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# COMMENTS

## FEDERALISM AS A PREVENTIVE MEASURE: AVOIDING STATE ENFORCEMENT OF FEDERAL ANTI-GUN LEGISLATION IN 2013

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### I. INTRODUCTION

On December 14, 2012, the nation grappled with the inconceivable massacre of twenty-six residents of Newtown, Connecticut, twenty of them small children, in the second-deadliest school shooting in the history of the United States.<sup>292</sup> The number of casualties in the Newtown shooting is surpassed only by the 2007 massacre at Virginia Tech, during which a Virginia Tech student killed himself and thirty-two others.<sup>293</sup> Last summer, an armed gunman entered a Colorado movie theatre and opened fire, killing twelve people and wounding fifty-eight more.<sup>294</sup> This tragedy occurred only twenty miles from Littleton, Colorado, where twelve students and one teacher were murdered and twenty-four other students were wounded in the unforgettable Columbine High School shooting in 1999.<sup>295</sup> Immediately following the most recent massacre in Newtown, many politicians surged forward with anti-gun legislation. The coverage of the shooting included interviews with children as young as five-years-old, triggering an emotional response from the American public and reigniting the gun control debate. As a result, on January 16, 2013, President Barack Obama issued twenty-

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<sup>292</sup> Susan Candiotti & Sarah Aarhun, Police: 20 Children among 26 victims of Connecticut school shooting, CNN (Dec. 15, 2012, 12:19AM), <http://www.cnn.com/2012/12/14/us/connecticut-school-shooting>.

<sup>293</sup> Christine Hauser & Anahad O'Connor, Virginia Tech Shooting Leaves 33 Dead, N.Y. TIMES (Apr. 16, 2007), [http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html?pagewanted=all&\\_r=0#](http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html?pagewanted=all&_r=0#).

<sup>294</sup> Dan Frosch & Kirk Johnson, Gunman Kills 12 in Colorado, Reviving Gun Debate, N.Y. TIMES (July 20, 2012), <http://www.nytimes.com/2012/07/21/us/shooting-at-colorado-theater-showing-batman-movie.html?pagewanted=all>.

<sup>295</sup> James Brooke, Terror in Littleton: The Overview; 2 Students in Colorado School Said to Gun Down as Many as 23 and Kill Themselves in Siege, N.Y. TIMES (Apr. 21, 1999), <http://www.nytimes.com/1999/04/21/us/terror-littleton-overview-2-students-colorado-school-said-gun-down-many-23-kill.html?page-wanted=all&src=pm>.

three executive actions aimed at reducing gun violence in the United States.<sup>296</sup>

There are many theories as to why controversial anti-gun legislation has been brought to the forefront of American politics. Since 1982, there have been at least sixty-two mass shootings across the country, covering at least thirty of the fifty states.<sup>297</sup> Twenty-five of those mass shootings have occurred since 2006.<sup>298</sup> The theory of “political salience” serves as one possible explanation for the push for gun control in 2013. “Salience” is the prominence of a political issue in the public mindset; it tends to manifest as a result of the interaction between voters and interest groups, media, political parties, and activists.<sup>299</sup> The most sensible time to propose controversial legislation, according to this theory, is immediately following an event that has struck a chord in the public’s consciousness.<sup>300</sup> One such sensible time would be after twenty children are brutally shot to death in their classrooms because this would allow gun control supporters and left-wing politicians to capitalize on the emotional reaction of the public. That is exactly what happened after Newtown with the President issuing an Executive memorandum<sup>301</sup> and Congress introducing several pieces of gun-control legislation.<sup>302</sup>

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<sup>296</sup> Now is the Time: Gun Violence Reduction Executive Actions, THE WHITE HOUSE (Jan. 16, 2013), [http://www.whitehouse.gov/sites/default/files/docs/wh\\_now\\_is\\_the\\_time\\_actions.pdf](http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_actions.pdf); See also Presidential Memorandum from the White House on Engaging in Public Health Research on the Causes and Prevention of Gun Violence to the Secretary of Health and Human Services, 78 Fed. Reg. 4295, (Jan. 16, 2013); Presidential Memorandum from the White House on Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System to the Heads of Executive Departments and Agencies, 78 Fed. Reg. 4297, (Jan. 16, 2013); Presidential Memorandum from the White House on Tracing of Firearms in Connection with Criminal Investigations to the Heads of Executive Departments and Agencies, 78 Fed. Reg. 4301, (Jan. 16, 2013).

<sup>297</sup> Mark Follman, Gavin Aronsen & Deanna Pan, A Guide to Mass Shootings in America, MOTHER JONES (Feb. 27, 2013, 7:45AM), <http://www.motherjones.com/politics/2012/07/mass-shootings-map>.

<sup>298</sup> Id.

<sup>299</sup> Ryan Card, Comment, *Can States “Just Say No” to Federal Health Care Reform? The Constitutional and Political Implications of State Attempts to Nullify Federal Law*, 2010 B.Y.U. L. REV. 1795, 1819 (2010) (“When the political and economic stakes are high, interest groups and politicians seek to maintain an issue’s salience long enough to capitalize from the political issue in the voting booth.”).

