of its time and resources, it may prefer to shift the burdens of implementation and enforcement to the Federal Government entirely through preemption.<sup>63</sup>

Though the decision in *New York* reasserted the nature of the Tenth Amendment as an enforceable limit on congressional power by ruling that Congress could not commandeer state legislatures, it was not presented with the question of whether Congress could commandeer state executives in the administration of federal policies.<sup>64</sup> That issue came to the forefront in *Printz v. United States*.

## 2. *Printz v. United States*

*Printz* arose under interim provisions of the Brady Bill, which amended the Gun Control Act of 1968.<sup>65</sup> The interim provisions provided a temporary system of background checks until the completion of an instant background check-system was in place.<sup>66</sup> The temporary system imposed duties on local law enforcement officials by requiring them to perform background checks on potential gun purchasers.<sup>67</sup> Chief Law Enforcement Officers (“CLEO”) from Arizona and Montana objected to the duties imposed on them by the Brady Bill and brought suit.<sup>68</sup> Their cases were consolidated before the Supreme Court.<sup>69</sup>

Writing for the five justice majority, Justice Antonin Scalia held that Congress could not commandeer state executive officers in the administration of a federal program.<sup>70</sup> He based his reasoning on: (1)

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63. *Id.*

64. It should be noted that the majority’s decision did not rest on the text of the Tenth Amendment, but referred at length to historical understanding of the dual system of government embodied by the Constitution. *See id.* at 156–57 (noting that the Tenth Amendment is indeed a “tautology,” but that it still “restrains the powers of Congress” by “confirm[ing] that the . . . Federal Government is subject to limits that may . . . reserve power to the States”). Thus, the controlling question is whether an “incident of state sovereignty is protected by a limitation on an Article I power.” *Id.* at 157.

65. 18 U.S.C. § 921 (2006).

66. *Id.*; *see* *Printz v. United States*, 521 U.S. 898, 902 (1997).

67. 18 U.S.C. § 921; *see also* *Printz*, 521 U.S. at 902. After receiving a report from a gun dealer, including a purchaser’s sworn statement that he is not included among those prohibited from purchasing a hand-gun and the dealer’s verification of the purchaser’s identity, Chief Law Enforcement Officers (“CLEO”) have five days to verify the information in the report. 18 U.S.C. § 921.

68. *Printz*, 521 U.S. at 904.

69. *Id.*

70. *Id.* at 933 (categorically concluding that “[t]he Federal Government may not compel the States to *enact* or *administer* a federal regulatory program.” (quoting *New York v. United States*, 505 U.S. 144, 188 (1992))) (emphasis added).

historical understanding and practice; (2) the structure of the Constitution; and (3) the Court's previous decisions.<sup>71</sup> In addition, he echoed Justice O'Connor's political accountability argument set forth in *New York*.<sup>72</sup> Because each of Justice Scalia's arguments inform the Court's anti-commandeering doctrine, they bear heavily on an analysis of whether the bypass clause constitutes a similar type of commandeering. As such, each argument will be briefly reviewed below.<sup>73</sup>

*a. Historical Understanding and Practice*

Looking to historical understanding and practice, Justice Scalia turned to early congressional enactments first, and then to the Federalist Papers for evidence of whether the Constitution has been understood as empowering Congress to commandeer state executives.<sup>74</sup> Justice Scalia acknowledged that some early enactments required state judges to perform quasi-executive functions relating to citizenship, but he argued that these requirements assumed the States consented to such obligations.<sup>75</sup> He further argued that such statutes only show that Congress may enlist state *judges*, not executives.<sup>76</sup> Ultimately, Justice Scalia concluded that the significant lack

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71. *Id.* at 905–33.

72. *Id.* at 920–30.

73. This article briefly addresses the dissent's counter arguments, as well as those of various scholars, in the footnotes of each of Scalia's arguments. However, it is not the purpose of this article to assess the validity of the anti-commandeering doctrine. Rather, it seeks to fully lay bare the policies and arguments that inform the doctrine in order to ascertain whether the current Court would find the bypass clause unconstitutional on the grounds that it violates the doctrine.

74. *Printz*, 521 U.S. at 905 (noting that “early congressional enactments ‘provid[e] contemporaneous and weighty evidence of the Constitution’s meaning.’” (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986))); *id.* at 910 (referring to the Federalist Papers as “[an]other source[] we have usually regarded as indicative of the original understanding of the Constitution”).

75. *Id.* at 906–07.

76. *Id.*; Justice Scalia also argues that the Constitutional basis for enlisting state judges is much more solid, since the Supremacy Clause and the Full Faith and Credit Clause require state courts to hear cases involving federal law. *Id.* at 907; *see also* *Testa v. Katt*, 330 U.S. 386 (1947) (holding that state courts cannot refuse to apply federal law). Critics, including the dissenters in *Printz*, have argued that the distinction between judges and executive officers is too formalistic, given that early enactments enlisted judges in the administration of federal law. *See Printz*, 521 U.S. at 951–52 (Stevens, J., dissenting) (suggesting a functional, rather than formalistic test for determining the constitutionality of commandeering state officials); Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 200 (1997) (suggesting that even “all but the most unreflective formalists should find [the Court’s formalistic] reasoning process troubling”).

of statutes enlisting state executives non-conclusively establishes the absence of such a power in the Constitution.<sup>77</sup>

Justice Scalia next responded to arguments regarding three of the Federalist Papers and whether they indicated an understanding by the Framers regarding the enlistment of state officers.<sup>78</sup> The first was Federalist 27, which states that the Constitution will “enable the [national] government to employ the ordinary magistracy of each [state], in the execution of its laws.”<sup>79</sup> Justice Scalia argued that state consent was presumed necessary for Congress to enlist state officers.<sup>80</sup> Federalist 27 also suggests that state officials are bound by the Constitution because of its supremacy.<sup>81</sup> To this, Justice Scalia responded that state officers cannot *obstruct* federal law, but have no affirmative duty to enact it.<sup>82</sup> The other two Federalist Papers that he quoted were 36 and 45, which speak to the Framers’ intention that state officers be enlisted in the collection of federal taxes.<sup>83</sup> Justice Scalia responded similarly, arguing that such enlistment necessarily depends on state consent.<sup>84</sup> Ultimately, Justice Scalia found no historical basis supporting a constitutional commandeering power.

*b. The Structure of the Constitution*

Moving on to structural arguments, Justice Scalia argued that the Constitution sets up a system of “dual sovereignty,” where both the States and the Federal Government retain certain powers.<sup>85</sup> Such a system is “rendered express by the Tenth Amendment.”<sup>86</sup> Justice Scalia pointed out that the Framers’ experience with the Articles of Confederation led them to

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77. *Printz*, 521 U.S. at 907–08.

78. *Id.* at 910–11.

79. THE FEDERALIST NO. 27 (Alexander Hamilton). For an illustrative discussion of the Federalist Papers involved in the commandeering debate, see Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993) (arguing that the Federalist Papers indicate that the Framers saw Congress as having commandeering power over state executives, but not state legislatures).

