

# FEDERAL REGULATION OF STATE EMPLOYMENT UNDER THE COMMERCE CLAUSE AND “NATIONAL DEFENSE” POWERS: CONSTITUTIONAL ISSUES PRESENTED BY THE PUBLIC SAFETY EMPLOYER-EMPLOYEE COOPERATION ACT

**Abstract:** Pending before Congress is the Public Safety Employer-Employee Cooperation Act, which would require states and their localities to engage in collective bargaining with unions representing their public safety officers (i.e., police officers, firefighters, and emergency medical services workers). As constitutional authority for the Act, the legislation invokes the Commerce Clause and congressional “national defense” powers. This Note examines Congress’s ability to regulate the states’ employment of public safety officers. It concludes that the Commerce Clause does not enable such regulation because public safety employment does not substantially affect interstate commerce and that state sovereignty acts as an independent bar to the regulation. This Note further concludes that Congress’s “national defense” powers do not enable the regulation of public safety employment because, under both the current statutory regime of domestic emergency-response efforts and the constitutional anti-commandeering doctrine, the states’ public safety officers are beyond the reach of federal control. Thus, this Note posits that if the Public Safety Employer-Employee Cooperation Act is enacted, the Supreme Court would—and should—strike it down.

## INTRODUCTION

On July 17, 2007, the House of Representatives passed House Bill 980, the “Public Safety Employer-Employee Cooperation Act of 2007,” which would require states and their localities to permit public safety officers (i.e., police officers, firefighters, and emergency medical services workers) to unionize and engage in collective bargaining with their governmental employers.<sup>1</sup> Senate Bill 2123, House Bill 980’s

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<sup>1</sup> Public Safety Employer-Employee Cooperation Act of 2007, H.R. 980, 110th Cong. §§ 3–4 (2007). “Collective bargaining” refers to negotiation over employment matters (e.g., wages, hours, or benefits) between an employer and a representative of all employees on the employees’ behalf (i.e., a union) rather than multiple negotiations between an

companion, is presently pending in the Senate, and, with thirty-six co-sponsors, it is poised for passage.<sup>2</sup> If successfully enacted into federal law, this legislation would wreak a dramatic change in the current federalist balance of power in state and local labor relations.<sup>3</sup> Currently, governmental employers—at the federal, state, and local levels—are exempt from the requirements of the National Labor Relations Act (“NLRA”), which imposes an obligation on private employers, enforced by the National Labor Relations Board, to participate in collective bargaining with their employees’ unions.<sup>4</sup> Congress largely eradicated the federal government’s NLRA exemption, however, with the passage of the Civil Service Reform Act of 1978, which authorizes most civil servants to unionize and engage in collective bargaining with their agency-employers.<sup>5</sup> House Bill 980 and Senate Bill 2123 represent the latest in a similar twelve-year effort by certain members of Congress to eradicate a portion of state and local governments’ NLRA exemption with respect to those governments’ public safety employees.<sup>6</sup> Since 1995, twelve “Public Safety Employer-Employee Cooperation Act” (“PSEEC Act”) bills seeking to impose the collective bargaining obligation on states and their localities have been introduced in either the House or the Senate.<sup>7</sup> Only two advanced out of their committees.<sup>8</sup> House Bill

employer and each employee individually. *See* ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW § 1.3, at 4–7 (2d ed. 2004).

<sup>2</sup> *See* Public Safety Employer-Employee Cooperation Act of 2007, S. 2123, 110th Cong. (2007); 154 CONG. REC. S5205 (daily ed. June 5, 2008); 154 CONG. REC. S4487 (daily ed. May 20, 2008); 154 CONG. REC. S4029 (daily ed. May 12, 2008); 154 CONG. REC. S2232 (daily ed. Mar. 31, 2008); 154 CONG. REC. S1877 (daily ed. Mar. 11, 2008); 154 CONG. REC. S1202 (daily ed. Feb. 26, 2008); 153 CONG. REC. S15,139 (daily ed. Dec. 11, 2007); 153 CONG. REC. S14,400 (daily ed. Nov. 14, 2007); 153 CONG. REC. S13,990 (daily ed. Nov. 6, 2007); 153 CONG. REC. S13,686 (daily ed. Nov. 1, 2007); 153 CONG. REC. S13,581 (daily ed. Oct. 30, 2007); 153 CONG. REC. S12,937 (daily ed. Oct. 16, 2007); 153 CONG. REC. S12,379 (daily ed. Oct. 1, 2007).