<sup>300</sup> Id.

<sup>301</sup> See Now is the Time: Gun Violence Reduction Executive Actions, THE WHITE HOUSE (Jan. 16, 2013), [http://www.whitehouse.gov/sites/default/files/docs/wh\\_now\\_is\\_the\\_time\\_actions.pdf](http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_actions.pdf).

<sup>302</sup> See, e.g., NICS Reporting Improvement Act of 2013, S. 480, 113th Cong. (2013); Fix Gun Checks Act of 2013, S. 374, 113th Cong. (2013); Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013); Sandy Hook Elementary School Violence Reduction Act, S. 2, 113th Cong. (2013); Gun Trafficking Prevention Act of 2013, H.R. 452, 113th Cong. (2013); Strengthening Background Checks Act of 2013, H.R. 329, 113th Cong. (2013); Fire Sale Loophole Closing Act, H.R. 238, 113th Cong. (2013); Support Assault Firearms Elimination and Reduction for our Streets Act, H.R. 226, 113th Cong. (2013); Handgun Licensing and Regulation Act of 2013, H.R. 117, 113th Cong. (2013); Blair Holt’s Firearm

Conservatives across the nation fear that legislative response to the Newtown shooting will infringe on the individual's right to bear arms, established in the Second Amendment and affirmed in the landmark case of *District of Columbia v. Heller*.<sup>303</sup> Republican members of the United State Congress have consequently responded with protective legislation.<sup>304</sup> In the meantime, state legislatures have taken a different constitutional approach to preserve Second Amendment freedoms. While the Second Amendment remains at the heart of the debate, several states have attempted to pass state laws preventing state assistance to federal officials that infringe upon the Right to Bear Arms.<sup>305</sup> For example, in Virginia, Republican Delegate Bob Marshall introduced House Bill 2340, a bill that, if signed into law, would prevent state compliance with any federal anti-gun legislation. The summary of the text reads:

A BILL to prevent any agency, political subdivision, or employee of Virginia from assisting the Federal Government of the United States in any investigation, prosecution, detention, arrest, search, or seizure under the authority of any federal statute enacted, or Executive Order or regulation issued, after December 31, 2012, infringing the individual Right to Keep and Bear Arms by imposing new restrictions on private ownership or private transfer of firearms, firearm magazines, ammunition, or components thereof.

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On its face, this bill seems to violate the well-established Supremacy Clause.<sup>307</sup> This comment will delve into this question, seeking to answer whether or not the Constitution allows states to refuse to comply with federal law. This analysis requires the application of a constitutional principle that reaches far beyond the scope of the Right to Bear Arms; it calls into play the vertical separation of powers and the rights belonging to state sovereigns described in the Tenth Amendment. The comment will proceed as follows. Part II will address the constitutionality of House Bill 2340, compared against other kinds of legislation and in light of case law. It

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Licensing and Record of Sale Act of 2013, H.R. 34, 113th Cong. (2013).

<sup>303</sup> See *District of Columbia v. Heller*, 554 U.S. 570 (2008). See generally U.S. CONST. amend. II.

<sup>304</sup> See e.g., Veterans Second Amendment Protection Act, H.R. 602, 113<sup>th</sup> Cong. (2013); Respecting States' Rights and Concealed Carry Reciprocity Act of 2013, H.R. 578, 113<sup>th</sup> Cong. (2013); Second Amendment Protection Act of 2013, H.R. 575, 113<sup>th</sup> Cong. (2013); Restore the Constitution Act of 2013, H.R. 410, 113<sup>th</sup> Cong. (2013); Recreational Fishing and Hunting Heritage and Opportunities Act, S. 170, 113<sup>th</sup> Cong. (2013); Separation of Powers Restoration and Second Amendment Protection Act of 2013, S. 82, 113<sup>th</sup> Cong. (2013).

<sup>305</sup> See e.g., H.B. 2340, 2013 Gen. Assemb., Reg. Sess. (Va. 2013); S.B. 129, 2013 Reg. Sess. (Ky. 2013); H.B. 120, 2013 Gen. Assemb., Reg. Sess. (Mo. 2013); H.B. 357, Gen. Assemb., 2013-2014 Reg. Sess. (Pa. 2013); H.B. 42, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013); H.B. 553, 83rd Reg. Sess. (Tex. 2013); H.B. 0104, 2013 Gen. Assemb., Reg. Sess. (Wyo. 2013).

<sup>306</sup> H.B. 2340, 2013 Gen. Assemb., Reg. Sess. (Va. 2013).

<sup>307</sup> U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land.")

will be argued that the Federal Government cannot compel states to comply with certain types of federal law, and that states, as sovereigns, may pass state legislation to refuse such compliance. Part III will in turn explain the legal ramifications of state defiance, including Congress's constitutional power under the Spending Clause to grant or withhold federal funding where it sees fit, so long as the conditions are not deemed coercive. Consequently, Virginia and other states may have to forfeit federal funding should these bills pass, and will likely refer the bills to their respective appropriations committees to assess the economic forfeiture incurred by signing a non-compliance bill into law.