80. *Printz*, 521 U.S. at 910–11. Prakash disagrees with this assertion, arguing that the Federalists, in an effort to comfort anti-federalists who feared a large federal bureaucracy, suggested the enlistment of state officers in the administration of federal law. See Prakash, *supra* note 79, at 2005. The dissent made a similar assertion, arguing that States’ rights are hardly protected by a ruling that will lead to a larger federal bureaucracy. See *Printz*, 521 U.S. at 959 (Stevens, J., dissenting).

81. THE FEDERALIST NO. 27 (Alexander Hamilton); Woods, *supra* note 52, at 1422.

82. *Printz*, 521 U.S. at 910.

83. THE FEDERALIST NO. 36 (Alexander Hamilton); THE FEDERALIST NO. 45 (James Madison); Woods, *supra* note 52, at 1422, 1431.

84. *Printz*, 521 U.S. at 910–11.

85. *Id.* at 918–19.

86. *Id.* at 919.

enact a system where the Federal Government acts upon individuals, not states. He wrote, “[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people.”<sup>87</sup> Thus, according to Justice Scalia, state sovereignty adds to the weight of evidence in favor of rejecting a constitutional commandeering power.

*c. The Court’s Previous Cases*

Turning next to precedent, Justice Scalia called the Court’s jurisprudence regarding commandeering the “most conclusive[] in the present litigation.”<sup>88</sup> He noted that the issue did not even arise until the 1970s when Congress tried to force States to implement traffic and emissions standards.<sup>89</sup> However, the Court did not get a chance to analyze the constitutionality of the provisions because the Federal Government itself admitted their invalidity.<sup>90</sup> Not surprisingly, the most on-point case for commandeering was *New York*. Justice Scalia read *New York* broadly, rejecting the argument that it only applied to state legislatures.<sup>91</sup> He reasoned that the difference between making and implementing policy is not always clear, and that attempting to distinguish between the two would likely prove to be an unmanageable judicial standard.<sup>92</sup> As such, Justice Scalia, writing for the majority, drew a clear standard for commandeering: Congress may not conscript state legislatures *or* executive officers to enact or administer a federal program.<sup>93</sup>

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87. *Id.* at 919–20. Justice Stevens disagrees with Justice Scalia’s analysis, noting that the Constitution represents an *augmentation* of federal powers in response to the weak federal powers under the Articles of Confederation. *See id.* at 944 (Stevens, J., dissenting).

88. *Id.* at 925.

89. *Id.* (citing *Maryland v. EPA*, 530 F.2d 215, 226 (4th Cir. 1975), *vacated*, 431 U.S. 99 (1977); *Brown v. EPA*, 521 F.2d 827, 838–42 (9th Cir. 1975) *vacated*, 431 U.S. 99 (1977)).

90. *Id.*

91. *Id.* at 927–28.

92. *Id.* at 928; *see Woods*, *supra* note 52, at 1420 (arguing that this bright line rule provides clarity in an otherwise murky area).

93. *Printz*, 521 U.S. at 933 (emphasis added).

d. *Political Accountability*<sup>94</sup>

Justice Scalia echoed the concern over political accountability that Justice O'Connor voiced in *New York*. He noted that unpopular federal policies burden state executives, whereas Congress may take credit for popular ones.<sup>95</sup> Though not the most extensive part of the majority's argument, the Court did express Justice O'Connor's concern over the handicap state officials incur when the source of a policy is not readily apparent to the voting citizen.

In sum, the Court resurrected the Tenth Amendment as a limit on Congressional power in *New York* and *Printz* by affirming federalism principles such as dual sovereignty, and by ultimately holding that Congress may not enlist States in the enactment or administration of federal programs.<sup>96</sup> Yet, the scope of the anti-commandeering rule was unclear and untested after *Printz*, until the Court had a chance to clarify the difference between regulating state activity and commandeering states to regulate their citizens in *Reno v. Condon*.<sup>97</sup>

C. *Clarifying the Reach of the Anti-Commandeering Doctrine: Reno v. Condon*

Only one Tenth Amendment case has reached the Supreme Court since *Printz: Reno v. Condon*.<sup>98</sup> *Reno* arose under the federal Driver's Privacy Protection Act which regulated state motor vehicle departments regarding

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94. For other arguments in support of the anti-commandeering rule, see Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restrictions of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 485–86 (2002) (supporting an extension of the federalism principles expounded in *New York* and *Printz* to the Court's review of conditions-on-spending); R. Seth Davis, Note, *Conditional Preemption, Commandeering, and the Values of Cooperative Federalism*, 108 COLUM. L. REV. 404, 406 (arguing that the commandeering rule should be extended to include conditional preemption).

95. *Printz*, 521 U.S. at 930 (noting that the CLEOs will bear the brunt of criticism from would-be gun purchasers if something goes awry—not the Federal Government). The dissent contests this claim, arguing that citizens can readily find out who is behind a policy, and that state politicians, upon hearing disapproving voices, would be more than willing to actively blame the Federal Government. *See id.* at 958 n.18 (Stevens, J., dissenting). Many scholars have disagreed with Justice O'Connor's political accountability argument, based on similar grounds. *See* Caminker, *supra* note 76, at 1069–72 (arguing that the political accountability argument is faulty given the electorate's ability to find out who is behind a certain policy); Siegel, *supra* note 49, at 1632.

96. *New York v. United States*, 505 U.S. 144, 175–77 (1992); *Printz*, 521 U.S. at 933.

97. *Reno v. Condon*, 528 U.S. 141 (2000).

98. *Id.*

the disclosure and resale of a driver's personal information.<sup>99</sup> South Carolina claimed that the statute violated the Tenth Amendment by violating the anti-commandeering doctrine laid out in *New York and Printz*.<sup>100</sup> It argued that the statute imposed a financial and administrative burden on state officers by forcing them to administer its provisions.<sup>101</sup>

In a (surprisingly) unanimous decision, the Court rejected the State's Tenth Amendment claim and upheld the statute.<sup>102</sup> It reasoned that the statute regulated an *activity* in interstate commerce, where both private and state actors were participants.<sup>103</sup> It noted that Congress may regulate state activities, that is, States as participants in an activity that Congress is empowered to regulate, without running afoul of the anti-commandeering doctrine.<sup>104</sup> Additionally, it clarified the anti-commandeering doctrine by stating that commandeering occurs when Congress "require[s] the States in their sovereign capacity to regulate their own citizens."<sup>105</sup> Thus, the mere fact that federal legislation has an administrative and financial impact on state bureaucracy does not constitute commandeering, absent a showing that Congress is trying to direct the manner in which a State regulates its own citizens.

