Out of Thin Air: Evaluating the Legality of the Clean Power Plan Under the Equal Sovereignty Principle

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Introduction

On October 23, 2015, the Environmental Protection Agency ("EPA") finalized a groundbreaking rule, known as the Clean Power Plan, which would reduce carbon emissions by focusing on pollution from power plants and setting state-specific emissions goals.[1] The overall purpose of the rule is to decrease the United States' CO2 emission levels from the year 2005 by thirty-two percent by 2030.[2] The regulation targets the electricity sector, an industry that is responsible for emitting thirty-one percent of all CO2 emissions in the United States.[3] As of this note, twenty-nine states have mounted legal challenges against the regulation's implementation on federalism and statutory construction grounds, and the Supreme Court recently issued a stay of the rule until the D.C. Circuit decides the merits of these legal challenges.[4]

The Clean Power Plan establishes national standards for CO2 emissions under the auspices of section 111(d) of the Clean Air Act, which requires states to develop emission standards for pollutants emitted by

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1. Clean Power Rule, 80 Fed. Reg. 64661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

2. *Id.* at 64665.

3. Environmental Protection Agency, *Sources of Greenhouse Gas Emissions*, http://www3.epa.gov/climatechange/ghgemissions/sources/electricity.html (last visited Dec. 22, 2015).

4. Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016), http://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html.

existing sources of pollution. The EPA contends that section 111(d) gives the agency the authority to regulate power plants as existing sources of pollution.[5] Thus, under the rule, states that have qualifying Electric Generating Units ("EGUs"), or power plants, will be required to develop and implement plans that set emission standards for these EGUs, or find other ways of meeting the state-specific emissions targets.[6] In keeping with the cooperative federalism approach found in environmental statutes like the Clean Air Act, the Clean Power Plan allows states and power plants the flexibility to decide how they will meet their emissions reductions goals.

The final rule specifies that the States of Alaska and Hawaii, as well as the territories of Guam and Puerto Rico, do not have to comply with the requirements of the rule because the "EPA does not possess all of the information or analytical tools needed to quantify the BSER (Best System of Emission Reduction)."[7] The State of Vermont and the District of Columbia also do not have to comply with the requirements of the rule because these areas do not house affected EGUs. The rule also acknowledges the burdens that coal-country states will face in terms of job losses and posits that the economic side effects that may result from the policy will be mitigated by the POWER+ plan, a program that "addresses the important legacy costs in coal country."[8]

Because Alaska and Hawaii are excluded from the rule, and because coal states will bear a significant burden under the regulation, one potential legal defect of the Clean Power Rule is that it violates the Equal Sovereignty Principle.[9] The doctrine served as the basis for invalidating the preclearance formula in the Voting Rights Act.[10] According to Chief Justice Roberts's majority opinion in *Shelby v. Holder*, the Equal Sovereignty Principle must be factored in when assessing the "disparate treatment of states," reasoning that "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized."[11] Accordingly, Chief Justice Roberts calls for a

5. Clean Power Rule, *supra* note 1, at 64663.
6. *Id.* at 64664.
7. *Id.*
8. Clean Power Rule, *supra* note 1, at 64670.
9. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2623 (2013).
10. *Id.* at 2631.
11. *Id.* at 2623.

more stringent level of review for federal government actions that treat states differently.[12]

The Clean Power Plan may be inconsistent with the Equal Sovereignty Principle because (1) the rule singles out states for disparate treatment in two ways and (2) the EPA has an insufficient justification for the disparate treatment in both instances. The rule singles out states for disparate treatment by exempting the States of Alaska and Hawaii from compliance, thus denying them of the benefits of the Clean Power Plan. The rule also results in a disproportionate burden on coal-producing states because they will have to expend significant resources to transition to a clean energy economy while weakening existing domestic industries, a burden that other states do not have to bear. Insufficient justification for disparate treatment would violate the Equal Sovereignty Principle.

This Note argues that, because the Clean Power Plan provides a benefit to the states in which it applies, the exemption singled out the states to which it does not apply—Alaska and Hawaii—for disfavored treatment, and the government did not have a compelling reason for doing so. This results in the violation of the Equal Sovereignty Principle as articulated in *Shelby v. Holder*. This Note also contends that the disproportionate burden facing coal-producing states under the rule does not constitute disparate treatment, and accordingly, the Equal Sovereignty Principle does not apply to this argument. Part I of this paper explores the background and controversy behind the Clean Power Plan. Part II of this Note analyzes the Equal Sovereignty Principle and discusses how courts have treated Equal Sovereignty arguments. Part III explores a framework for applying the Equal Sovereignty Principle. Part IV applies the analytical framework to the Clean Power Plan. Part V concludes the paper by discussing the potential benefits of applying the Equal Sovereignty Principle in the climate change context.

I. Background

The Clean Power Plan marks "the strongest action ever taken in the United States to combat climate change."[13] The plan sets uniform standards for energy generating facilities: Natural gas plants have a performance target of 771 pounds of carbon per megawatt-hour of power, while coal and oil plants must meet a target of 1,305 pounds of carbon per

12. *Id.* at 2621.

