



THE COMMITTEE ON ENERGY AND COMMERCE

MEMORANDUM

July 9, 2014

To: Members, Subcommittee on Environment and the Economy

From: Majority Committee Staff

Re: Hearing on “Constitutional Considerations: States vs. Federal Environmental Policy Implementation”

On Friday, July, 11, 2014, at 9:15 a.m. in 2123 of the Rayburn House Office Building, the Subcommittee on Environment and the Economy will hold a hearing entitled, “Constitutional Considerations: States vs. Federal Environmental Policy Implementation.” The hearing will focus on the authority the Commerce Clause of the Constitution grants Congress to set uniform, national standards in certain aspects of environmental policy and the role of the States in taking the lead in crafting State-specific environment solutions.

I. WITNESSES

- Jonathan H. Adler, Johan Verheij Memorial Professor of Law, Case Western University School of Law;
- Robert Meltz, American Law Division, Congressional Research Service (CRS); and
- Richard L. Revesz, Lawrence King Professor of Law, Dean Emeritus, New York University School of Law.
- Rena Steinzor, Professor, University of Maryland School of Law, President, Center for Progressive Reform.

II. BACKGROUND

Historically, the States conducted environmental policy and regulation. Throughout the latter half of the twentieth century, however, the Federal government began assuming a more prominent role in setting environmental standards for the nation. Notable examples of the expanded Federal scope in environmental policy include the Resources Conservation and Recovery Act (RCRA) enacted in 1976, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) enacted in 1980, and the Toxic Substances Control Act (TSCA), which was enacted in 1976.

Federal environmental statutes differ in the degree of latitude they give states to implement Federal policies. With RCRA, the Federal government sets the minimum standards for managing hazardous and nonhazardous waste, but States may determine the best route to

meet those standards.¹ TSCA, however, limits State authority to regulate a chemical substance after the EPA has issued a rule on that chemical.² One question that Congress often faces is whether the States or the Federal government have the Constitutional authority to take the lead on a particular environmental issue. Which entity is likely to produce the preferred policy outcome is a separate question.

States' authority to implement environmental policy stems from their implied "police power" in the Constitution.³ This power allows the States to regulate the health, safety, and well-being of their citizens. Therefore, since the state of the environment can impact citizens' health and safety, the States traditionally have had authority to set environmental policy.

While the Federal government does not have explicit "police power," it does have the authority over the commercial activity of the nation through the Commerce Clause of the Constitution.⁴ The Commerce Clause gives Congress the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁵

From the 1930's until the 1990's, Congress enjoyed a broad interpretation of the Commerce Clause that allowed it to regulate virtually all manner of economic or noneconomic activity.⁶ However, starting with *United States v. Lopez* in 1995, the Supreme Court began to impose some limitations on Congress' Commerce Clause power. In that case, the Court struck down the Federal Gun-Free School Zones Act because possessing a firearm in a school zone is not economic activity, nor does it affect interstate commerce.⁷ Then, in *United States v. Morrison*, the Supreme Court struck down a provision in the Violence Against Women Act (VAWA) that created a Federal civil remedy for gender-motivated violence. In its decision, the Court reasoned:

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. *Lopez*, 514 U.S., at 568, 115 S.Ct. 1624 (citing *Jones & Laughlin Steel*, 301 U.S., at 30, 57 S.Ct. 615). In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.⁸

Since the civil remedy provision was aimed at combatting gender-motivated violence, rather than regulating interstate commerce or activity that could enable or facilitate interstate commerce, the Court found that Congress did not have the authority to implement this remedy.

¹ Environmental Protection Agency, RCRA State Authorization (2013). <http://www.epa.gov/osw/laws-regs/state/>

² The Toxic Substances Control Act, 15 U.S.C. §§ 2616 (1976).

³ Kenneth R. Thomas, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, Congressional Research Service 1 (2013).

⁴ *Id.*

⁵ U.S. Const., Art. I, §, 8 cl. 3.).

⁶ See, e.g. *Wickard v. Filburn*, 317 U.S. 111, 123-24 (1942).

⁷ *United States v. Lopez*, 514 U.S. 549, 567 (1995).

⁸ *United States v. Morrison*, 529, U.S. 598, 617-18 (2000).

Despite these limitations on Congress' power to regulate interstate commerce, Congress still has broad authority to set environmental and health and safety policy. Congress may entice the States to adopt its preferred policy by withholding a limited amount of Federal funding if the States do not adopt that policy. For example, in *South Dakota v. Dole*, Congress was allowed to withhold a limited amount of Federal transportation funding for South Dakota unless South Dakota increased its drinking age to twenty-one.⁹ In addition, if a State does not adopt a program meeting Federal standards, Congress may instruct a Federal agency to enforce that standard in the State.¹⁰ However, the Federal government may not mandate that a State adopt a Federal program,¹¹ nor may it commandeer State officials to implement a Federal program.¹²

In deciding whether the States or the Federal government should take the lead on a particular policy implementation, Congress often considers several factors. For example, if Congress is focused on ensuring that a particular environmental protection will be adequately stringent, it could set a regulatory "floor" of minimum protections that the States would have to meet, allowing States the option of taking more stringent action. On the other hand, if Congress also wants to facilitate commerce among States and with foreign countries, it may apply a uniform standard so that buyers and sellers of goods and services do not face a State-by-State patchwork of regulations.

III. ISSUES

The following issues may be examined at the hearing:

- What is the scope of Congress' authority under the Commerce Clause to set Federal environmental policy?
- How does the Tenth Amendment limit Congress' authority to place mandates on the States to implement environmental policy?
- Should Congress use its power to regulate commerce to achieve non-commercial ends or should Congress focus its use of the Commerce Clause on facilitating trade among States and with foreign countries?
- When is decentralization of environmental policy implementation desirable? When is uniform policy beneficial?
- Does facilitation of interstate commerce also benefit trade with foreign countries? If so, how?

IV. STAFF CONTACT

If you have any questions regarding the hearing, please contact David McCarthy, Jerry Couri, or Tina Richards of the Committee staff at (202) 225-2927.

⁹ *South Dakota v. Dole*, 483 U.S. 203, 203 (1987).

¹⁰ *See New York v. United States*, 505 U.S. 144, 167-68 (1992).

¹¹ *See Id.*

¹² *Printz v. United States*, 521 U.S. 898, 898 (1997).