#### IV. CONSTITUTIONAL AVENUES FOR THE IMPLEMENTATION OF FEDERAL POLICY IN THE STATES

In *New York*, Justice O'Connor took pains to note that the anti-commandeering doctrine does not leave Congress without recourse.<sup>106</sup> Congress may preempt, threaten to preempt, or attach conditions to the receipt of federal funds in order to implement federal policy in the States.<sup>107</sup> Because these avenues, if applicable and properly used, would avoid a finding that the bypass clause unconstitutionally commandeers state executives, this section will briefly summarize each avenue below with the ultimate goal of placing the bypass clause in its proper constitutional sphere for effective analysis.

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99. *Id.* at 143–44. The regulations limit the State's ability to disclose, and thus resale, a driver's personal information without the driver's consent. *Id.* at 144.

100. *Id.* at 149–50.

101. *Id.*

102. *Id.* at 143.

103. *Id.* at 146.

104. *Id.* at 150–52.

105. *Id.* at 151.

106. *New York v. United States*, 505 U.S. 144, 167–68 (1992).

107. *Id.*

A. *Preemption*<sup>108</sup>

The Supremacy Clause of the U.S. Constitution states that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.”<sup>109</sup> When Congress enacts legislation under one of its enumerated powers, such legislation preempts any state or local law that conflicts with the federal law.<sup>110</sup> Preemption may be express, where the text of the statute explicitly overrides state and local law, or it may be implied, where the structure and purpose of the statute indicate Congress’s intent to occupy a field of regulation.<sup>111</sup> There are three types of implied preemption: (1) field preemption, where federal legislation occupies the entire regulatory field “so pervasive[ly] as to make reasonable the inference Congress left no room for the States to supplement it”; (2) conflict preemption, where it is impossible to comply with both state and federal law; and (3) impediment preemption, where “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>112</sup>

In determining the existence and extent of preemption, the Court has noted that “[t]he purpose of Congress is the ultimate touchstone’ in every pre-emption case.”<sup>113</sup> Though the existence and extent of preemption depend on congressional intent, such intent is often murky at best, and results in the Court making guesses about congressional objectives.<sup>114</sup> Furthermore, such conjecture is also influenced by the Court’s deference to the States’ police powers where congressional intent is unclear.<sup>115</sup> Despite these concerns, where Congress legislates under an enumerated power, it

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108. For a more in-depth review of preemption, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 366–81 (2d ed. 2005).

109. U.S. CONST. art. VI, cl. 2.

110. See CHEMERINSKY, *supra* note 108, at 366, 368 (noting that Congress may only preempt state and local law when it “has the authority to legislate”).

111. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (giving the current test for preemption).

112. *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

113. See *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

114. See CHEMERINSKY, *supra* note 108, at 367 (arguing that congressional intent, “especially as to the scope of preemption,” is difficult to ascertain given the nature of the legislative process).

115. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001) (“[W]e ‘work[] on the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress.’” (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325 (1997))).

may preempt state and local laws, so long as it manifests an express or implied intention to do so.

### B. *Conditional Non-Preemption*

Where Congress has authority to act, it may encourage states to regulate according to federal policy by threatening to preempt the area of regulation if the State refuses.<sup>116</sup> The Court has held that such encouragement is not coercive because it allows the State to use either its own resources and personnel for implementing federal law or shift the burden of implementation and regulation to the Federal Government, which will bear ultimate accountability if the policy is unpopular.<sup>117</sup> In sum, where Congress acts under an enumerated power, it may withhold preemption on the condition that States regulate according to federal policy.

### C. *Conditions on Spending*

In *South Dakota v. Dole*, the Court acknowledged that Congress may regulate activities outside its limited Article I powers through the use of conditions on federal grants to state governments.<sup>118</sup> Though the concern over a federal intrusion into state areas of regulation is still present and possible, the Court has reasoned that such an intrusion is less problematic because States may *voluntarily* accept or decline such federal involvement.<sup>119</sup> Nevertheless, concerned that an unlimited power to regulate state affairs through the use of conditions on federal grants would render the Court's protection of federalism "academic,"<sup>120</sup> it has outlined a five-part test limiting Congress's power to use such grants.<sup>121</sup>

First, the conditions must be in pursuit of the "general welfare."<sup>122</sup> However, this restriction is subject to the high level of deference the Court

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116. See *New York v. United States*, 505 U.S. 144, 167 (1992) (citing *Hodel v. Va. Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 288–89 (1981)).

117. *Id.* at 168 (noting also that if states choose to allow preemption, they retain regulatory authority over areas beyond the scope of the preemption).

118. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citing *United States v. Butler*, 297 U.S. 1, 65–66 (1936)); 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, 461 (2003).

119. *Dole*, 483 U.S. at 210 (quoting *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 143–44 (1947)); Baker & Berman, *supra* note 118, at 463.

120. *New York*, 505 U.S. at 167.

121. *Dole*, 483 U.S. at 207–11; Baker & Berman, *supra* note 118, at 463–64.

122. *Dole*, 483 U.S. at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937); *United States v. Butler*, 297 U.S. 1, 65 (1936)); Baker & Berman, *supra* note 118, at 463.

gives to Congress in determining the “general welfare.”<sup>123</sup> Second, the conditions must be stated “unambiguously” so that the States know exactly what is required of them.<sup>124</sup> Third, the conditions must be related to the federal program at issue.<sup>125</sup> Fourth, the conditions may not require the States to participate in unconstitutional activities.<sup>126</sup> Finally, the Court noted that conditions may not be so irresistible or necessary to the States that they become “coercive” rather than optional.<sup>127</sup> It failed to specify, however, the point at which funds become “coercive.”<sup>128</sup>

Numerous scholars have criticized each of the elements of the *Dole* test as weak and toothless,<sup>129</sup> including many who have argued that the Court’s spending doctrine creates a constitutional loophole for Congress to avoid running afoul of the Court’s Tenth Amendment doctrines.<sup>130</sup> However, some have cautioned Congress against abusing the spending power for fear that “a too clever Congress” may lead the Court to tighten its spending doctrine to bring it more in-line with its other federalism decisions.<sup>131</sup>

A related topic, and very germane to analysis of the bypass clause, is the question of whether the Federal Government may allow States to violate their own constitutions and state law through conditions on the receipt of federal funds. When Congress validly preempts state law through express or implied preemption, “any state law . . . which interferes with or is contrary to federal law, must yield.”<sup>132</sup> The idea that a state constitution is not “any state law” seems illogical. Indeed, at least one state has noted that where

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123. *Dole*, 483 U.S. at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 645 (1937); Baker & Berman, *supra* note 118, at 463).

124. *Dole*, 483 U.S. at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); Baker & Berman, *supra* note 118, at 463.

125. *Dole*, 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)); Baker & Berman, *supra* note 118, at 463.

126. *Dole*, 483 U.S. at 208; Baker & Berman, *supra* note 118, at 463–64.

127. *Dole*, 483 U.S. at 211; Baker & Berman, *supra* note 118, at 464.

128. *Dole*, 483 U.S. at 211; Baker & Berman, *supra* note 118, at 464.

129. *See, e.g.*, Baker & Berman, *supra* note 118, at 464–69 (arguing that courts have found little, if any use for the 5 elements of the *Dole* test, as evidenced by the fact that the number of conditions invalidated under one of the elements is extremely low).

