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Constitutional Law 17.245
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Paper #1: Analysis of the Climate Stabilization Act

The challenge to the Climate Stabilization Act (CSA) brings up several constitutional questions regarding Congress' power to regulate interstate commerce and federal taxing and spending. This opinion reviews and analyzes the constitutionality of each of the sections of the CSA. While section 1)a is unconstitutional as geographically biased, the remainder of Section 1 is not constitutionally suspect. Section 2 is only constitutional in part. While the regulation of businesses to reduce greenhouse gas emissions is permissible, including ones engaged purely in intrastate business, the enforcement procedure outlined does not withstand constitutional scrutiny. Lastly, Section 3 is constitutional, as it passes the federal test for spending in *South Dakota v. Dole*.

Section 1: Taxing and Commerce Clause

In examining Section 1 of the CSA, our analysis demonstrates that it is constitutional, with the exception of Section 1)a. By adjusting the taxes for the states of California and Oregon to be different from the rest of the country, Section 1)a violates the Uniformity Clause of Article I, Section 8 of the Constitution. The Uniformity Clause was designed to prevent Congress from imposing different tax rates on members of different regions or states, and required geographical uniformity. The only significant exception to the Uniformity Clause was developed in *United States v. Ptasynski*[1], in which Alaskan oil is regulated differently due to the inherent differences between the geographic conditions of obtaining the oil in the Arctic Circle. However, *Ptasynski*

1 *United States v. Ptasynski*, 462, U.S. 74 (1983)

does not apply in this case, as the differences faced in the CSA example do not stem from an inherent geographic difference, but rather an economic one that is then divided geographically.

While Section 1)a is constitutionally suspect, the remainder of section 1 withstands scrutiny. The main clause, “All commercial establishments, with the following exceptions, shall pay a tax of $20 per ton of carbon dioxide emissions,” is permissible under Congress’ ability to regulate interstate commerce. In *Massachusetts v. Environmental Protection Agency*[2], this Court ruled that under terms of the Clean Air Act, carbon dioxide was a pollutant that the Environmental Protection Agency (EPA) could regulate. Combined with the Necessary and Proper clause, Congress is empowered to do what is essential to regulate the emissions of carbon dioxide, and thus create a tax of $20 per ton. This is further supported by environmental taxes such as the Gas Guzzler tax, which taxes purchases of low mileage cars, or the Corporate Average Fuel Economy tax, which requires certain gas efficiency levels from new cars.

Section 1b also falls under the previous argument. However, the variance is also allowed, as it is not a geographic condition in violation of the Uniformity clause. Moreover, it regulates by considering a purely economic situation and a single industry.

Section 2: Commerce Clause

Section 2 of the CSA has two provisions, the first of which is constitutional, the second of which is not. The first provision regulates commercial establishments by requiring the installation of “advanced technologies to reduce their greenhouse gas emissions.” The second provision details the enforcement of this section, “Town or county building inspectors shall inspect businesses for compliance with this section of the CSA, and report non-complying businesses to the Environmental Protection Agency”.

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[2] *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007)

In analyzing the constitutionality of the first clause, several past cases must be examined. *United States v. Lopez*[3] established that any use of the commerce clause required the government to show that a given action substantially affects interstate commerce. In the instant case, regulating all commercial establishments with more than 5 people will have a significant impact on interstate commerce. As noted previously, the ability for Congress to regulate carbon dioxide emissions was established in *Massachusetts v. Environmental Protection Agency.* Moreover, in *Gonzales v. Raich*[4], we held that while on an individual basis, even if there is no significant impact on interstate commerce, the aggregation of individual's actions was permissible in determining its significance towards interstate commerce. Combining our rulings from *Massachusetts* and *Raich* with the fact that (a) commercial energy usage accounts for nearly 20% of all carbon dioxide emissions in the United States (even excluding industrial usage, which could be covered as part of "commercial establishments")[5] [6], and (b) over 80% of the United States workforce is in a company of 5 people or larger[7], the first provision of Section 2 meets the requirement of substantially affecting interstate commerce by significantly reducing overall greenhouse gas emissions in the aggregate.

The provision also withstands scrutiny over purely intrastate businesses, as established in *Raich* as well as *Wickard v. Filburn*[8]. In these cases, instances of businesses engaged exclusively in intrastate activity are not exempt from interstate commerce, since the commercial establishments can overall still affect the national market when considered together. Applying

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

4 *Gonzales v. Raich*, 545 U.S. (2005)

5 United States Energy Information Administration. "Electricity Explained"
http://205.254.135.7/energyexplained/index.cfm?page=electricity_in_the_united_states

6 Environmental Protection Agency. "2011 United States Greenhouse Gas Inventory".
http://www.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2011-ES-Executive-Summary.pdf

7 United States Small Business Administration. "Small Business FAQ's"
http://www.sba.gov/advocacy/7495/29581

8 *Wickard v. Filburn*, 317 U.S. 111 (1942).

Raich and *Wickard* to this case, the greenhouse gases of purely intrastate businesses in the aggregate affect the overall "market", which in this instance is the amount of greenhouse gases.

Examining the second provision of Section 2 leads to a quick conclusion that it is unconstitutional based on the precedent established in *Printz v. United States*[9]. In *Printz*, this Court ruled that the federal government did not have the power to compel state and local officials to administer the execution of federal laws. Under Section 2 of the CSA, the town or county building inspectors are tasked with looking for violations, in what amounts to administration of the law. *Printz* does provide for exceptions, such as requiring states to simply report actions, such as police reports of missing children, or tying administration to conditional federal funding, neither of which is applicable in this situation. Thus, based on our ruling in *Printz,* the second provision must be struck down as unconstitutional.