## II. CONSTITUTIONALITY OF HOUSE BILL 2340

### A. The 10<sup>th</sup> Amendment

The Tenth Amendment of the United States Constitution explicitly limits the power of the Federal Government, and reserves those powers not enumerated by the Constitution to the States.<sup>308</sup> The Federal Government has been said to be a body of limited and enumerated powers,<sup>309</sup> and is only entitled to legislate in areas specifically delegated to it in the Constitution. Although interpretive tools have evolved over time, one way to determine what the Framers of the Constitution intended is to put the Framers' beliefs into context. In 1788, only three years before the Tenth Amendment was ratified, James Madison noted that the powers delegated by the proposed Constitution to the Federal Government are "few" and "defined" while those in the state governments are "numerous" and "indefinite."<sup>310</sup> At the core of this division of power is the idea that without the States in the union, the United States would cease to exist as a political body.<sup>311</sup> The States existed before the Constitution, and the Constitution was created in an effort to "establish a more perfect union."<sup>312</sup> The desire to preserve the States' independent authority and autonomy is evident through the early debates over the Virginia and New Jersey Plans. During these conversations, it was decided that Congress's legislative authority would be exercised directly over individuals rather than over the States.<sup>313</sup>

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<sup>308</sup> See U.S. CONST. amend. X.

<sup>309</sup> See *Gonzalez v. Raich*, 545 U.S. 1, 70 (2005) (Thomas, J., dissenting).

<sup>310</sup> THE FEDERALIST No. 45 (James Madison).

<sup>311</sup> *Lane Cnty. v. Oregon*, 74 U.S. 71, 76 (1868).

<sup>312</sup> U.S. CONST. pmb.; see also *id.*

<sup>313</sup> See *New York v. United States*, 505 U.S. 144, 164-65 (1992) (explaining the Virginia and New Jersey Plans).

Interestingly enough, one of the primary reasons the Virginia Plan was favored was to avoid the potential for coercion by the Federal Government upon the States.<sup>314</sup> The Framers of the Constitution could not have been clearer in their intentions: the Federal Government was not to create laws that would coercively require States to comply with federal regulation.

The Supreme Court has frequently recognized this reservation of state power.<sup>315</sup> Justice Story referred to the Tenth Amendment as an essential tool of Constitutional interpretation.<sup>316</sup> Because the Constitution is an instrument of limited and enumerated powers, he claimed, “it follows irresistibly, that what is not conferred, is withheld, and belongs to the states.”<sup>317</sup> As the nation has grown, the Tenth Amendment has served a broader purpose. The constitutional allocation of powers known as “federalism” has allowed the states to function as individual political sovereigns. In *Gregory v. Ashcroft*, the Supreme Court noted four specific ways in which the balance of powers is conducive to the state autonomy that the Framers sought to maintain:

It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.<sup>318</sup>

A system of federalism certainly has its advantages. The problem, however, is that, in spite of the clear intentions of the Framers and their obvious preservation of state power, the Federal Government still attempts to enact legislation that undermines the sovereign interests of states. Such interference with state sovereignty is not included in the limited powers enumerated to the Federal Government in the Constitution.<sup>319</sup> Critics of the American system of federalism have analogized this abuse of federal power with a superior-subordinate relationship, rather than the dual-sovereignty system that was intended.<sup>320</sup> Although the vertical separation of power

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<sup>314</sup> Edmund Randolph, The Virginia Plan, OUR DOCUMENTS (June 8, 2013, 10:03 AM), [http://www.ourdocuments.gov/document\\_data/pdf/doc\\_007.pdf](http://www.ourdocuments.gov/document_data/pdf/doc_007.pdf).

<sup>315</sup> *Lane Cnty.*, 74 U.S. at 76 (“But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized.”); see also *Texas v. White*, 74 U.S. 700, 725 (1868); *Alden v. Maine*, 527 U.S. 706, 714-15 (1999); *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011).

<sup>316</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833).

<sup>317</sup> *Id.*

<sup>318</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

<sup>319</sup> See generally James L. Buchwalter, Annotation, Construction and Application of 10th Amendment by United States Supreme Court, 66 A.L.R. FED. 2d 159 (2012) (discussing all judicial opinions in which the Supreme Court has constructed or applied the 10th Amendment to the Constitution).

<sup>320</sup> Edward L. Rubin, Puppy Federalism and the Blessings of America, 574 ANN. AM. ACAD. POL. & SOC. SCI. 37, 48-49 (Alan W. Heston, Ed., 2001) (“Is this really federalism, is it really the way one sovereign treats another sovereign? It seems to bear a closer resemblance to the way a superior treats a

model was discussed as far back as the Constitutional Convention, the line was not distinct enough, and the Supreme Court has continuously struggled with how to remedy the problem.<sup>321</sup>