130. *See, e.g.*, Norman Redlich & David R. Lurie, *Federalism: A Surrogate for What Really Matters*, 23 OHIO N.U. L. REV. 1273, 1283 n.60 (1997) (noting that the scope of the commandeering rule in *New York* is undermined by the Court’s spending doctrine); Kimberly Sayers-Fe, Comment, *Conditional Federal Spending: A Back Door to Enhanced Free Exercise Protection*, 88 CAL. L. REV. 1281, 1299 (2000) (“Depending on one’s perception[], *Dole* is either a crack in the constitutional foundation or an opportunity begging to be exploited.”).

131. *See* Baker & Berman, *supra* note 118, at 460 (arguing that continual and “clever” resort to the Court’s spending power jurisprudence may cause the Court to revise the test so as to limit congressional power).

132. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)).

“federal law imposes a binding obligation on a state, its constitution cannot obstruct that obligation.”<sup>133</sup>

Yet, the issue becomes murkier when the federal direction is not binding, but is merely a direction as part of a condition to a federal grant to which the State has agreed. Is the Federal Government prohibited from providing conditions that allow state branches of government to violate their own state law? Many state court judges have claimed that it is prohibited from doing so.<sup>134</sup> However, significant precedent right on point is scarce.<sup>135</sup> Though the answer is far from clear, at least one state court, the Supreme Court of Oregon, has held that the state legislature may not violate its own constitution to qualify for a benefit that Congress leaves “*optional*.”<sup>136</sup>

#### V. THE PROPER CONSTITUTIONAL ARENA FOR THE BYPASS CLAUSE

The novelty of the bypass clause—allowing state legislatures to accept federal funds if that state’s governor refuses—complicates a determination of its constitutionality. The differences in state law regarding the power to accept federal funds cloud the water even more. The stimulus package comes in the form of a federal grant with conditions attached, but that is hardly conclusive of the nature of the bypass clause and does not systematically remove it from constitutional analysis. In an attempt to properly pigeon-hole the bypass clause, this section will place it within each of the previously mentioned areas of law—preemption, conditional non-preemption, conditions on spending, and commandeering—with the ultimate goal of finding the closest fit.

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133. *Salem Coll. & Acad., Inc. v. Employment Div.*, 695 P.2d 25, 30 (Or. 1985).

134. *See Hills, Jr.*, *supra* note 8, at 1206 (arguing that most judges and commentators simply accept as true the proposition that the Federal Government cannot direct nonfederal government entities to violate their own state and local law).

135. *See id.* (arguing that very little precedent exists supporting the notion that the Federal Government cannot enlarge the powers of nonfederal governmental entities in violation of the state and local law). The Supreme Court did rule on the issue in 1936 in *Ashton v. Cameron County Water Improvement District*. 298 U.S. 513, 530–32 (1936) (invalidating the Municipal Bankruptcy Act of 1934 on the grounds that it regulated municipalities’ authority to declare bankruptcy—a power which the Court held was reserved to the States as head of its municipalities). *But see Hills, Jr.*, *supra* note 8, at 1206 n.21 (arguing that the Court’s reasoning was strained given that, under the Act, states had to give permission for municipalities to file bankruptcy).

136. *Salem*, 695 P.2d. at 30 (emphasis added).

### A. Preemption

Placing the bypass clause under preemption involves a multi-layered analysis. First, because Congress may only preempt state and local law in a field where it has concurrent authority under Article I, the first step is to determine the field of regulation Congress is seeking to preempt, and whether that field rationally stems from an enumerated power.<sup>137</sup> Second, because the Court looks heavily to congressional intent in determining whether Congress has preempted a field, the next step is to ascertain whether Congress intended, either explicitly or implicitly, to occupy this field.<sup>138</sup> Finally, because this preemption analysis is reflected by Governor Sanford's own preemption argument—one which the South Carolina Supreme Court avoided under the canon of constitutional avoidance—this analysis will address each point in the context of the Sanford litigation, followed by a comparison to the different outcomes that Arizona law would likely produce.<sup>139</sup>

#### 1. The Field of Regulation

In *Edwards v. State*, Governor Sanford argued that section 14005 of the stimulus package gave him unfettered discretion over the acceptance of South Carolina's share of the stimulus funds.<sup>140</sup> He argued that receipt of the funds was conditioned on his retaining unique power over acceptance and because the stimulus package was federal law, any state law in violation of that condition was necessarily preempted.<sup>141</sup>

Essentially, Governor Sanford argued that the field that Congress was trying to preempt was state acceptance of federal funds.<sup>142</sup> Facially, this seems like a field clearly outside Congress's Article I powers. However,

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137. See CHEMERINSKY, *supra* note 108, at 368 (noting that Congress may only preempt state and local law when it “has the authority to legislate”).

138. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (noting that “[p]reemption may be either express or implied”); *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

139. *Edwards v. State*, 678 S.E.2d 412, 418 (S.C. 2009).

140. *Id.*

141. *Id.*

142. Such an attempt really boils down to a condition on *acceptance* rather than a condition on the receipt of federal funds. Simply stated, it goes something like this: If you want to receive federal funds, and be bound to the conditions attached, then you must accept the funds according to *our* rules. The various ways that Congress may condition acceptance will be discussed below at Part V.B. This Part assumes, *arguendo*, that the conditions are valid, and discusses whether such conditions would preempt South Carolina or Arizona law regarding the acceptance of federal funds.

Congress (theoretically) attempted to regulate acceptance and appropriation of federal funds, a state function, within a condition on a federal grant, which allows Congress to regulate areas outside its enumerated Article I powers.<sup>143</sup> Thus, the bypass clause, at least facially, could be an attempt to preempt state acceptance of federal funds within a condition on a federal grant. Such a finding is premature, however, until congressional intent is determined.

## 2. Congressional Intent

The State Supreme Court ultimately avoided Governor Sanford's argument—that Congress had preempted the acceptance process—in order to avoid a conflict with South Carolina law, which granted the state legislature the very powers that Governor Sanford claimed he was entitled to under section 14005 of the stimulus package.<sup>144</sup> In doing so, the State Supreme Court cited the bypass clause as evidence that Congress meant to grant the state legislatures a degree of participation in the acceptance process.<sup>145</sup> It was correct in so ruling. Indeed, the very existence of a clause that allows state legislatures to accept where the governor has rejected discredits the notion that Congress intended, explicitly or implicitly, to preempt the acceptance process by requiring that the state governor be the *only* entity empowered to accept and appropriate funds. Congressional intent to preempt is lacking, at least in regards to Governor Sanford's argument.

However, what if Congress intended the opposite of Governor Sanford's argument? That is, what if Congress intended to condition the acceptance of federal funds on the condition that state legislatures have the power to accept the funds in the event that the Governor rejects them, thus preempting the acceptance process?<sup>146</sup>

Such preemption may not necessarily conflict with South Carolina law, which already grants the legislature similar powers in the acceptance process.<sup>147</sup> However, the condition that state legislatures possess acceptance power in case the Governor rejects the funds may be problematic if it conflicts with the Governor's power to veto the state legislature's

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143. See *infra* Part IV.C.1.a for an analysis of this “condition,” and whether it actually constitutes one.