<sup>3</sup> *See* *United States v. Morrison*, 529 U.S. 598, 617–18 (2000); *Printz v. United States*, 521 U.S. 898, 935 (1997); *United States v. Lopez*, 514 U.S. 549, 566–67 (1995); *New York v. United States*, 505 U.S. 144, 181–83 (1992); S. 2123 §§ 3–4; H.R. 980 §§ 3–4.

<sup>4</sup> *See* 29 U.S.C. §§ 152(2), 157 (2000).

<sup>5</sup> *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 701, 92 Stat. 1111, 1191–1216 (codified as amended at 5 U.S.C. §§ 7101–7135 (2006)). Interestingly, federal law enforcement officers are not covered by the Civil Service Reform Act and thus have no right to collective bargaining. *See* 5 U.S.C. § 7103(a)(3).

<sup>6</sup> *See* H.R. REP. NO. 110-232, at 5–9 (2007).

<sup>7</sup> *See id.*; *see also* S. 2123; H.R. 980; S. 513, 109th Cong. (2005); H.R. 1249, 109th Cong. (2005); S. 606, 108th Cong. (2003); H.R. 814, 108th Cong. (2003); S. 952, 107th Cong. (2001); H.R. 1475, 107th Cong. (2001); S. 1016, 106th Cong. (1999); H.R. 1093, 106th Cong. (1999); H.R. 1173, 105th Cong. (1997); H.R. 1484, 104th Cong. (1995).

<sup>8</sup> *See* H.R. REP. NO. 110-232, at 5–9.

980 is the first of this legislation to be passed by a house of Congress.<sup>9</sup> Even if the bill fails to gain approval in the Senate, its advancement certainly evidences the momentum this type of legislation has gained in the new, Democrat-controlled Congress, and one would certainly expect the effort to continue.<sup>10</sup>

Congress passed the NLRA in 1935, invoking its power to “regulate Commerce with foreign Nations, and among the several States” under Article I, Section 8, Clause 2—the Commerce Clause—of the Constitution.<sup>11</sup> Similarly, and predictably, the drafters of the various PSEEC Act bills have invoked the Commerce Clause as constitutional authority for that legislation.<sup>12</sup> Interestingly, however, the Commerce Clause is not the only source of federal authority invoked in House Bill 980 or Senate Bill 2123.<sup>13</sup> Indeed, the Commerce Clause authority seems almost like a secondary consideration, appended near the very end of the bills’ “declaration[s] of purpose.”<sup>14</sup> Beyond the Commerce Clause, the bills expressly refer to the role of local first-responders in national defense and national emergency response, thus invoking Congress’s powers to legislate matters concerning national defense.<sup>15</sup> The bills speak of local police officers, firefighters, and emergency medical services workers as agents of the federal government in times of emergency, with duties to protect federal property and to take on federal responsibilities.<sup>16</sup> Thus, under its constitutional ability to “make all Laws which

<sup>9</sup> See *id.*; 153 CONG. REC. H7871–72 (daily ed. July 17, 2007).

<sup>10</sup> See H.R. REP. NO. 110-232, at 5–9; see also DEMOCRATIC NAT’L COMM., STRONG AT HOME, RESPECTED IN THE WORLD: THE 2004 DEMOCRATIC NATIONAL PLATFORM FOR AMERICA 24 (July 27, 2004), available at <http://www.dnc.org/pdfs/2004platform.pdf> (stating that the Democrats’ national platform includes “reforming our labor laws to protect the rights of workers (*including public employees*) to bargain contracts and organize on a level playing field without interference” (emphasis added)).