#### B. The Anti-Commandeering Doctrine

While Congress has attempted to pass many federal laws that extend far beyond its limited legislative power, perhaps the most relevant to the Tenth Amendment are those pieces of legislation that attempt to “commandeer” the states. Congress “commandeers” when it passes legislation that either imposes specific legislation upon state legislatures or assigns a duty of enforcement to carry out federal law to state executive branches.<sup>322</sup> One of the most authoritative applications of the Tenth Amendment using the anti-commandeering doctrine was the Supreme Court’s decision in *New York v. United States*.<sup>323</sup> The State of New York challenged the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (“the Act”). The Act attempted to resolve the failure of states to implement policies that would ensure the safe disposal of commercial radioactive waste through incentive schemes.<sup>324</sup> One of the provisions of the Act was a “take-title” provision that compelled any state that failed to adopt an appropriate plan to take possession of any radioactive waste produced within its borders.<sup>325</sup> The majority opinion, written by Justice O’Connor, declared the take-title provision to be an unconstitutional exercise of federal legislative power.<sup>326</sup> Congress, she wrote, is not permitted to commandeer the internal legislative or executive processes of the individual states by “directly compelling them to enact and enforce a federal regulatory program.”<sup>327</sup> The Court cited two other prior cases to depict two occasions

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subordinate administration, and not a very trusted subordinate at that.”).

<sup>321</sup> *Fry v. United States*, 421 U.S. 542, 549-50 (1975) (Rehnquist, J., dissenting) (demanding boundaries that would clearly delineate state and federal power).

<sup>322</sup> Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANN. AM. ACAD. OF POL. & SOC. SCI. 158, 163 (Alan W. Heston, Ed., 2001).

<sup>323</sup> See generally *New York v. United States*, 505 US 144 (1992) (Congress passed legislation whereby States either had to take title and possession of waste or States had to adhere to a specific waste policy. New York argued that this was the United States government commandeering New York’s right to develop a unique waste policy).

<sup>324</sup> *Id.* at 149-52; See also Thomas B. McAfee, Jay S. Bybee & A. Christopher Bryant, *POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS* 188-89 (2006).

<sup>325</sup> *New York*, 505 U.S. at 153-54.

<sup>326</sup> *Id.* at 186.

<sup>327</sup> *Id.* at 161 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)).

when it upheld statutes against similar constitutional challenges.<sup>328</sup> In those two cases, however, it was determined that nowhere in either statute did Congress compel the states to enact federal law.<sup>329</sup> Thus clearly distinguishing the facts of those two cases from the facts of New York.<sup>330</sup>

The Court also notably stated that the extent of a potentially strong federal interest in forcing states to comply is irrelevant.<sup>331</sup> While the Government asserted that all provisions, the take-title provision included, were intended to encourage the States to establish safer policies for waste disposal, the Court noted that the provision went beyond encouragement and instead was a striking example of coercion.<sup>332</sup> In imposing such requirements on state governments, the Court felt that the Act relieved federal officials of accountability should the citizens of the state localities disapprove.<sup>333</sup> State officials are specifically elected to act in the best interest of their constituents, and they are unable to do so when the government has coerced them into adopting legislation in alignment with its federal regulatory scheme.<sup>334</sup> This theory of political accountability similarly underlies the holding in another Tenth Amendment milestone, *Printz v. U.S.*<sup>335</sup>

### C. *Printz v. US*

In 1968, Congress enacted the Gun Control Act of 1968 (“the GCA”), which created a federal program to regulate the distribution of firearms.<sup>336</sup> In 1993, Congress amended the GCA by enacting the Brady Handgun Violence Prevention Act, which required the Attorney General to create a national background check database.<sup>337</sup> One of the provisions of the Brady Act required chief law enforcement officers (“CLEOs”) throughout the country to conduct background checks and complete other relevant tasks

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<sup>328</sup> See *Hodel*, 452 U.S. at 304–05; *Fed. Energy Reg. Comm’n v. Mississippi*, 456 U.S. 742, 769 (1982).

<sup>329</sup> *Hodel*, 452 U.S. at 304–05; *Fed. Energy Reg. Comm’n*, 456 U.S. at 769.

<sup>330</sup> *Hodel*, 452 U.S. at 304–05; *Fed. Energy Reg. Comm’n*, 456 U.S. at 769.

<sup>331</sup> *New York*, 505 U.S. at 178 (“No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation... It may not conscript state governments as its agents.”).

<sup>332</sup> *Id.* at 174–75.

<sup>333</sup> *Id.* at 168–69.

<sup>334</sup> *Id.*

<sup>335</sup> Jennifer A. Wiegleb, *Strong Arming the States to Conduct Background Checks for Handgun Purchasers: An Analysis of State Autonomy, Political Accountability, and the Brady Handgun Violence Prevention Act*, 48 WASH. U. J. URB. & CONTEMP. L. 373, 386 (1995).

<sup>336</sup> Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921 et seq. (1993)).