144. *Edwards*, 678 S.E.2d at 418.

145. *Id.*

146. For an analysis on this possible “condition,” see *infra* Part V.C.

147. *Edwards*, 678 S.E.2d at 416–17.

appropriations act.<sup>148</sup> Suppose that the South Carolina State Legislature certifies under the bypass clause and applies for stimulus funds. South Carolina law allows the Governor to veto any appropriations made by the state legislature, subject to a two-thirds override.<sup>149</sup> But if the funds were received under the bypass clause, they may not be subject to gubernatorial veto.

First, because acceptance of the funds by the state legislature binds the State to the federal conditions attached to the funds, a gubernatorial veto of a legislative appropriation of such funds may place the State in violation of its “contract” with the Federal Government. Second, both the legislative intent behind the bypass clause and the nature of a concurrent resolution signify that a state governor *could not veto the funds regardless of his state-granted power*. Regarding intent, Representative Clyburn’s intent for inserting the bypass clause was to get around Governor Sanford.<sup>150</sup> It seems illogical that he would have intended the Governor to retain veto power over the funds. As to the nature of a concurrent resolution, a concurrent resolution, though not binding as law, does not require executive signature.<sup>151</sup>

Though the South Carolina Supreme Court did call the idea that its state legislature could obtain the stimulus funds through a 1607(b) certification alone a “substantive contention,”<sup>152</sup> Governor Sanford would have valid arguments against such a contention. In fact, he could use the Court’s own argument to his advantage by arguing that “federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of power, in the absence of the *plain statement*.”<sup>153</sup> Simply stated, if Congress intended to preempt South Carolina law by stripping the Governor of his veto powers, it should have said so explicitly in the text of the stimulus package. The South Carolina Supreme Court, following its own canon of constitutional avoidance, should read anything less than a clear statement stripping the Governor of his veto

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148. *Id.* (noting that the state legislature had the power to enact an appropriations act, subject to gubernatorial veto).

149. *Id.*

150. See Davis & De Vogue, *supra* note 5.

151. California Legislative Counsel Bureau, Glossary of Legislative Terms, <http://www.sen.ca.gov/ftp/ACCESS/GUIDES/AP3GLOS.HTM> (last visited Oct. 4, 2009).

152. *Edwards*, 678 S.E.2d at 418.

153. *Id.* at 417 (quoting *Nixon v. Mo. Municipal League*, 541 U.S. 125, 140 (2004) (emphasis added)). The South Carolina Supreme Court used this clear-statement rule requirement to conclude that the stimulus package did not require the governor to retain exclusive control over stimulus funds. *Id.*

powers as insufficient congressional intent to preempt state law, Representative Clyburn's obvious intent to do so notwithstanding. Thus, in such a scenario, it should conclude that a 1607(b) certification alone would not be sufficient for the legislature to accept the funds.

### 3. Arizona Law

Would Governor Sanford's argument—that section 14005 conditions acceptance of federal funds on the Governor's exclusive control of acceptance and appropriation powers—hold up in Arizona? If Arizona courts followed the canon of constitutional avoidance, such an argument might have a better shot of winning out. Because Arizona vests complete control over the acceptance and appropriation of federal funds in the state governor, a finding that Congress intended to include the state legislatures in the decision-making process would conflict with Arizona law.<sup>154</sup>

Yet, could an Arizona court really find that Congress did *not* intend to include the state legislatures in the acceptance process in some way, given its fairly obvious intent to do so through the bypass clause? It may conclude that Congress intended the bypass clause as merely an *option* for those States that allow some role for the state legislature in the acceptance or appropriation process in the first place. Because Arizona does not allow the state legislature any role in the process, a court could conclude that Congress did not intend the bypass clause to apply to Arizona, especially in the absence of a clear statement.<sup>155</sup> Such an interpretation would avoid the serious constitutional questions of whether Congress may allow state entities to violate their own law to comply with a federal condition, and whether states may “violat[e] [their own] constitution[s] in order to qualify for a [federal] benefit.”<sup>156</sup>

Accordingly, though valid (and somewhat attenuated) arguments exist that the bypass clause fit into federal preemption, congressional intent to preempt the acceptance process falls short, largely due to the lack of an unequivocal, express intent to do so. Additionally, when Congress preempts state law, the preemption constitutes Congress's end goal: regulation in a

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154. ARIZ. REV. STAT. ANN. § 41-101.01(A) (2009); *Navajo Tribe v. Ariz. Dept. of Admin.*, 528 P.2d 623, 624–25 (Ariz. 1975) (holding that federal funds are custodial in nature, not having arisen from the operation of state law, and as such are under the control of the executive branch).

155. *Navajo Tribe*, 528 P.2d at 624–25.

156. *Salem Coll. & Acad., Inc. v. Employment Div.*, 695 P.2d 25, 30 (Or. 1985). As was noted, the lack of precedent regarding these substantial questions may serve to persuade a court even further to interpret the stimulus package in a way that avoids the conflicts completely.

certain field. If the bypass clause is to be governed by a preemption analysis, then Congress meant to use preemption, not as an end in itself, but as a *means* to an end. That is, it intended to preempt state law with the ultimate goal of achieving state consent to a condition in a federal grant<sup>157</sup>—a course which Congress is unlikely to take. Thus, though not exactly a square peg into a round hole, the bypass clause fails to fit neatly into a preemption analysis.

### B. *Conditional Non-Preemption*

It is unlikely that the bypass fits neatly into conditional non-preemption where Congress can threaten federal preemption unless the States regulate according to federal policy.<sup>158</sup> Nevertheless, if it is possible to characterize the bypass clause as conditional non-preemption, such characterization may go something like this: Congress will preempt the acceptance process by granting to state legislatures the power to accept, unless state governors accept stimulus funds.<sup>159</sup> Yet, such a statement fails to constitute conditional non-preemption. First, Congress can only threaten preemption as to areas where it has concurrent authority with States, and acceptance of federal funds is a matter of state law.<sup>160</sup> Second, acceptance of stimulus funds can hardly be characterized as a federal policy to which States must adhere, lest Congress preempt the acceptance process.

Finally, all threats necessarily involve some kind of condition. Namely, Congress will not preempt the acceptance process on the condition that state governors accept the funds. Yet, this is not the kind of “condition” which allows Congress to reach beyond its Article I powers to regulate state affairs. States become subjects of the federal will by choosing either to accept such a “condition” or reject it. Such a theory of conditional non-preemption would allow Congress to expand into virtually every area of regulation. The difference between Arizona and South Carolina law has

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157. Admittedly, the “end goal” is similar if Congress takes this means-end approach because achieving state consent on a condition leads to compliance with the condition, which furthers federal policy. However, the federal policies are different in the two scenarios. Under “direct” preemption, Congress uses preemption to obtain regulatory authority in the field it is preempting. Under “indirect” preemption, as I call it, Congress is using preemption to attain regulatory influence in different fields of regulation.