<sup>11</sup> See National Labor Relations Act, ch. 372, § 1, 49 Stat. 449, 449–50 (1935) (codified as amended at 29 U.S.C. § 151 (2000)) (“The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or necessary effect of burdening or obstructing commerce . . .”).

<sup>12</sup> See, e.g., H.R. 980 § 2(5) (“The potential absence of adequate cooperation between public safety employers and employees . . . can affect interstate and intrastate commerce.”).

<sup>13</sup> See S. 2123 § 2(4); H.R. 980 § 2(5).

<sup>14</sup> See S. 2123 § 2(4); H.R. 980 § 2(5).

<sup>15</sup> See S. 2123 § 2(2); H.R. 980 § 2(2).

<sup>16</sup> See S. 2123 § 2(2); H.R. 980 § 2(2). Federal responsibilities certainly include “avoid[ing] substantial and debilitating interference with interstate and foreign commerce” and “protect[ing] the national security of the United States.” See U.S. CONST. art. I, § 8, cls. 1, 3; H.R. 980 § 2(2).

shall be necessary and proper” to effect federal powers,<sup>17</sup> Congress has asserted a right to regulate relations between these would-be federal “deputies” and their actual employers, state and local governments.<sup>18</sup>

The PSEEC Act, in its pending form, raises several questions of constitutional law, including whether Congress may properly impose, either under the Commerce Clause or under its “national defense” authority, a collective bargaining requirement on states and localities as employers of police officers, firefighters, and emergency medical services workers.<sup>19</sup> This Note analyzes this constitutional question, determines that the PSEEC Act has weak constitutional support, and predicts that the Supreme Court likely would—and should—strike it down.<sup>20</sup> Part I of this Note examines federal regulation of employment under the Commerce Clause by reviewing the use of that clause to support congressional legislation pertaining to private employment, the expansion of the clause to support congressional regulation of public employment, the Supreme Court’s jurisprudence with respect to state sovereignty as a limitation on otherwise valid Commerce Clause jurisprudence, and the Supreme Court’s recent limitation of Commerce Clause authority generally.<sup>21</sup> Part II examines the role of the federal government in national emergencies by looking at Congress’s powers of “national defense,” the current structure under which emergencies are handled by different levels of government, and the limitations on Congress’s ability to commandeer state and local executive officials to carry out federal laws.<sup>22</sup> Part III looks at the history of the PSEEC Act and examines the current version in detail, including its purported sources of authority.<sup>23</sup> Finally, Part IV examines the constitutional issue presented by the PSEEC Act’s purported sources of authority, including issues under the Commerce Clause and under federal “national defense” authority, and concludes that neither source is sufficient to enable the legislation’s enactment.<sup>24</sup>

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<sup>17</sup> See U.S. CONST. art. I, § 8, cl. 18.

<sup>18</sup> See *id.* cls. 1, 8, 18; S. 2123 § 2(2); H.R. 980 § 2(2).

<sup>19</sup> See *infra* notes 190–252 and accompanying text.

<sup>20</sup> See *infra* notes 190–252 and accompanying text.

<sup>21</sup> See *infra* notes 25–114 and accompanying text.

<sup>22</sup> See *infra* notes 115–152 and accompanying text.

<sup>23</sup> See *infra* notes 153–189 and accompanying text.

<sup>24</sup> See *infra* notes 190–252 and accompanying text.

## I. CONGRESSIONAL AUTHORITY AND LIMITATIONS WITH RESPECT TO LABOR REGULATION UNDER THE COMMERCE CLAUSE

Congress successfully regulates, in one form or another, nearly all private employment and many aspects of public sector employment by invoking its constitutional power to regulate interstate commerce.<sup>25</sup> This Part reviews Congress's ability to impose collective bargaining on private employers under the Commerce Clause through the National Labor Relations Act ("NLRA" or the "Act").<sup>26</sup> It continues by examining congressional attempts to regulate public sector employment under the Commerce Clause and the Supreme Court's wavering jurisprudence on the effect of state sovereignty on such regulation.<sup>27</sup> Finally, this Part examines the Supreme Court's recent Commerce Clause cases and the current limits of congressional power under the clause.<sup>28</sup>