<sup>337</sup> Brady Handgun Control, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 921-925A (Supp. V. 1994)).

before the creation of a national database.<sup>338</sup> Several CLEOs in Montana, Mississippi, Arizona and Vermont filed claims in federal court, alleging that the interim provisions of the GCA were unconstitutional, and each District Court ruled that it was unconstitutional.<sup>339</sup> On appeal, however, the Ninth Circuit Court of Appeals reversed.<sup>340</sup> The Supreme Court granted certiorari and heard the case on December 1996.<sup>341</sup> Justice Scalia wrote for the majority, reversing the Ninth Circuit decision and holding that Congress imposed an unconstitutional obligation on state officers to execute federal laws.<sup>342</sup> A true originalist, Scalia relied heavily on constitutional history, citing the Federalist Papers as support of the Framers' intent.<sup>343</sup> Moreover, the holding in *New York* and the anti-commandeering doctrine dictated much of the opinion. *New York* held that the anti-commandeering doctrine protected the state legislatures from federal encroachment, and *Printz* extended that holding by affording the same protection to the states' executive branches.<sup>344</sup> The Court held that the requirement of CLEOs to take reasonable steps to investigate the legality of pending gun sales violated state sovereignty.<sup>345</sup>

In addition to offending notions of state autonomy, the background check mandate undermined political accountability in three ways.<sup>346</sup> First, CLEOs, as well as the state elected bodies that fund CLEOs, would be forced to reallocate funds to the background check system, instead of allocating funds to other programs that their constituents might support or desire. To avoid doing this, elected officials might be forced to raise taxes to cover the costs. Second, voters would likely be dissatisfied by the diversion of resources, and the CLEOs would face the repercussions of voter dissatisfaction. Third, there would be a blurry distinction as to who should be held politically "answerable," Congress or the CLEOs who were forced to comply with the GCA.<sup>347</sup> To require states to enforce federal law or to regulate state law in compliance with federal law would thus

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<sup>338</sup> 18 U.S.C. § 922(s)(2) (Supp. V 1993).

<sup>339</sup> *Wiegleb*, supra note 42, at 385–86 (citing the decisions of *Printz v. United States*, 854 F.Supp. 1503 (D. Mont. 1994), *McGee v. United States*, 863 F.Supp. 321 (S.D. Miss. 1994), *Mack v. United States*, 856 F.Supp. 1372 (D. Ariz. 1994), and *Frank v. United States*, 860 F.Supp. 1030 (D. Vt. 1994)).

<sup>340</sup> *Mack v. United States*, 66 F.3d 1025, 1034 (9th Cir. 1995).

<sup>341</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>342</sup> *Id.* at 935.

<sup>343</sup> *Id.* at 919–920.

<sup>344</sup> *Adler*, supra note 29, at 163; See also *Wiegleb*, supra note 42, at 391–93.

<sup>345</sup> *Printz*, 521 U.S. at 932.

<sup>346</sup> *Wiegleb*, supra note 42, at 387.

<sup>347</sup> *Wiegleb*, supra note 42, at 387.



essentially require that state officials act as agents of the Federal Government, directly contrary to the Framers' intent.<sup>348</sup>

#### D. Virginia's House Bill 2340

In 1787, Alexander Hamilton wrote about the potential for the national government to invade state governance.<sup>349</sup> In such a situation, they can “discover the danger at a distance...” and “...at once adopt a regular plan of opposition, in which they can combine all the resources of the community.”<sup>350</sup> He even recognized the ability of states to communicate and unite against federal encroachment: “They can readily communicate with each other in the different States and unite like common forces for the protection of their common liberty.”<sup>351</sup> When President Obama first announced that he would be issuing several executive orders after the Newtown shooting, many states across the country rushed to pass preventative bills in their respective legislative sessions.<sup>352</sup> Most of the bills contained similar, if not identical, language: the state legislatures sought to prohibit state officers from enforcing federal law or assisting the government in any action that would violate their constitutional liberties.<sup>353</sup>

On January 18, 2013, only five days prior to the issuance of the President's executive orders, Virginia Delegate Bob Marshall (R-13th District), along with thirteen co-patrons, introduced House Bill 2340 to the Virginia General Assembly. The bill forbids any agency of the Commonwealth<sup>354</sup> from knowingly aiding any entity of the Federal Government “in any investigation, prosecution, detention or arrest, or

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<sup>348</sup> THE FEDERALIST No. 45, at 261 (James Madison) (ABA, 2009) (“Thus, each of the principal branches of the Federal Government will owe its existence more or less to the favor of state governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them. On the other side, the component parts of the State governments will in no instance be indebted for their appointment to the direct agency of the Federal Government, and very little, if at all, to the local influence of its members.”).

<sup>349</sup> THE FEDERALIST No. 28 (Alexander Hamilton).

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> H.B. 2340, 2013 Gen. Assemb., Reg. Sess. (Va. 2013); S.B. 129, 2013 Reg. Sess. (Ky. 2013); H.B. 357, Gen. Assemb., 2013-2014 Reg. Sess. (Pa. 2013); H.B. 42, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013); H.B. 553, 83rd Reg. Sess. (Tex. 2013); H.B. 0104, 2013 Gen. Assemb., Reg. Sess. (Wyo. 2013).

<sup>353</sup> See, e.g., H.B. 553, 83rd Reg. Sess. (Tex. 2013) (prohibiting an act of a state employee that “intentionally enforces or attempts to enforce any acts, laws, executive orders, agency orders, rules or regulations of any kind whatsoever of the United States government relating to confiscating any firearm, banning any firearm, limiting the size of a magazine for any firearm, imposing any limit on the ammunition that may be purchased for any firearm, taxing any firearm or ammunition therefore, or requiring the registration of any firearm or ammunition therefore.”).