158. See *New York v. United States*, 505 U.S. 144, 167 (1992) (citing *Hodel v. Va. Surface Mining and Reclamation Ass’n, Inc.*, 452 U.S. 264, 288–89 (1981)).

159. This seems pretty close to what Rep. Clyburn actually did. See *Davis & De Vogue*, *supra* note 5.

160. *New York*, 505 U.S. at 167 (citing *Hodel*, 452 U.S. at 288–89).

little bearing on the conclusion that the bypass clause is not a threat to preempt.

### C. *Conditions on Spending*

The stimulus package comes in the form of a federal grant with conditions attached.<sup>161</sup> Facially, it may seem that the bypass clause is governed by the Supreme Court's five-part test laid out in *Dole*. Assuming that it is, for argument's sake, the first step is to ascertain the exact nature of the condition at issue and then proceed to analyze the constitutionality of the condition under the *Dole* test, again comparing the state law of South Carolina and Arizona. In addition, the related topic of whether the Federal Government may allow a State to violate its own law through conditions on receipt of federal funds merits brief analysis, and is addressed below.

Considering the bypass clause in the context of conditions on spending requires clarification as to the exact nature of the condition. The "condition" in the stimulus package may be interpreted in two different ways. First, it may take the form of Governor Sanford's argument: a condition that the state's governor retain exclusive control over the acceptance of federal stimulus funds under section 14005.<sup>162</sup> Second, the bypass clause itself may be interpreted as conditioning the receipt of federal stimulus funds on vesting the state legislature with acceptance power in the event that the governor rejects the funds.

Section 14005 of the stimulus package states that "The Governor of a State desiring to receive an allocation . . . shall submit an application."<sup>163</sup> Governor Sanford argued that this provision conditioned acceptance of stimulus funds on his retaining the sole power to accept such funds.<sup>164</sup> Such an assertion, given the existence of the bypass clause, is tenuous at best, and was avoided by the South Carolina Supreme Court.<sup>165</sup> Because the assertion that section 14005 conditions acceptance of federal funds on the Governor's retaining sole acceptance power is unsupported by both lack of precedent and a textual reading of the stimulus package itself (namely, the bypass clause), Congress clearly meant to include *some* kind of role for state legislatures.

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161. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §§ 1604–1607, 123 Stat. 115, 303 (2009) (requiring that the funds be used for economic growth and stabilization).

162. *Edwards v. State*, 678 S.E.2d 412, 418 (S.C. 2009).

163. American Recovery and Reinvestment Act § 14005, 123 Stat. at 282.

164. *Edwards*, 678 S.E. 2d at 418.

165. *Id.*

If the South Carolina Supreme Court had ruled in favor of Governor Sanford, which it did not, it would have severely limited the state legislature's powers of acceptance and appropriation, powers which the South Carolina Supreme Court acknowledged were substantial under South Carolina law.<sup>166</sup> Understandably, it correctly avoided such a conclusion. If the condition were at issue in an Arizona case, the issue seems to disappear. A condition that grants the governor complete power of acceptance is completely in line with Arizona state law.<sup>167</sup>

The more interesting possibility is that the bypass clause itself represents a condition on the receipt of stimulus funds. The bypass clause may represent a condition that state legislatures be vested with acceptance power in the event that the state governor rejects the funds. However, calling the bypass clause a "condition" in this sense seems highly illogical, not to mention impractical.

First, acceptance of the funds by a state governor would hardly amount to acquiescence to the condition. Simply stated, the fact that a governor accepts stimulus funds does not mean he acknowledges that the state legislature had acceptance power in the event of his refusal. Furthermore, if the governor refuses the funds, such a refusal could hardly be interpreted to mean that he acknowledges the concurrent power of the state legislature to accept where he has rejected. Such rejection would likely amount to objections over the stimulus package. The problem arises in determining which state entity consents to this condition and how such consent is given.

Nevertheless, if a court ruling on the issue looked past the inherent difficulties in determining that the bypass clause is a condition, and not just an option, would it pass the *Dole* test? It depends (the classic legal answer). The main thrust behind the Court's spending doctrine laid out in *Dole* is that allowing Congress to regulate state areas of law through conditions on federal grants is permissible because States give *voluntary* consent.<sup>168</sup> Yet, state law decides who is able to give consent, and the law varies from state to state.

If the state executive is the only party empowered by state law to accept federal funds, as is the case in Arizona, does the "State" really consent if the legislature does the consenting and not the executive officer? Such a

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166. *Id.* at 417.

167. ARIZ. REV. STAT. ANN. § 41-101.01 (2009) (granting Governor power to accept federal funds); *Navajo Tribe v. Ariz. Dept. of Admin.*, 528 P.2d 623, 624–25 (Ariz. 1975) (holding that federal funds are custodial in nature, not having arisen from the operation of state law, and as such are under the sole control of the executive branch).

168. *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (quoting *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143–44 (1947) (emphasis added)); *Baker & Berman*, *supra* note 118, at 463.

“condition,” if it indeed can be called that, seems to manufacture consent to achieve the result most favorable to Congress. Though the Supreme Court has been extremely reluctant to invalidate conditions on federal grants under any of the five elements in the *Dole* test,<sup>169</sup> there is a valid argument that it could do so where the condition itself attempts to alter state law so as to create consent in a manner that removes voluntariness from the equation.

Under South Carolina law, the condition would not be as blatantly in conflict with state law regarding the acceptance of federal funds because the state legislature can indirectly accept federal funding by forcing the Governor to apply for the funds (through a two-thirds override of his gubernatorial veto of the budget).<sup>170</sup> Yet, the condition may limit the Governor’s ability to veto funds accepted by the legislature under the bypass clause.<sup>171</sup>

Regarding Congress’s ability to allow a State to violate its own law through a condition on a federal grant, precedent is scarce on the subject. Perhaps the fault, if any exists, should lie with the States which consent to violate their own law, and not with the Federal Government. Though States are hardly unanimous on the subject, the Oregon Supreme Court has held that its state legislature may not “violate [its own] constitution in order to qualify for a benefit that Congress leaves optional.”<sup>172</sup> One commentator has proposed that a state’s bill of rights should be interpreted as prohibiting the State from participating in any federal grant program that would abrogate such rights.<sup>173</sup> Is the logical extension of such a proposal that state constitutions and statutes should be interpreted as precluding state participation in a federal program that allows the state legislature to assert powers that are wholly executive under state law? Or should courts interpret federal grants as completely optional, allowing States to do as they please, even if it means violating their own law? Though the answer to this question is beyond the scope of this article, it is sufficient to note that the bypass clause likely does not constitute a typical condition within a federal grant. Thus, a resolution of this issue is not substantially significant to an analysis of the bypass clause.