13. Coral Davenport & Gardiner Harris, *Obama to Unveil Tougher Environmental Plan with His Legacy in Mind*, N.Y. TIMES (Aug. 2, 2015), http://www.nytimes.com/2015/08/02/us/obama-to-unveil-tougher-climate-plan-with-his-legacy-in-mind.html.

megawatt-hour.[14] The rule also sets a particular state's emissions target based on the weighted aggregate of the rate goals outlined for the two types of power plants.[15] For example, if a state has twenty-five power plants, and twenty-two of them are coal-fired plants (with the remainder of them being natural gas plants), the state's overall emissions goal would equal 1,242 pounds of carbon per megawatt-hour. The state then has the flexibility to come up with ways to meet its target—it could require the plants themselves to meet their individualized emissions targets or the state could accomplish its obligations by establishing a cap-and-trade program, join an existing cap-and-trade scheme, or enact renewable portfolio standards.[16] States are obligated to submit a plan to the EPA detailing the course of action it has selected to meet the standards.[17]

The practical impact of the rule is that it will result in significant reductions in the United States' contribution to greenhouse gas emissions, mirroring the steps that countries like China are taking to reduce their own relative contributions.[18] However, in many states, the fossil fuel economy continues to provide jobs that are perceived as crucial to the vitality of their local economies. Thus, states have expressed deep concerns with the rule. Attorney General Patrick Morrissey of West Virginia said in an interview: "We think this regulation is terrible for the consumers of the state of West Virginia. It's going to lead to reduced jobs, higher electricity rates, and really will put stress on the reliability of the power grid."[19] Kentucky Energy and Environment Secretary Leonard Peters, commenting on the stricter targets the state would have to meet compared to the draft rule, said that "if the rule was a book, the draft would be a murder mystery and the final rule would be a comedy."[20]

Accordingly, over two dozen states have filed suit to challenge the validity of the rule. Opponents of the Clean Power Plan contend the rule is legally vulnerable on a variety of constitutional and statutory interpretation grounds. For example, they argue that section 111(d) does not give the EPA the authority to regulate greenhouse gas emissions by mandating

14. Clean Power Rule, *supra* note 1, at 64667.

15. *Id.* at 64674.

16. Clean Power Rule, *supra* note 1, at 64695–96.

17. *Id.* at 64697.

18. *Id.* at 64699.

19. Davenport & Harris, *supra* note 13.

20. Jean Chemnick and Emily Holden, *Clean Power Plan Ratchets Up Burdens on Coal States*, E&E NEWS (Aug. 12, 2015), http://www.eenews.net/stories/1060023333.

reductions from regulated power plant sources.[21] Another example of a statutory construction argument against the rule stems from the fact that the rule requires states and electricity generating facilities to comply with a new and complex regulatory scheme, requiring states to submit implementation plans to the EPA similar to the Clean Air Act requirements regarding State Implementation Plans ("SIPs"). Accordingly, the rule imposes a statutory scheme that is just as onerous and cumbersome as the organic statute itself, without additional congressional authorization. This goes against the principle stated by Justice Scalia in *Whitman v. American Trucking*: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[22]

There are also constitutional challenges to the Clean Power Plan on the basis of the rule upsetting the horizontal separation of powers. Professor Laurence Tribe argues that the rule violates the Tenth Amendment.[23] As articulated in *Printz v. United States*, the Tenth Amendment precludes the federal government from subverting the democratic process and commandeering state governments by compelling them to implement federal policies.[24] Professor Tribe argues that the Clean Power Plan effectively allows the federal government to dictate a state's energy mix, while imposing the costs of implementing its choice onto the states.[25] According to Professor Tribe, this arrangement impermissibly deprives the citizens of the states the opportunity to hold the actual responsible parties politically accountable.[26] Other constitutional law scholars contend that this argument is not persuasive: The Clean Power Plan is modeled after statutes such as the Clean Air Act, which give states

21. David A. Zillberberg, *EPA Issues Ambitious Clean Power Plan Mandating Significant Reductions to GHG Emissions from the Power Industry by 2030*, 15 PRATT'S ENERGY LAW REPORT 9 (LexisNexis A.S. Pratt).

22. Whitman v. American Trucking Ass'n, 531 U.S. 457, 468 (2001).

23. *EPA'S Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues: Hearing on the Clean Power Rule Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce*, 114th Cong. 16–23 (2015) (statement of Laurence Tribe), http://docs.house.gov/meetings/IF/IF03/20150317/103073/HHRG-114-IF03-Wstate-TribeL-20150317-U1.pdf.

24. 521 U.S. 898 (1997).

25. Tribe, *supra* note 23, at 19–23.

26. *Id.* at 22.

the flexibility to decide how to comply with federal standards, and have not been found to pose constitutional problems.[27]

However, another principle concerning the horizontal separation of powers that has come up in recent case law, and may also be relevant to the Clean Power Plan, is the Equal Sovereignty doctrine.[28] The principle served as the basis for invalidating the preclearance formula in the Voting Rights Act.[29] The *Shelby County* Court did not define the reaches of the Equal Sovereignty Principle, and thus, the doctrine has the potential to serve as a basis for striking down federal government actions in the future. Indeed, as Justice Ginsburg noted in her dissent in *Shelby County*, the decision "is capable of much mischief."[30] The Equal Sovereignty Principle may prove particularly relevant in the climate change context, where certain states may be saddled with regulatory burdens that others are exempt from by virtue of their proximity to coastlines, or their relative contributions to the problem.

II. The Equal Sovereignty Principle

The Supreme Court largely rested its decision to strike down section 4 of the Voting Rights Act of 1965 on the Equal Sovereignty Principle.[31] Up until *Shelby County*, the concept of equal sovereignty, or the presumption of equality among the states, was rarely invoked in case law.[32] In fact, in 1966, when the Supreme Court considered a constitutional challenge to the Voting Rights Act, the majority dismissed the argument that the federal government could not target specific states.[33] Thus, commentators fiercely criticized the *Shelby County* decision for striking down a law of such import based on a questionable legal hook. Judge Richard Posner, Chief Judge of the Seventh Circuit Court of Appeals, wrote that equal sovereignty "is a principle of constitutional law of which I had never heard—for the excellent reason that . . . there is no such principle . . . [t]he

27. Richard Revesz, *Obama's Professor on Clean Power Plan—Wrong on the Facts and Law*, THE HILL (Dec. 9, 2014, 11:30 AM), http://thehill.com/blogs/pundits-blog/energy-environment/226449-obamas-professor-on-clean-power-plan-wrong-on-facts-and.

28. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2623 (2013).

29. *Id.* at 2631.

30. *Id.* at 2649.

31. James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right To Vote Shelby County v. Holder*, 8 HARV. L. & POL'Y REV. 39, 44 (2014).

32. *Id.*

33. South Carolina v. Katzenbach, 383 U.S. 301, 328-29 (1966).

opinion rests on air."[34] David Gans of the Constitutional Accountability Center commented: "No matter how many times one reads our Constitution, the simple fact is that there is no 'Equality of States Clause' in it."[35]

Others argue that there "is indeed a deep structural principle of equal sovereignty that runs through the Constitution."[36] Thomas Colby argues that the Equal Footing doctrine, which has been recognized by the courts, necessarily implies the existence of the Equal Sovereignty Principle.[37] The Equal Footing doctrine concerns the admission of new states to the union, and whether they are admitted on the same terms as existing states.[38] The *Shelby County* opinion cited, but did not analyze, three cases in support of its invocation of Equal Sovereignty: *Coyle v. Smith*, *United States v. Louisiana*, and *Pollard v. Hagan*, all of which are Equal Footing doctrine cases.[39] Colby, thus, argues that the Equal Footing doctrine inheres the Equal Sovereignty Principle because "Congress cannot admit a new state without making it the sovereign equal of the other states."[40]

In order to analyze whether the Equal Sovereignty Principle applies, and whether the principle would potentially affect the Clean Power Plan, it is necessary to analyze cases in which courts have faced Equal Sovereignty arguments. Equal Sovereignty arguments have been invoked in cases pre- and post-*Shelby County* with mixed results. In *United States v. Ptasynski*, the Supreme Court faced the question of whether a federal statute that exempted a particular state's oil from a tax was valid.[41] In *Nuclear Energy Institute, Inc. v. EPA* ("*NEI*"), the D.C. Circuit Court considered Equal Sovereignty claims in the environmental context.[42] *Shelby County* considered the constitutionality of the preclearance formula in the Voting Rights Act, which required some states to seek permission from the federal government before making changes to their voting laws, and was the first

34. Richard A. Posner, *The Voting Rights Act Ruling Is About The Conservative Imagination*, SLATE (June 26, 2013, 12:16 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html.

35. Thomas Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. (forthcoming 2016).

36. *Id.* at 4.

37. *Id.* at 15–17.

38. *Id.* at 15–16.

39. *Id.* at 19.

40. *Id.* at 17.

41. United States v. Ptasynski, 462 U.S. 74, 75-76 (1983).

42. Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1258 (D.C. Cir. 2004).

case that struck down a portion of a statute on Equal Sovereignty grounds.[43] In the Third Circuit case of *NCAA v. New Jersey*, decided post-*Shelby County*, the court considered the constitutionality of a federal law that banned the licensing of sports betting in all but one state.[44] Together, these cases illustrate how the doctrine may be applied in future instances.

A. *United States v. Ptasynski*

In *Ptaskynski*, the Court considered the constitutionality of a federal statute to exempt oil produced in Alaska from the Crude Oil Windfall Profit Tax Act.[45] The Act imposed an excise tax on oil producers, and the rate of the tax was determined by the category of producer and type of oil produced.[46] The Act exempted oil owned by governments and charities, Alaskan oil, oil produced on Native American lands, and "front-end" oil, from the tax.[47] The plaintiffs, largely domestic oil producers and the States of Louisiana and Texas, contended that the Alaskan Oil exemption violated the Uniformity Clause of the Constitution, which requires taxes to be uniform throughout the United States.[48]

The district court invalided the Act on the grounds that the statute impermissibly drew distinctions based on geographic boundaries.[49] The Supreme Court reversed, rejecting this Equal Sovereignty-type argument.[50] In doing so, the Court noted that Alaska's exemption from the tax "reflects Congress' considered judgment that unique climatic and geographic conditions require that oil produced from this exempt area be treated as a separate class of oil."[51] The Court also pointed out that drilling wells in Alaska costs more than in other parts of the United States, thus, justifying the exemption.[52] The Court concluded that Alaskan oil "merited favorable treatment."[53] This case may also illustrate that private parties, not just states, have the ability to raise Equal Sovereignty-type arguments. Thus,

43. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2623 (2013).
44. NCAA v. Governor of N.J., 730 F.3d 208, 224 (3d Cir. N.J. 2013).
45. United States v. Ptasynski, 462 U.S. 74, 75–76 (1983).
46. *Id.* at 77–78.
47. *Id.*
48. Ptasynski v. United States, 550 F. Supp. 549, 550 (D. Wyo. 1982).
49. *Id.* at 553.
50. *Ptasynski*, 462 U.S. at 80.
51. *Id.* at 79.
52. *Id.*
53. *Id.* at 86.

this case can serve as a guide in instances where private parties are harmed by the inapplicability of a law or policy in a particular state.