Section 3: Congress' ability to regulate federal spending

The third section of the CSA conditions continued federal highway funding on the creation of comprehensive state plans to reduce emissions by 50% by 2050. The CSA stipulates that 30% of a state's federal highway funding will be withheld if the state does not meet the planning criteria. The basic test to establish the constitutionality of conditioning federal spending was created in *South Dakota v. Dole*[10], where this Court held that any federal funding must meet the following requirements: (1) the funding must be to "promote the general welfare", (2) the conditions on funding must be unambiguous, (3) the conditions must relate to the federal interest on the funded project, (4) the conditions must not breach any other constitutional rights, and (5) the conditions must not be coercive.

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9 *Printz v. United States*, 521 U.S. 898 (1997).
10 *South Dakota v. Dole*, 483 U.S. 203 (1987).

In this case, the first prong of the test is not contested, and federal highway spending is approved as spending to promote the general welfare in *Dole*.

The second test for ambiguity also survives constitutional scrutiny. In this case, Section 3 outlines the conditions to receiving highway funding, stating that receiving the funds requires states to create a plan to reduce emissions by 50% by 2050. While an argument can be made that not outlining the specific requirements of such a plan creates ambiguity, ultimately the main goal of the plan is to establish procedures to reduce emissions by 50% by 2050, a task that the federal government does not need to establish any sort of intermediate requirements for, as steps to reach that goal will undoubtedly be different for different states due to the nature of a given state's industry and economy.

The CSA's Section 3 also passes the third test of germaneness. Reducing emissions overall, in practice, must be linked to reducing emissions from cars. Presently, nearly one third of all carbon dioxide emissions are from transportation vehicles[11] [12]. Thus, by reducing carbon dioxide emissions, the only practical solution must include reducing carbon dioxide emissions from automobiles as well, since the overall industry creates such a significant amount of the overall emissions.

Other than the challenge to it's constitutionality under Congress' powers, the CSA does not receive any other constitutional challenges and thus passes the fourth part of the test in *Dole*.

The last part of the test is perhaps the most ambiguous when it comes to constitutionality. Prior to our recent decision in *National Federation of Independent Business v. Sebelius*[13], this Court had not recently reviewed whether a federal spending condition was coercive. *Dole*

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11 Environmental Protection Agency. "2011 United States Greenhouse Gas Inventory".

12 Environmental Protection Agency. "US Transportation Sector Greenhouse Gas Emissions". http://www.epa.gov/otaq/climate/documents/420f12063.pdf

13 *National Federation of Independent Business v. Sebelius*, 546 U.S. 11-363 (2012).

established a lower bound of 5% of highway funds as non-coercive. However, with our recent ruling in *Sebelius* that conditioning all of a state's Medicaid funds was unconstitutional, this Court has also now set an upper bound. In this case, the conditions set forth are much more aligned to the precedent set in *Dole*, rather than *Sebelius*. As Chief Justice Roberts noted in the *Sebelius*, South Dakota only faced losing less than half of one percent of it's overall budget, while in *Sebelius*, states faced the possible loss of over 10% of their overall budget. Extrapolating the data to reach the amount prescribed under the CSA, states face the possible loss of less than 3% of their overall budgets. While a loss of 3% may be seen as a lot to reduce spending, it is much less than the 6-9% cuts that states experienced following the 2008 recession[14]. Moreover, the increase in the percentage of highway funding conditioned on compliance is justified in that the group it attempts to regulate is much larger in this case than in *Dole*. *Dole* attempts to regulate a very small demographic (drivers under 21), while the group affected by any regulation towards reducing emissions from transportation is the entire driving populace, thus meriting an increase in proportional highway funding.

Opponents to the CSA that insist Section 3 amounts to coercion might point out that forcing the states to develop comprehensive plans to reduce emissions, rather than the federal government creating a plan to regulate emissions amounts to action beyond what the government can do in the regulation of emissions. However, in the case of the No Child Left Behind Act (NCLV), states were forced to develop their own testing and education standards, with a plan to meet those standards. While the NCLB never had a definitive ruling, this Court repeatedly denied certiorari to states petitioning on this matter and upheld the requirements.[15]

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[14] Johnson, Nicholas, Phil Oliff, and Erica Williams. "An Update on State Budget Cuts". *Center on Budget Priorities and* Politics. Feburary 9, 2011. http://www.cbpp.org/cms/index.cfm?fa=view&id=1214

[15] Walsh, Mark. "Supreme Court Declines to Hear NCLB Challenge". *Education Week.* February 22, 2011. http://blogs.edweek.org/edweek/school_law/2011/02/justices_decline_to_hear_nclb.html

This analysis contains several further implications for both federalism and the future of greenhouse gas regulations. In terms of federalism, it further expands federal power to regulate interstate commerce. By allowing the regulations of small businesses even as small as 5 employees, it provides a strong stepping stone for expanded federal power. However, this decision would not provide a slippery slope towards the federal government to regulate any business, as some might argue, but rather continues the expansion of power outlined in *Wickard* and *Raich.* Moreover, it turns back some of the decline in federal power from *Sebelius*. However, that case does not provide too much potential to greatly scale back the Commerce clause, as it mainly concerns the governments ability to regulate *inactivity* rather than actual economic and interstate activity that most Commerce clause acts regulate, such as gun control or environmental protection.

This decision also further expands the baseline on which the test established in *Dole* relies on to determine coercion. While the upper bound on what did not constitute coercion was established in *Sebelius* at 10%, this decision raised the lower bound on what could constitute coercion from half a percent to 3 percent.

While this generally expands the ability to regulate interstate commerce, it even more significantly enhances the ability to regulate greenhouse gas emissions. By requiring most businesses to install technologies to reduce gas emissions, it provides new territory for what the EPA or Congress can require people to do to contain emissions, now expanding beyond big business.

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