<sup>354</sup> VA. CODE ANN. § 8.01-385 (West 2011) (defining agency as “any department, division, commission, association, board, or other administrative body established pursuant to the laws of a jurisdiction”).

participation in any search or seizure, relating to any, criminal, civil, or administrative restrictions on firearms, firearm magazines, ammunition, or components thereof, based on any federal statute enacted, or Executive Order or regulation issued, after December 31, 2012 (emphasis added).<sup>355</sup> Moreover, Section B of the bill outlaws the assistance by state officers to the Federal Government in conducting any “background check related to any...transfer of firearms between citizens of the Commonwealth who do not possess any federal firearms license under 18 U.S.C. section 293.”<sup>356</sup> The bill was ultimately referred to the Committee on Appropriations to determine the fiscal impact of its enactment, and was left in committee.<sup>357</sup>

#### E. Is it Constitutional?

##### 1. The Supreme Court says yes

It is evident that these bills are precautionary measures introduced to protect the Second Amendment rights of the people and the Tenth Amendment rights of the states. This situation is distinguishable from that in *Printz* and *New York* because the bills were introduced before Congress had passed any legislation or the President issued any Executive Orders. The question is not whether the government can compel states to act; that was clearly answered by the Supreme Court.<sup>358</sup> Rather, it is whether states are permitted to enforce precautionary provisions that are seemingly contrary to the Supremacy Clause. The simple answer is yes. In *Printz*, the Court actually acknowledged that the state of Montana had enacted a law mandating non-compliance with the federal one, and that the plaintiff sheriffs, if they had complied with the government, would have been in violation of state law and incurred penalties.<sup>359</sup>

##### 2. State officers take an oath to uphold the Constitution

Moreover, an argument can be made for obligation of state officials to uphold their oath of office. Specifically, Article VI of the Constitution binds “Senators and Representatives, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and the several States” by oath or affirmation to uphold the

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<sup>355</sup> H.B. 2340, 2013 Gen. Assemb., Reg. Sess. (Va. 2013).

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

<sup>359</sup> *Printz*, 521 U.S. at 934, n.18 (1997).

Constitution.<sup>360</sup> James Madison explained the need for such a provision by stating that state officers are those who will play a critical role in giving effect to the Constitution.<sup>361</sup> In *Ableman v. Booth*, the Supreme Court acknowledged that the States surrendered power to the Federal Government for their own protection from each other.<sup>362</sup> That being said, the states anticipated the full preservation of state powers as defined in the Constitution in Article VI.<sup>363</sup> Although the states conferred power to the government, one of the primary purposes of the Constitution was to protect against overreaching encroachment by the Federal Government. In swearing to uphold the Constitution, state officers not only promise to respect federal power, but also agree to protect the Constitutional liberties granted to United States citizens.

Virginia has codified a similar oath for state officers.<sup>364</sup> For example, the Virginia Police Force has a written oath of office.<sup>365</sup> Furthermore, Virginia state representatives swear, upon oath or affirmation that they will uphold the Constitution. Representatives make this oath at least two times and a Virginia state police officer agrees to be an agent of the Constitution three times. Thus, these state officers do not swear to uphold the acts of Congress. In passing a bill such as House Bill 2340, Virginia officers are striving to uphold the Constitution by enforcing the boundary between state and federal power conferred in the Tenth Amendment, in an effort to protect the Second Amendment rights guaranteed to all citizens.

### III. LEGAL EFFECTS

Although the States do have the power to refuse to comply with a federal regulatory scheme, Congress has a concurrent power to refuse to provide or condition federal funding to the States.<sup>366</sup> Each year, the Federal

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<sup>360</sup> U.S. CONST. art. VI.

<sup>361</sup> THE FEDERALIST, No. 44 (James Madison).

<sup>362</sup> *Ableman v. Booth*, 62 U.S. 506, 524 (1858).

<sup>363</sup> *Id.* at 524-25.

<sup>364</sup> VA Code Ann § 49-1 (West 2012) (“Every person before entering upon the discharge of any function as an officer of this Commonwealth shall take and subscribe the following oath: ‘I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia, and that I will faithfully and impartially discharge all the duties incumbent upon me as....according to the best of my ability, (so help me God).’”).

<sup>365</sup> Law Enforcement Oath of Honor, VIRGINIA ASSOCIATION OF CHIEFS OF POLICE, [http://www.vachiefs.org/index.php/programs/oath\\_of\\_honor/](http://www.vachiefs.org/index.php/programs/oath_of_honor/) (last visited March 29, 2013) (“On my honor...I will always uphold the Constitution, the community, and the agency I serve, so help me God.”).

<sup>366</sup> U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”).

Government provides billions of dollars that compose a large portion of each state's revenue,<sup>367</sup> none of which are offered unconditionally.<sup>368</sup> Some have noted that Congress's spending power is the greatest threat to state autonomy,<sup>369</sup> as it essentially allows Congress to circumvent constitutional restrictions on federal regulation of the states.<sup>370</sup> As a result, many of the states attempting to pass these precautionary statutes will have to tediously examine the legal and fiscal effects before doing so.