B. *Nuclear Energy Institute, Inc. v. Environmental Protection Agency ("NEI")*

In *NEI*, the plaintiffs challenged the federal government's decision to designate Yucca Mountain in Nevada as a national nuclear waste repository site.[54] Congress decided to locate the waste at Yucca Mountain after it abandoned the lengthy and time-consuming process detailed in the National Waste Policy Act for selecting sites to store nuclear waste.[55] Congress amended the original law by requiring the government to focus exclusively on Yucca Mountain.[56] Because the law was not facially neutral, the petitioners contended, it violated the Tenth Amendment and "principles of federalism ostensibly inherent in the Constitution as a whole."[57] The plaintiffs contended that the law violated the Constitution's "equal treatment" requirement because it imposed unique burdens on the state of Nevada.[58] The plaintiffs argued that while there is no direct textual basis supporting the concept of equal treatment of the states, the concept is implied from the existence of the Guarantee Clause, the Port Preference Clause, the Uniformity Clause, the Bill of Attainder Clause, and the Equal Footing doctrine.[59]

The *NEI* court rejected the petitioner's Tenth Amendment and equal treatment arguments on several grounds. In rejecting the Tenth Amendment claim, the court heavily factored in the fact that Yucca Mountain was federal property, and that under the Property Clause, Congress has plenary power over federal lands.[60] Additionally, the law did not regulate the state's activities, but only circumscribed the state's ability to use Yucca Mountain for another purpose.[61] The court also held that because the national political process did not operate in a defective manner when Congress chose to designate Yucca Mountain as the national waste

54. Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1257 (D.C. Cir. 2004).

55. *Id.* at 1260.

56. *Id.* at 1260–61.

57. *Id.* at 1305.

58. *Id.*

59. *Id.*

60. *Id.* at 1308 ("We fail to see, moreover, how the constraints demanded by Nevada's claim would be consistent with the plenary nature of Congress's Property Clause authority.").

61. *Id.* at 1305.

repository, the Tenth Amendment was not implicated.[62] In rejecting the petitioner's equal treatment argument, the court simply stated that the "novel" concept "has no textual basis in the Constitution."[63]

C. *Shelby County v. Holder*

At issue in *Shelby County* was the constitutionality of the Voting Rights Act.[64] The Act requires that certain states and counties, determined by a coverage formula, would have to seek prior approval from the Department of Justice before making changes to local election laws.[65] Nine southern states were largely singled out by the preclearance formula, which applied to jurisdictions that historically employed a voter suppression device such as a literacy test or poll tax.[66] Shelby County, Alabama, a covered jurisdiction under the Act, sought an injunction against the enforcement of the law and a declaratory judgment that the coverage formula was facially unconstitutional.[67]

Chief Justice Roberts's opinion in *Shelby County* asserted that there is a "fundamental principle of equal sovereignty among the states," and that the principle is relevant to assessing federal government action that treats states differently.[68] Accordingly, the opinion articulated the standard that should apply to laws in this context. "A departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[69] Thus, the federal government must have a sufficient justification for treating states differently.

The opinion alludes to the idea that the Act's departure from the Equal Sovereignty Principle may have been necessary at the time it was enacted in order to address pervasive racial discrimination that Black communities faced in attempting to exercise the franchise.[70] However, given the recent trends suggesting that Blacks and Whites in covered jurisdictions were approaching parity, and even exceeding the rates of participation and registration in noncovered jurisdictions, the majority in *Shelby County*

62. *Id.*
63. *Id.* at 1306.
64. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2621 (2013).
65. *Id.* at 2623.
66. South Carolina v. Katzenbach, 383 U.S. 301, 329 (1966).
67. *Shelby Cty.*, 133 S. Ct. at 2622.
68. *Id.* at 2624.
69. *Id.* at 2627.
70. *Id.* at 2618.

contended that the conditions giving rise to the extraordinary expansion of federal power were no longer present.[71] The opinion, however, acknowledged that discrimination in voting still takes place. Thus, in spite of the continued existence of the problems that the statute attempts to address, the Court held that there was not a sufficient justification for the disparate treatment of the states based on the original coverage formula.[72] This suggests that federal government must clear a significantly high bar when treating states differently, rather than simply requiring a rational relationship between the problems and the statute's means to address them.

The opinion further describes the mechanics of the Act, and how they serve to create disparities amongst the states.[73] For example, the Act requires covered jurisdictions to go through the lengthy and time-consuming preclearance process, whereas uncovered jurisdictions that may have worse voting outcomes, are not subject to the onerous requirements outlined by the Act.[74] Accordingly, it may be surmised that the Court was troubled that the problems sought to be addressed in the Act were present in uncovered jurisdictions, yet went unregulated under the statute because the preclearance formula did not adapt to changing conditions.

Therefore, under the Equal Sovereignty Principle as articulated in *Shelby County*, the Court is suspicious of federal action that treats states differently without having a sufficient justification because it upsets the relationship between the federal government and the states. Thus, statutes that allow states to slip by unregulated under a scheme where the problems addressed in the regulation are occurring may be constitutionally problematic.

D. *NCAA v. New Jersey*

The Third Circuit considered Equal Sovereignty arguments post *Shelby County* in *NCAA v. New Jersey*.[75] The State of New Jersey attempted to license gambling on professional and amateur sports.[76] The plaintiffs argued that New Jersey's decision violated the Professional and Amateur Sports Protection Act ("PASPA"), which made the licensing of sports betting illegal in most states.[77] New Jersey argued that PASPA was

71. *Id.* at 2625.
72. *Id.*
73. *Id.* at 2624.
74. *Id.*
75. NCAA v. N.J., 730 F.3d 208 (3d Cir. 2013).
76. *Id.* at 214.
77. *Id.*

unconstitutional on Equal Sovereignty grounds because it permits Nevada to license widespread sports gambling while banning other states from the activity.[78]

The Third Circuit's analysis of the Equal Sovereignty Principle first required it to ascertain whether the law was permissible under the Commerce Clause.[79] After concluding that PASPA regulates an activity that has substantial effects on interstate commerce, and is therefore valid, the court rejected New Jersey's Equal Sovereignty argument.[80] The court rested its decision on the fact that in *Shelby County*, the Voting Rights Act was enacted pursuant to Congress's power under the post-Civil War Amendments, rather than the Commerce Clause:

> Indeed, while the guarantee of uniformity in treatment amongst the states cabins some of Congress' powers, *see, e.g.*, U.S. Const., art. I., § 8, cl. 1 (requiring uniformity in duties and imposts); *id.* § 9, cl. 6 (requiring uniformity in regulation of state ports), no such guarantee limits the Commerce Clause.[81]

The court expressed concern that a one-size-fits-all approach for laws enacted under the Commerce Clause would severely circumscribe Congress's power.[82] The court also noted that even if the Equal Sovereignty Principle applied to legislation enacted pursuant to the Commerce Clause, PASPA would still pass muster because the law served to single out a Nevada for favorable treatment, which was unlike the case in *Shelby County*, where the Voting Rights Act singled out states for disfavored treatment.[83] Furthermore, the court noted that New Jersey's invocation of the Equal Sovereignty Principle to invalidate PASPA altogether was inappropriate: "[I]f PASPA's preferential treatment of Nevada violates the equal-sovereignty doctrine, the solution is not to strike down only that exemption. The remedy New Jersey seeks—a complete invalidation of PASPA—does far more violence to the statute, and would be a particularly odd result."[84]

78. *Id.*
79. *Id.* at 224.
80. *Id.* at 225–26.
81. *Id.* at 238.
82. *Id.*
83. *Id.* at 239.
84. *Id.*

III. The Equal Sovereignty Framework

Given the infrequent invocation of the Equal Sovereignty Principle, it is unclear what, exactly, an Equal Sovereignty analysis entails. The seminal Equal Sovereignty case, *Shelby County*, provides little guidance on how the doctrine could be applied in future instances. Thomas Colby argues that in *NCAA v. New Jersey*, the Third Circuit's treatment of the Equal Sovereignty claim post-*Shelby County* was akin to the court throwing its hands up in the air.[85] However, looking closely at the aforementioned cases, the outcomes are reconcilable. The cases reveal that the essential aspects of the doctrine include: 1) whether the law calls for disparate treatment of the states; 2) whether the issue at hand raises concerns regarding the vertical balance of power by regulating in an area traditionally performed by states; and 3) whether there is sufficient justification for the disparate treatment.

The first step in the Equal Sovereignty analysis is whether the law at issue treats states differently. The *Shelby County* Court specified that the principle is operative any time there is disparate treatment of the states, while the Third Circuit suggested that an Equal Sovereignty analysis is limited to instances where the disparate treatment resulted in unfavorable treatment for one or more states, as was the case in *Shelby County*. The totality of the aforementioned Equal Sovereignty cases suggest that Equal Sovereignty issues arise when one or more states are specifically benefited or burdened in a regime, rather than when the impact of a facially neutral regime happens to disproportionately fall on one or more states.

Disparate treatment was present in every equal sovereignty case. For example, in *Ptasynski*, the statute named Alaska as a recipient of the oil tax exemption, rather than basing the exemption on a set of neutral criteria, such as the cost of drilling exceeding the national average by some amount.[86] In *NEI*, Yucca Mountain in Nevada was the site statutorily designated for nuclear waste without any consideration of other sites.[87] In *Shelby County*, however, the use of the preclearance formula may indicate disparate impact rather than disparate treatment because of a formula's perceived neutrality, but it was clear that the *Shelby County* Court viewed the formula's unchanging nature as de facto disparate treatment: the formula would always result in the application of the preclearance

85. Colby, *supra* note 35, at 4.

86. Ptasynski v. United States, 550 F. Supp. 549, 551 (D. Wyo. 1982).

87. Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1260-61 (D.C. Cir. 2004).

requirement to the same states without Congress amending the formula.[88] Hence, if there is only a disparate impact on the states rather than the presence of treatment, there are likely no Equal Sovereignty concerns.

However, if disparate treatment is present, the next step in the analysis is to determine whether the disparate treatment raises concerns regarding the vertical separation of powers. In *NEI*, Congress's regulation of nuclear waste likely did not raise a federalism problem because it was an issue of national concern, thus making it an appropriate subject for congressional action. Similarly, in *Ptasynski* and *NCAA*, the taxing of domestic oil producers in response to international oil markets and the regulation of gambling did not arouse suspicion of federal aggrandizement. In contrast, in *Shelby County*, the Court noted that decisions regarding voting were traditionally a province of state governments, thus federal regulation in this area raised concerns regarding the balance of power between federal and state government.

The cases also illustrate that an integral part of the balance of power analysis takes into consideration whether the law or regulation represents a valid exercise of power.[89] For example, in *NEI*, Congress was properly acting pursuant to its broad powers under the Property Clause by choosing to designate Yucca Mountain as the nuclear waste repository site: Yucca Mountain is federal property.[90] In *NCAA*, Congress was exercising its power to regulate interstate commerce, and in *Ptasynski*, Congress was acting under its taxing power.[91] Thus, when the Constitution allots broad powers to a branch of government and it is acting in furtherance of that broad grant of power, the balance of power problem is not implicated.

The last step of the analysis, as articulated in *Shelby County*, is whether the federal government has sufficient justification for the disparate treatment and also that it is sufficiently related to the problem that it targets. In *Shelby County*, the Court struck down the preclearance formula because there was an insufficient basis to continue using it to impose onerous requirements on covered jurisdictions.[92] It was important that the condition sought to be regulated by the Voting Rights Act—disenfranchisement of Black communities—was present (or may have been

88. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2615 (2013) ("Coverage still turned on whether a jurisdiction had a voting test in the 1960s or 1970s, and had low voter registration or turnout at that time.").

89. NCAA v. N.J., 730 F.3d 208, 224 (3d Cir. 2013) (analyzing the Commerce Clause claim before addressing the Equal Sovereignty issue).