### A. *Federally Imposed Collective Bargaining on Private Employers Under the National Labor Relations Act*

The NLRA declares the failure of private employers to engage in collective bargaining with their employees' unions an "unfair labor practice."<sup>29</sup> The Act effectively prohibits all unfair labor practices "affecting commerce" by empowering the National Labor Relations Board ("NLRB") to investigate and prevent such practices and to issue court-enforceable injunctions against them.<sup>30</sup> Thus, the NLRA imposes collective bargaining on nearly all private employers.<sup>31</sup>

Enacted in 1935, the NLRA was Congress's first successful attempt at the broad regulation of private employers' labor relations.<sup>32</sup> Prior to

<sup>25</sup> See, e.g., National Labor Relations Act, 29 U.S.C. §§ 151–169 (2000).

<sup>26</sup> See *infra* notes 29–49 and accompanying text.

<sup>27</sup> See *infra* notes 50–87 and accompanying text.

<sup>28</sup> See *infra* notes 88–114 and accompanying text.

<sup>29</sup> 29 U.S.C. §§ 152(8), 158(a)(5).

<sup>30</sup> *Id.* § 160(a), (c), (e).

<sup>31</sup> See *id.* §§ 152(8), 158(a)(5), 160(a), 160(c), 160(e). Because of the vast number of private employers relative to its budget, the NLRB has chosen to enforce the NLRA only against employers whose gross revenues exceed certain minima. See GORMAN & FINKIN, *supra* note 1, § 3.2, at 27–32.

<sup>32</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (upholding the constitutional validity of the NLRA). Prior to the passage of the NLRA, Congress had enacted, and the Supreme Court upheld, the Railway Labor Act, which created very similar rights and duties to those of the NLRA but only for railroad employers and employees. See *Railway Labor Act*, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151–188 (2000)); *Tex. & N.O.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 570–71 (1930) (upholding the constitutional validity of the Railway Labor Act). For an overview of Con-

the Act, the Supreme Court consistently struck down federal legislation aimed at regulating industrial labor relations.<sup>33</sup> The crux of the Court's holdings was that local activities having only indirect effects on interstate commerce, such as labor relations, could not be reached by Congress under the Commerce Clause.<sup>34</sup> In 1937, in *NLRB v. Jones & Laughlin Steel Corp.*, however, the Court changed course.<sup>35</sup> Jones & Laughlin Steel Corporation, one of the largest, vertically integrated steel companies of its era, was charged by the NLRB with discriminating against a group of unionized employees in violation of the NLRA.<sup>36</sup> Jones & Laughlin refused to comply with the NLRB's order requiring the rehiring of certain fired employees, so, in accordance with the NLRA, the Board petitioned the U.S. Court of Appeals for the Fifth Circuit to enforce the order.<sup>37</sup> The court refused, holding, largely in accord with contemporaneous Supreme Court precedent, that the Act exceeded the scope of the Commerce Clause.<sup>38</sup> On review, however, the Supreme Court reversed, announcing a new standard for determining the validity of congressional action under the Commerce Clause: whether the regulated activity *affects* interstate commerce.<sup>39</sup> The Act itself purported to limit its own applicability to labor practices "affecting commerce," defined as "burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of com-

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gress's attempts to legislate labor relations prior to the NLRA, see ARCHIBALD COX, *LABOR LAW* 37-72 (14th ed. 2006).

<sup>33</sup> See *Carter v. Carter Coal Co.*, 298 U.S. 238, 297-310 (1936) (striking down legislation of mineworkers' working conditions and collective bargaining rights); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542-50 (1935) (striking down congressionally authorized regulations of wages and hours of slaughterhouse workers); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362-74 (1935) (striking down legislation requiring that railroads fund government-administered pensions for their employees); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (striking down legislation aimed at curtailing child labor); *Adair v. United States*, 208 U.S. 161, 176-80 (1908) (striking down legislation requiring common carriers to permit their employees to join labor unions); *Howard v. Ill. Cent. R.R. Co. (The Employers' Liability Cases)*, 207 U.S. 463, 496-502 (1908) (striking down legislation granting a federal cause of action to injured employees of common carriers against their employers).