#### A. The Limitless Power of the Spending Clause

The Court has explicitly held conditional federal funding to be a constitutional exercise of Congress' spending power.<sup>371</sup> In *Oklahoma v. United States Civil Service Commission*, the Supreme Court explicitly recognized that, while the government is powerless to regulate local politics, including elections and appointments of state officials, it does have the power to decide how federal funds will be disbursed to the states and the terms accompanying such disbursements.<sup>372</sup> In that case, Congress passed the Hatch Act, requiring Oklahoma to suspend a member of the Oklahoma Highway Commission so that Oklahoma could receive federal funds.<sup>373</sup> Oklahoma claimed that this condition violated its Tenth Amendment rights, but the Court did not deem the condition to constitute federal coercion and declared it valid.<sup>374</sup>

In situations such as these, where the Court does not find federal coercion, federal statutes are usually upheld because they are not seen as obligations to be followed by the States, but instead are options which the States are free to accept or reject.<sup>375</sup> While the Court has adopted this coercion standard, it is often difficult to distinguish between a permissible condition and a coercive condition.<sup>376</sup> For that reason, although it is

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<sup>367</sup> Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1918 (1995).

<sup>368</sup> *Id.*

<sup>369</sup> Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANN. OF AM. ACADEMY OF POL. AND SOC. SCI. 104, 105 (2001).

<sup>370</sup> *Id.* at 104; see *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

<sup>371</sup> *New York v. United States*, 505 U.S. 144, 188 (1992) ("The Constitution permits the Federal Government to hold out incentives to States as a means of encouraging them to adopt suggested regulatory schemes.").

<sup>372</sup> *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947).

<sup>373</sup> *Id.* at 133.

<sup>374</sup> *Id.* at 142-43.

<sup>375</sup> See, e.g., *Massachusetts v. Mellon*, 262 US 447, 480 (1923).

<sup>376</sup> Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1656 (2006).

constitutional under the Spending Clause, conditional funding can be just as coercive as commandeering.<sup>377</sup>

According to some, this distinction between conditional funding and commandeering is illusory: conditional federal spending in many cases forces states to consent to be commandeered, but such commandeering is really just as coercive in cases where the impact of losing federal funding is too great to do otherwise.<sup>378</sup> The issue for the Supreme Court is thus to determine how to find a way to distinguish among coercive conditions which contravene the States' Tenth Amendment rights, while upholding conditions which are within Congress' power to spend for the "general welfare" and do not constitute indirect regulation of the States.<sup>379</sup>

The Supreme Court has suggested, implicitly, that the ability to condition federal funds is a loophole in our system of government, which allows Congress to "run around any restrictions the Constitution might be held to impose on [its] ability to regulate the States."<sup>380</sup> This ultimately means Congress may exercise powers of regulation not enumerated to it by the Constitution, so long as it is an exercise of its Spending Power. *South Dakota v. Dole* established four limitations on conditional funding through the Spending Clause: (1) It must be in the pursuit of the general welfare; (2) The conditions must be unambiguous, so that States are well aware of the consequences of their participation or lack thereof; (3) the conditions must be related to the federal interest in particular national projects or programs; and (4) the conditions must not be barred by any other provisions of the Constitution.<sup>381</sup> With regard to the Tenth Amendment argument, the *Dole* Court said that traditional limits on federal regulation of state affairs do not "concomitantly limit the range of conditions legitimately placed on federal grants."<sup>382</sup>

While the *Dole* court outlined a four-part test to determine if federal spending was constitutionally within its power, a more recent Supreme Court decision altered the thinking about Congress' spending power.<sup>383</sup> *National Federation of Independent Business v. Sebelius* ("*NFIB*") was the first time that the Supreme Court considered the issue of federal coercion as a serious possibility in examining a federal statute, rather than just an

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<sup>377</sup> *Id.*

<sup>378</sup> *Id.* at 1657.

<sup>379</sup> *Baker*, supra note 74, at 1920.

<sup>380</sup> *Baker*, supra note 76, at 105 (citing *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987)).

<sup>381</sup> *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

<sup>382</sup> *Id.* at 210.

<sup>383</sup> Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 577 (2013).

abstract possibility.<sup>384</sup> The Court found that the provision of the Patient Protection and Affordable Care Act (the “PPACA”), which expanded Medicaid, was coercive and exceeded Congress’s power under the Spending Clause.<sup>385</sup> A portion of the PPACA gave the Secretary of Health and Human Services the authority to penalize States who chose not to participate in the expanded Medicaid program.<sup>386</sup> The PPACA prescribed that the penalty would include the withholding of further Medicaid payments so long as the State continued to fail to comply.<sup>387</sup> The Court concluded that this was an overreach by Congress because the PPACA failed to give states an actual choice.<sup>388</sup> Part of the plurality’s justification for this conclusion was that individual liberties would suffer if all power were vested in one national government.<sup>389</sup> The Court also addressed the political accountability factor and stated that the voters would not know whom to blame for a particular program if States were forced to comply with federal objectives due to the withholding of federal funding.<sup>390</sup> If the States had a legitimate choice, there would be a clear distinction.