90. *NEI*, 373 F.3d at 1308.

91. *NCAA*, 730 F.3d at 225-26; *Ptasynski*, 462 U.S. at 80.

92. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013).

worse) in uncovered jurisdictions.[93] In contrast, in *Ptasynski*, the Court cited the costs of drilling oil in Alaska, as compared to other domestic sources of oil, as a sufficient justification for exempting oil producers in that state from the windfall profits tax since the high price of oil would risk oil production there and therefore would result in a loss of tax revenues.[94] Thus, the exemption, which served as the basis for disparate treatment, was found to be justified by the local conditions. In *Shelby County*, there were insufficient differences between covered and uncovered jurisdictions to justify the difference in treatment.

IV. Applying the Equal Sovereignty Doctrine to the Clean Power Rule

Using the framework discussed above, in order to evaluate whether the Clean Power Rule violates the Equal Sovereignty Principle, we must first ascertain whether the principle applies. If the regulation treats states differently in some respect, the doctrine is applicable. If, on the other hand, there is only the presence of disparate impact rather than disparate treatment, the Equal Sovereignty Principle does not apply. Next, if disparate treatment is present, the question is whether there are balance of power concerns with the federal regulation of the subject at hand. If the subject of regulation does not concern the vertical balance of power, the regulation would pass muster under the Equal Sovereignty Principle. However, if the regulation concerns an area that has traditionally been under the purview of states, we must next examine whether there is a sufficient justification for the disparate treatment. If there are insufficient differences between the regulated and unregulated jurisdictions with respect to the target problem at hand, the justification is insufficient, and the Clean Power Rule would violate the Equal Sovereignty Principle.

A. Whether the Equal Sovereignty Principle Applies

The threshold question is whether the Equal Sovereignty Principle applies. As the Third Circuit indicated, there may be certain limitations on when the doctrine applies in a given context.[95] As discussed previously, the Equal Sovereignty Principle may not apply to circumstances where there is a disparate impact of a facially neutral law or policy; doing so would severely circumscribe congressional power, which the Third Circuit

93. *Id.* at 2622.

94. *Ptasynski*, 462 U.S. at 79.

95. *NCAA*, 730 F.3d at 239.

noted was a concern in a broader application of the Equal Sovereignty Principle.[96]

Here, in challenging the Clean Power Rule, opponents could argue that the rule results in disparate treatment for two reasons. First, the Clean Power Rule specifically exempts Alaska and Hawaii even though the states have qualifying EGUs under the rule. Alaska and Hawaii did not qualify for an exemption on the basis of neutral criteria that would have been available to other states if they simply harbored specific traits that would serve as the grounds for an exemption. Rather, the states were specifically named, akin to the circumstances in *NEI* and *Ptasynski*. Therefore, the exemption constitutes disparate treatment, and the Equal Sovereignty Principle applies to this claim.

Second, opponents to the rule may also use the burden borne by the coal states as evidence of disparate treatment. The rule itself acknowledges that it is likely to result in more onerous burdens for states that depend on coal as compared to other states.[97] Thus, they may contend that it is analogous to the scheme in *Shelby County* where the majority opinion characterized the coverage formula as disparate treatment, even though the formula did not specifically name the states the formula applied to. This argument, however, is unpersuasive. In *Shelby County*, the coverage formula was based on conditions that were operative on or before a specified year, so a state could never escape the preclearance requirement, regardless of what steps or measures were taken subsequently to address the problem of disenfranchisement. In contrast, in the Clean Power Plan, a state's status is dependent on the number of fossil fuel burning power plants within the state, so a state could theoretically escape the regulatory burden by taking remedial action. The rule calls for determining a state's GHG emissions target based on the number and type of energy plants located within the state; states with more EGUs may face more regulatory burdens than states with fewer EGUs. Consequently, the Equal Sovereignty Principle likely does not apply to this argument.

Under the Third Circuit's jurisprudence, the Equal Sovereignty Principle seemingly only applies when one or more states have been singled out for unfavorable treatment. This limiting principle may make the doctrine easier to apply and may be useful for courts in considering Equal Sovereignty claims. Here, if only unfavorable treatment is sufficient to invoke the application of the Equal Sovereignty Principle, proponents of

96. *Id.* at 238.

97. Clean Power Rule, *supra* note 1, at 64670 (discussing the POWER+ plan to help coal states grapple with changes to their economy as a result of the rule).

the exemption would argue that it constitutes favorable treatment for Alaska and Hawaii, and thus, the Equal Sovereignty Principle does not apply here as well.

From a traditional federalism analysis, it may be the case that regulation, generally, constitutes disfavored treatment, and a lack of regulation constitutes favorable treatment. However, the favorable/unfavorable analysis could be construed more broadly: If we consider the benefits a state receives from a particular regulatory scheme, the deprivation of these benefits could, actually, constitute disfavored treatment. This conception is warranted under the Equal Sovereignty Principle because it seemingly arises from a distinct legal premise, rather than from the Commerce Clause or the Tenth Amendment, where the favorable/unfavorable analysis takes for granted that the presence of regulation is a *per se* burden on the state.

With regards to the Clean Power Rule, research suggests that there are significant benefits associated with its implementation.[98] David E. Adelman and David B. Spence contend that the benefits of the Clean Power Plan would exceed the costs of the regulation, and that the benefits of reducing emissions under the rule would be predominantly felt locally.[99] Several studies support the conclusion that coal plants are responsible for more damage to public health and the environment than any other industrial source.[100] Opponents of the exemption could argue that, because the exemption would result in preventing the people of Alaska and Hawaii from experiencing the benefits of the Clean Power Plan, the lack of regulation constitutes unfavorable treatment.[101] Therefore, even under a requirement that the Equal Sovereignty Principle only applies to disfavored treatment, the Equal Sovereignty Principle should apply in this context.