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169. See, e.g., Baker & Berman, *supra* note 118, at 464–69 (arguing that courts have found little, if any use for the 5 elements of the *Dole* test, as evidenced by the fact that the number of conditions invalidated under one of the elements is extremely low).

170. *Edwards*, 678 S.E.2d at 417.

171. See Part V.A.2, *supra*, for a discussion on how this problem arises under a preemption analysis.

172. *Salem Coll. & Acad., Inc. v. Employment Div.*, 695 P.2d 25, 30 (Or. 1985).

173. See William Van Alstyne, “*Thirty Pieces of Silver*” for the Rights of Your People: *Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL’Y 303, 307 (1993).

Though any analysis of the bypass clause must include a discussion on conditions on spending, the bypass clause itself does not seem to constitute such a condition. Indeed, when the Supreme Court and commentators speak of conditions on spending, the conditions generally involve compliance with actual federal policy, not procedural steps to achieve consent to conditions with actual federal policy. Instead, the bypass clause seems to commandeer the acceptance process, and consequently the state executive, in an attempt to achieve state consent with the ultimate purpose of achieving the federal policies outlined in the stimulus package.

#### D. *Commandeering*

Finally, an analysis of the bypass clause must include its potential “fit” into the anti-commandeering rule. Because the party most affected by the bypass clause is the state governor, this analysis will loosely follow that of Justice Scalia’s in *United States v. Printz*, attempting to analogize the bypass clause’s impact on the state governor to the foundational support offered for the anti-commandeering doctrine. Namely, this section will consider precedent, political accountability, historical understanding and practice, and the structure of the Constitution in determining if the bypass clause constitutes commandeering. Again, because the different state laws of South Carolina and Arizona complicate the matter, each examination will include Arizona and South Carolina as case studies.

##### 1. Precedent for the Anti-Commandeering Rule

Not surprisingly, *New York* and *Printz* are the touchstone cases for determining if the bypass clause constitutes a new form of commandeering. Clearly, the Supreme Court was concerned with an intrusive Federal Government seeking to influence state policy through direct enlistment of state legislative and executive personnel. In addition, there was something implicit in the Court’s decisions regarding the nature of commandeering and why it was so constitutionally offensive to the majority: Congress must require state legislatures or executive officers to *take affirmative action*.<sup>174</sup>

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174. Authors Adler and Kreimer note this distinction as the difference between preemption and commandeering. Where Congress preempts state law, the state branches of government are in compliance by not obstructing federal law—that is, by doing nothing. Where Congress preempts state officials, it requires them to actually do something, such as vote on a statute, or conduct background checks. See Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 SUP. CT. REV. 71, 92–93 (1998).

Thus, the question is whether the bypass clause requires the state executive to act affirmatively or whether it simply shifts some executive powers to the state legislature. Facially, the bypass clause requires no affirmative action by the governor. It simply allows the state legislature to do what the governor refuses to do. However, this does not end the analysis.

Suppose the Governor of Arizona refused the stimulus funds. Over her (presumed) objections, the state legislature certifies under the bypass clause and accepts federal stimulus funds. Now, even though the Governor refused and had legal power to refuse consent to the funds, she is bound to honor the conditions attached to the receipt of stimulus funds. She is bound to carry out the policies of the stimulus package in Arizona, which requires affirmative action. The process would yield the same result in South Carolina.

Whether Congress directly enlists state governors to administer federal policy, or does so indirectly by manufacturing state consent to a federal grant matters little. Either way, a governor is little more than a “puppet[] of a ventriloquist Congress.”<sup>175</sup>

## 2. Political Accountability

Like the state legislature in *New York* and the CLEOs in *Printz*, governors who are forced to administer federal policies under the stimulus package, because their state legislatures have accepted the funds under the bypass clause, may bear some portion of the blame if the funds are used in unpopular ways. Yet, the political accountability argument is weaker here for multiple reasons.

First, the stimulus package is by no means obscure legislation.<sup>176</sup> The well-publicized recession, coupled with its passage within the first month of the inauguration of United States’s first African American president, increases the likelihood that voting citizens will be able to ascertain the source of funding and programs under the stimulus package. Second, one may question whether a state governor would even desire that his constituency know the true source of the funds, given the depth of the recession.<sup>177</sup> A governor may desire that the voting public think he is the one attempting to revitalize the economy for political reasons, and as such,

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

176. A Google search of “U.S. stimulus package” brings up thousands of results.

177. Barry Wood, *U.S. Jobless Total Rises by 651,000 in February*, VOANews.com, Mar. 6, 2009, [http://www.voanews.com/english/news/a-13-2009-03-06-voa5-68775782.html?CF\\_TOKEN=93239344&jsessionid=6630b6e841e54c4f0ddb4f17316b31e643a7&CFID=295216118](http://www.voanews.com/english/news/a-13-2009-03-06-voa5-68775782.html?CF_TOKEN=93239344&jsessionid=6630b6e841e54c4f0ddb4f17316b31e643a7&CFID=295216118) (noting that the U.S. unemployment rate reached a 25-year high of 8.1 in February, 2009).

would prefer the source be clouded so he receives most of the credit. Nevertheless, opposition exists, whether significant or not, to all legislation. It is conceivable that a governor may desire to remain as distanced as possible from the stimulus package in an attempt to please a certain constituency.

Regardless, much of this is speculation and is dependent on the national and local success of the stimulus package in revitalizing the economy. Accordingly, though still significant, the political accountability argument may not be as influential in an analysis of the bypass clause as it was in *New York* and, to some extent, *Printz*.

### 3. Historical Understanding and Practice

Examining the bypass clause through the lens of early congressional enactments and the Federalist Papers is, admittedly, somewhat anachronistic. Federal grants with conditions attached, as they exist today, did not become common-place until the early twentieth century.<sup>178</sup> To assert that the Framers did not conceive of the Federal Government possessing the power to alter the state executive's power of acceptance of federal funds is to assert little at all.

Nevertheless, though little historical information exists as to whether the Framers thought Congress had the power to alter the state executive's power to accept, Justice Scalia's dominant rationale for concluding that the Constitution was not understood to confer power on the Federal Government to commandeer state executives is still illustrative here. In the face of the Federalist Papers that indicate that at least some of the Framers thought the new government could enlist state officers, Justice Scalia continually asserted that such enlistment came against the backdrop of presumed *state consent to the enlistment*.<sup>179</sup>

Simply stated, if state consent is such an important element in the majority's decision in *Printz*, then it is unlikely that the Court would look with favor on a provision that alters the mechanisms of consent. Can a State really decide to consent when Congress decides the rules of consent? Given

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178. BEN CANADA, CRS REPORT RL30705: FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A BRIEF HISTORY 2 (2003), available at [http://ugar.senate.gov/services/pdf\\_crs/grants/Federal\\_Grants\\_to\\_State\\_and\\_Local\\_Governments\\_A\\_Brief\\_History.pdf](http://ugar.senate.gov/services/pdf_crs/grants/Federal_Grants_to_State_and_Local_Governments_A_Brief_History.pdf) (providing an overview of the grants-in-aid system).