Critics have proposed that the act of conditional federal funding divides the states into two groups: (1) the States that comply, with or without financial inducement (those that are unaffected by the choice of funding) and (2) the States that find the conditions to be unattractive and face the choice of having the funds withheld in order to comply with the condition(s) or complying with the undesirable regulation to receive the funds.<sup>391</sup> Because there are typically no other alternative sources of revenue, the States in the second group are extremely restricted in their legislative and executive decision-making. Most, if not all States fall into this second group, including Virginia.

#### B. Appropriations Committee

Virginia House Bill 2340 was received with an Impact Statement that described the possible fiscal impact of its enactment.<sup>392</sup> The conclusion was

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<sup>384</sup> *Id.*

<sup>385</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2662 (2012).

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* at 2607.

<sup>388</sup> *Id.* at 2608.

<sup>389</sup> *Id.* at 2602.

<sup>390</sup> *Id.* at 2660.

<sup>391</sup> *Baker*, *supra* note 75, at 106–07.

<sup>392</sup> VA. DEP’T OF PLANNING AND BUDGET, H.B. 2340 FISCAL IMPACT STATEMENT (2013), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=131&typ=bil&val=hb2340> (follow “Impact Statement” hyperlink).

that the proposal would not have a direct fiscal impact within the state, but the repercussions of its implementation were unknown.<sup>393</sup> The State Police warned that the possibility of the revocation of federal funding for firearm related initiatives would result in an entire project going unfunded.<sup>394</sup> The project at issue would give the Supreme Court of Virginia capability to “scan mental commitment orders and make them available electronically to Virginia State Police,” and the State risked losing \$793,568.00, the current amount of federal funding supporting the project.<sup>395</sup> The House of Delegates opted to refer the bill to the House Committee on Appropriations to determine the exact impact. Once there, the bill was left in the committee and did not pass.

According to Delegate Bob Marshall, the sponsor of the bill, those who voted to send the bill to the Appropriations Committee did so because they believed the State would lose funding as a result.<sup>396</sup> Marshall cited House Bill 1160, a 2012 bill that became law last July, which is similar to House Bill 2340 in that it addresses federal intrusion into the rights of the citizens of Virginia.<sup>397</sup> He wrote that, to his knowledge, no funding has been withheld from the government after the passage of House Bill 1160, so none would be withheld with the passage of House Bill 2340.<sup>398</sup> Nevertheless, the bill was left in committee. According to Marshall, “silence on House Bill 2340 is consent to an agreement with federal efforts to abridge our Second Amendment rights.”<sup>399</sup> While this statement is arguable, House Bill 2340 still serves as a prime example of a State acting in fear of its national government. Thus, the potential of the Federal Government withholding funds has caused Virginia to fail to pass a piece of legislation that would preserve both its Tenth Amendment rights and the Second Amendment rights of its citizens.

#### IV. CONCLUSION

The Federal Government has made a strong push for anti-gun legislation in the months following the agonizing, unbelievable massacre of small

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<sup>393</sup> Id.

<sup>394</sup> Id.

<sup>395</sup> Id.

<sup>396</sup> Id.

<sup>396</sup> Bob Marshall, Your Second Amendment Rights are on the Line!, BOB MARSHALL: REPUBLICAN DELEGATE, <http://delegatebob.com/email-alerts-archive/your-2nd-amendment-rights-are-on-the-line> (last visited Mar. 29, 2013).

<sup>397</sup> H.B. 1160, 2012 Gen. Assemb., Reg. Sess. (Va. 2012), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=121&typ=bil&val=hb1160> (follow 04/18/12 Governor: Acts of Assembly Chapter text (CHAP0792) pdf link for full text); Id..

<sup>398</sup> Marshall, *supra* note 103.

<sup>399</sup> Id.

children in Newtown, Connecticut, this past December. While it is evident that efforts need to be made to reduce gun violence, law-abiding citizens fear that their Second Amendment rights are being taken away. As representatives of those citizens, state legislators have taken proactive steps to prevent the intrusion of both Congress and the Executive Branch on constitutional rights of both citizens and the states themselves. According to a close reading of the Tenth Amendment, as well as Supreme Court precedent, Congress may not impose a federal regulatory scheme on the States that compels their compliance. Consequently, the States may pass legislation to preserve their autonomy through the Tenth Amendment. State officials are bound by oath to uphold the Constitution, and this includes the promise to protect the individual liberties of their citizens. While the States can choose to permissibly assert their rights as sovereigns in this way, the choice will not come without cost. Congress may condition federal funding, and States are at risk of losing grant funds should they pass legislation contrary to the objectives of federal regulations. That being said, with the recent holding in *NFIB*,<sup>400</sup> Congress's spending power is no longer limitless. If conditional funding related to future anti-gun legislation is at all coercive, Congress will not be able to circumvent the specific enumerated powers declared in the Constitution.

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<sup>400</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2662 (2012).