B. Whether There Are Federalism Concerns

Because the state exemptions likely constitute disparate treatment, and the treatment can be characterized as unfavorable, the next question is whether the subject of the regulation indicates that there may be balance of power issues. If the subject of the federal regulation has traditionally been

98. David E. Adelman & David B. Spence, *Cost-Benefit Politics in U.S. Energy* (Aug. 11, 2015) (unpublished manuscript), http://ssrn.com/abstract=2642459.

99. *Id.* at 23.

100. *Id.*

101. Suzanna Caldwell, *Fairbanks Air Quality a Dirty Shame Locals Call a Community Health Crisis*, ALASKA DISPATCH NEWS (Dec. 20, 2012), http://www.adn.com/article/fairbanks-air-quality-dirty-shame-locals-call-community-health-crisis.

under the purview of state governments, this is more likely to raise federalism concerns, as was the case in *Shelby County* and voting decisions.

Here, there are plausible arguments on both sides concerning the Clean Power Plan. Proponents of the existing rule can argue that, because the regulation is modeled after the Clean Air Act which has been found to pass constitutional muster, the Clean Power Rule's cooperative federalism approach also does not raise constitutional concerns. Additionally, proponents of the existing rule may argue that carbon pollution raises an issue of international significance, which makes the issue appropriate for the federal government to address. The recent Conference of the Parties meeting in Paris illustrates the global consequences of domestic efforts to reduce emissions: each country's commitment to curtail its emissions has been meticulously documented, and the international community has reached an agreement on a framework for addressing climate change.[102] Proponents could argue the Clean Power Plan does not upset the balance of state and federal power because the issue of climate change is inherently an international one where the U.S. must speak with one voice on the world stage. Therefore, they could argue that executive action on this subject is in accords with the international dimension of the issue of climate change.

However, opponents of the rule have a compelling argument that the subject of regulation does, indeed, touch an area that is traditionally under state purview. Professor Laurence Tribe argues that the rule "impermissibly trenches on State authority over intrastate energy regulation."[103] This argument rests on significant legal precedent. The Supreme Court has recognized that energy production and energy choices are decisions for state governments to make.[104] Even federal statutes recognize the states' authority in this arena: under the Federal Power Act, the regulation of intrastate electricity is the exclusive province of the states.[105]

Here, opponents of the rule may argue that the Clean Power Plan is designed to compel the states to make cleaner energy choices, and serves as an end run around established precedent developed under the Commerce Clause in the field of energy law. This is because the rule arguably limits

102. Framework Convention on Climate Change, *Adoption of the Paris Agreement*, U.N. Doc. FCC/CP/2015/L.9 (Dec. 12, 2015).

103. Tribe, *supra* note 23, at 19.

104. PG & E v. State Energy Comm'n, 461 U.S. 190, 224 (1983) ("States traditionally have possessed the authority to choose which technologies to rely on in meeting their energy needs.").

105. 16 U.S.C. § 824(a).

states' authority to regulate its energy sector or make decisions about its energy choices, an area that has been recognized as a subject of state regulation. Therefore, the Clean Power Rule likely raises federalism concerns akin to the voting regulations in *Shelby County*.

C. Whether There Is Sufficient Justification for the Disparate Treatment

Because the Clean Power Rule results in disparate treatment, and likely raises federalism concerns by regulating in an area traditionally left to the states, the next inquiry is whether there is sufficient justification for exempting Alaska and Hawaii from the Clean Power Rule. *Shelby County* suggested that this inquiry is demanding, requiring more than just a rational basis for the disparate treatment.[106] The final rule states: "Because the EPA does not possess all of the information or analytical tools needed to quantify the BSER for the two non-contiguous states with otherwise affected EGUs (Alaska and Hawaii) . . . [the] emission guidelines do not apply to those areas."[107] The rule further explains that setting targets for noncontiguous states would not be appropriate because they are geographically isolated.[108] Thus, the two justifications for the disparate treatment is the EPA's lack of information to set emissions targets and the states' geographic isolation. The question therefore becomes whether these two justifications are sufficiently related to the problem that the regulation targets: climate change.[109]

With regard to the first justification given by the EPA, it must be noted that the EPA did, in fact, initially issue emissions target for the State of Alaska.[110] An Alaska air quality official expressed that the exemption came as a surprise.[111] The decision to exempt the State of Alaska was lauded by the utilities industry in the state, and some have suggested that the EPA was influenced by the potential costs facing the state as a result of the plan, even though other states that are covered under the rule expressed

106. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2622 (2013) ("a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.").

107. Clean Power Rule, *supra* note 1, at 64664.

108. *Id.* at 64826.

109. *Id.* at 64664 ("This rule establishes, at the same time, the foundation for longer term GHG emission reduction strategies necessary to address climate change and, in so doing, confirms the international leadership of the U.S. in the global effort to address climate change.").

110. Memorandum from Norman Rokeburg, Regulatory Comm. of Alaska, to Senator Cathy Geisel (Feb. 2, 2015), http://www.legis.state.ak.us/basis/get_documents.asp?docid=3479.