179. *Printz v. United States*, 521 U.S. 898, 910–11 (1997). *But see* Prakash, *supra* note 79, at 2005 (disagreeing with Justice Scalia's conclusion, arguing that the Federalists, in an effort to comfort anti-federalists who feared a large federal bureaucracy, suggested the enlistment of state officers in the administration of federal law; state consent was never an issue).

the *Printz* majority's strong focus on the necessity for state consent to federal enlistment, the logical extension of such a focus is that States must decide how States will consent.

One may argue that the bypass clause simply expands the concept of state acceptance, rather than limiting it, by allowing different state entities to accept. Yet, an "expansion," if it can be rightly called such, still flies in the face of Arizona law that specifically allocates acceptance power to the Governor alone.

Though an attempt to alter the state executive's acceptance powers would conflict with Arizona law, the outcome may be different in South Carolina where the state legislature already possesses acceptance powers.<sup>180</sup> A congressional clause granting a State what it already has may not significantly alter the consent process. However, to the extent that the bypass clause removes the Governor's power to veto appropriations, it may pose constitutional problems.<sup>181</sup> Nevertheless, the South Carolina Supreme Court may have played its hand on the issue, calling the notion that the state legislature could receive funds on its own a "substantive contention" given the legislature's broad powers of the purse.<sup>182</sup>

There is a counter-argument to the assertion that Congress cannot dictate how States consent to federal funds. One commentator has noted several instances where the Congress directed state entities to appropriate funds in violation of state appropriation laws.<sup>183</sup> Surely such directions constitute an alteration of the inner workings of state government. At the risk of sounding unduly formalistic, however, there is a difference between the power to *accept* and the power to *appropriate*, namely in who usually wields such powers.<sup>184</sup> The power to appropriate federal funds is somewhat ambiguous. Many courts have held, like Arizona, that only the state executive may appropriate the funds.<sup>185</sup> Other courts have granted such power largely to the state legislature, such as in South Carolina.<sup>186</sup>

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180. *Edwards v. State*, 678 S.E.2d 412, 417 (S.C. 2009) (holding that South Carolina has power to accept federal funds by forcing the Governor to apply).

181. *Id.* (noting that the Governor has power to veto the Legislature's appropriations).

182. *Id.* at 418.

183. *See Hills, Jr.*, *supra* note 8 *passim* (noting several instances where Courts upheld conditions on federal grants that "freed" state executive officers from the state legislature's control).

184. *See Printz*, 521 U.S. at 952 (Stevens, J., dissenting) (criticizing the Majority's distinction between executive and judicial administration of executive functions as "empty formalistic reasoning").

185. *Navajo Tribe v. Ariz. Dep't of Admin.*, 528 P.2d 623, 624-25 (Ariz. 1974).

186. *See Edwards*, 678 S.E.2d at 417.

Yet, the power to *accept* federal funds is largely an executive function, even though some States do require legislative review of applications for federal funds.<sup>187</sup> There is a difference between the power to review and the power to accept completely. The first maintains the state executive's power, while limiting it somewhat, while the second eliminates the need for a state executive at all with regard to the accepting federal funds. Thus, while intrastate disputes over the appropriation of federal funds may very well exist, acceptance is a matter more threshold, and more established by state law. Congressional tampering with the acceptance power should raise greater concerns.

#### 4. The Constitution's Structural Division of Powers between the Federal and State Governments

If structural analysis is helpful, it must be through the division of powers between the federal and state government, made express by the Tenth Amendment. If the Framers intended a realm of legislation meant solely for the States, then surely the mechanisms and functions of state government, such as deciding which party deals with and accepts grants from the Federal Government, is within that realm. Indeed, the Supreme Court has held that States, and not the Federal Government, decide the allocation of power within their own governments.<sup>188</sup> One commentator has noted that state government functions are "exclusive state powers" upon which the Federal Government may not intrude.<sup>189</sup>

Yet this is exactly what the bypass clause seeks to do: decide which state entity may accept federal funds, even though States clearly have procedures and laws on the acceptance power. The federal intrusion upon Arizona law

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187. See Hills, Jr., *supra* note 8, at 1257 (noting that state legislatures usually do not have much of a role in the grant application process). *But see* Hills, Jr., *supra* note 8, at 1270 (arguing that state legislatures may bar Governors from applying for federal funds through legislation). See, e.g., ILL. REV. STAT. ch. 127, ¶ 415 (1979); ME. REV. STAT. ANN. tit. 5, § 1705 (1964). *But see* LA. REV. STAT. ANN. § 49:663 (1965) (gubernatorial review of federal grant applications); OR. REV. STAT. § 293.550 (1983) (same); Joan Schleaf, Comment, *Federal Funds and Separation of Powers: Who Controls the Purse?*, 53 U. CIN. L. REV. 611, 623 (arguing that the state legislature *should* be the branch empowered to accept federal funds).

188. See *Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental powers."); *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring in result); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

189. See Donald J. Toumey, Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694, 1702 (1981) (arguing, among other things, that decisions regarding state government functions should be decided solely by the State).

is clear, given that only the Governor may accept and appropriate federal funds. In addition, the fact that the bypass clause may not actually conflict with a State's chosen disposition of powers (such as in South Carolina) may be grounds for punting on the question under the canon of constitutional avoidance, but it does not make the attempt to do so any less dubious. If the Tenth Amendment truly "reserves" *any* power to the states at all, it must be that of allocation of powers within state government.

## VI. CONCLUSION

It is hoped that the novelty of the bypass clause will spur substantial contributions from scholars regarding the proper constitutional sphere under which to analyze it. Ultimately, this article concludes that it constitutes a new type of commandeering, where Congress has commandeered the acceptance process in order to manufacture consent to the stimulus package. Such commandeering removes the governor from the scene, only to bring him or her back onto a scene where he or she is obligated to administer federal policies—policies which he or she is empowered to reject and unwilling to implement.

To summarize, *New York* and *Printz* clearly condemn the commandeering of state officers to administer federal policy, which the bypass clause attempts to do by removing a governor's power to reject federal funds and indirectly forcing him or her to administer federal policy. Furthermore, the political accountability argument expressed in *New York* and *Printz* applies here, where a governor may be forced to bear the blame for unpopular federal policies because Congress decided (against state law in Arizona) that a state's legislature may accept federal funds. In addition, an attempt to alter the acceptance process (a matter of state concern) runs afoul of the Constitution's structural division of powers between federal and state governments, and (arguably) the Framers's understanding that any federal enlistment of state officers requires state consent. Though novel, the bypass clause is commandeering by any other name.

Commentators have questioned whether a "too clever Congress" may cause the Court to reorient its spending doctrine, so as to provide substantive limits to Congress's ability to place conditions on the receipt of federal funds.<sup>190</sup> The bypass clause may just be clever enough.

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190. See Baker & Berman, *supra* note 118, at 460 (arguing that continual and "clever" resort to the Court's spending power jurisprudence may cause the Court to revise the test so as to limit congressional power).