111. Elwood Brehmer, *Utilities, Leaders Welcome Exemption From Emissions Rule*, ALASKA JOURNAL OF COMMERCE (Aug. 6, 2015), http://www.alaskajournal.com/business-and-finance/2015-08-06/utilities-leaders-welcome-exemption-emissions-rule#.VnwO7d-rRE4.

similar concerns.[112] Indeed, Alaska's political leadership lobbied for an exemption from the rule,[113] and was reportedly given assurances from EPA Administrator Gina McCarthy emission standards are unlikely to be imposed on Alaska.[114] Hence, the fact that the EPA set targets for the state but later withdrew it as a result of intense lobbying indicates that the justification of a lack of information is unlikely to withstand intense review.[115]

The second justification for the exemption is that Alaska and Hawaii are geographically isolated.[116] In justifying the decision to not set emissions targets for these states, the EPA cited *Massachusetts v. EPA* for the proposition that "the Courts have recognized the authority of agencies to develop regulatory programs in step-by-step fashion."[117] However, this argument is also unpersuasive, and likely would not clear the test articulated in *Shelby County*, which requires a showing that the difference in treatment of the states is related to the problem the regulation is targeting.[118]

Because the goal of the regulation is to address climate change, the only valid reason for exempting states from the Clean Power Plan would be on the basis of those states not contributing to the problem of emissions from qualifying EGUs. Here, Alaska and Hawaii do have qualifying EGUs but were exempt from the regulation nonetheless. While the States of Alaska and Hawaii are isolated from the continental United States, climate change, however, is not a geographically isolated phenomenon: the greenhouse gas emissions contributing to the problem of climate change are present in Alaska and Hawaii, but the regulation still leaves them out. The effect of the exemption here is analogous to the circumstance in *Shelby County* that was found to raise an Equal Sovereignty problem: the problem exists in the unregulated jurisdictions as well, but only the regulated jurisdictions bear the burden of the Clean Power Plan. Interestingly, the rule repeatedly acknowledges how Alaska in particular is facing challenges

112. *Id.*

113. Erica Martinson, Murkowski Urges EPA To Drop Alaska From Climate Change Rule, ALASKA DISPATCH NEWS (Apr. 25, 2015), http://www.adn.com/article/20150429/murkowski-urges-epa-drop-alaska-climate-change-rule.

114. Power Plan Hub, E&E NEWS, http://www.eenews.net/interactive/clean_power_plan/states/alaska (last visited Dec. 22, 2015).

115. Clean Power Rule, *supra* note 1, at 64671.

116. *Id.* at 64825.

117. *Id.* at 64826.

118. Shelby Cty. v. Holder, 133 S. Ct. 2627 (2013).

attributed to climate change.[119] It is particularly problematic to exclude the state from the Clean Power Plan, effectively depriving the residents of the state from experiencing the localized benefits associated with the rule's implementation where the need is clearly acute.

The EPA's citation of *Massachusetts v. EPA* to justify not extending emissions targets to these states is also problematic. The Court explained there that a step-by-step approach justifies incremental actions to alleviate climate change. However, this statement does not justify a violation of the Equal Sovereignty Principle. Every step that the federal government takes to alleviate climate change can be taken in a manner that maintains the integrity of the Equal Sovereignty Principle. The incremental step approach endorsed in *Massachusetts v. EPA* was meant to address the challenge of solving climate change across all states over time, rather than trying to solve the problem on a state-by-state basis.[120] Thus, the EPA's citation to the case to justify the exemption was erroneous. The disparate treatment, therefore, is not sufficiently justified.

To remedy this Equal Sovereignty problem, the EPA need only include Alaska and Hawaii in the rule. This approach is consistent with the idea raised in the *NCAA* case, which mentioned that the best way to remedy an Equal Sovereignty problem may be to nullify the exemption, rather than striking the rule down altogether.

Conclusion

Although there are two bases to argue that the states are being treated under the Clean Power Plan, only the argument that the exempted state is experiencing disfavored treatment is a candidate for the application of the Equal Sovereignty Principle. The government must have a sufficient justification for the disparate treatment. Here, given that the government did seek to include Alaska in rule and only exempted the state at the very last stages of the rulemaking process, and did not articulate a compelling reason for this policy change, the rule is likely unconstitutional under the Equal Sovereignty Principle. The application of the Equal Sovereignty Principle would allow Alaska and Hawaii to realize the localized benefits

119. Clean Power Rule, *supra* note 1, at 64683 ("Climate change may also exacerbate ongoing environmental pressures in certain settlements, particularly in Alaskan indigenous communities."); *id.* at 64685 ("Particularly in Alaska, critical infrastructure and traditional livelihoods are threatened by climate change."); *id.* at 64687 (In Alaska, temperatures have changed faster than anywhere else in the U.S.").

120. Massachusetts v. EPA, 127 S. Ct. 1438, 1457 (2007) (discussing redressability arguments).

of the Clean Power Plan while helping to decrease the United States' contribution to global emissions.

Unless the Supreme Court articulates a limiting principle to the doctrine of Equal Sovereignty, environmentalists should be aware of the significance of the doctrine due to the impacts of climate change. Climate change will more than likely necessitate Congress to pass laws to deal with problems that require nuance and may be state-specific. The fact that laws or regulations in the future must have a sufficient justification for disparate treatment may be incompatible with the practical aspects of how legislation is passed, so it is important that laws are written in more neutral terms.

The Equal Sovereignty Principle could both be used to strike down laws that are important to environmentalists, or it could be used to increase the reach of environmentally protective statutes by preventing states from receiving exemptions from obligations, which are not sufficiently justified. This is important because every ton of CO2 emissions could prove critical in stemming the impact of climate change. Furthermore, this principle could help ensure that all states have responsibilities to combat climate change, instead of leaving the most vulnerable states to shoulder the burden.

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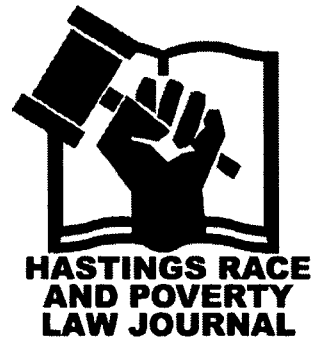

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