<sup>34</sup> See, e.g., *Adair*, 208 U.S. at 178; see also *United States v. Lopez*, 514 U.S. 548, 570-73 (Kennedy, J., concurring) (detailing the Supreme Court's pre-1937 Commerce Clause jurisprudence).

<sup>35</sup> See 301 U.S. at 29-32.

<sup>36</sup> *Id.* at 22.

<sup>37</sup> *Id.* For the NLRB's original order, see *In re Jones & Laughlin Steel Corp.*, 1 N.L.R.B. 503, 517-18 (1936), *enforcement denied*, 83 F.2d 998 (5th Cir. 1936), *rev'd*, 301 U.S. 1 (1937).

<sup>38</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 83 F.2d 998, 998-99 (5th Cir. 1936) (*per curiam*), *rev'd*, 301 U.S. 1 (1937).

<sup>39</sup> See *Jones & Laughlin*, 301 U.S. at 30-32.

merce.”<sup>40</sup> The Supreme Court accepted that legislation “affecting commerce” was within the bounds of the Commerce Clause and then held that the Act, purporting only to reach labor practices “affecting commerce,” was constitutional when applied in such cases.<sup>41</sup> The Court then examined the facts surrounding the charges against Jones & Laughlin and determined that its actions affected commerce.<sup>42</sup> The Court first noted that the company was “organized on a national scale,” meaning that any industrial strife (i.e., strikes or work stoppages) would burden the flow of interstate commerce.<sup>43</sup> The Court then simply took judicial notice of the belief that the refusal to permit employee unionizing and collective bargaining results in industrial strife.<sup>44</sup> Thus, the Court concluded that the potential burden on interstate commerce posed by the likelihood of strikes by Jones & Laughlin workers resulting from a lack of collective bargaining rights was properly within the scope of both the NLRA and the Commerce Clause.<sup>45</sup>

On the same day that the Court announced its decision in *Jones & Laughlin*, it also handed down several companion opinions affirming the applicability of the NLRA to various other companies, providing no additional analysis and simply citing *Jones & Laughlin*.<sup>46</sup> None of the companion-case companies was as large as Jones & Laughlin,<sup>47</sup> and one, although buying and selling interstate, had operations primarily only in a single location.<sup>48</sup> The Court thus silently extended its *Jones & Laughlin* holding to include small enterprises engaged only in interstate buying and selling of goods.<sup>49</sup>

<sup>40</sup> *Id.* at 30–31.

<sup>41</sup> *See id.* at 31.

<sup>42</sup> *Id.* at 41–42.

<sup>43</sup> *Id.* at 41.

<sup>44</sup> *Jones & Laughlin*, 301 U.S. at 42.

<sup>45</sup> *See id.* at 30–32, 41–42.

<sup>46</sup> *See* NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 75 (1937); NLRB v. Fruehauf Trailer Co., 301 U.S. 49, 57 (1937). Two additional cases decided on the same day also affirmed the NLRA but were based on slightly different reasoning than the “affects commerce” standard announced in *Jones & Laughlin*. *See* Wash., Va. & Md. Coach Co. v. NLRB, 301 U.S. 142, 146 (1937); Associated Press v. NLRB, 301 U.S. 103, 128–30 (1937). In *Coach*, the Court held that the NLRA properly applied to a passenger bus company because the company was an “instrumentality of interstate commerce.” 301 U.S. at 146. In *Associated Press*, the Court held that a news wire service, constantly using the “channels” of interstate and foreign commerce, was properly subject to the NLRA. 301 U.S. at 128–30.

<sup>47</sup> *See* *Friedman-Harry Marks*, 301 U.S. at 72–73; *Fruehauf Trailer*, 301 U.S. at 53–54; *see also Jones & Laughlin*, 301 U.S. at 25–27.

<sup>48</sup> *See* *Friedman-Harry Marks*, 301 U.S. at 72.

<sup>49</sup> *See id.* at 75.

### B. Federal Regulation of State and Local Employer-Employee Relations

Since the Supreme Court's decision in *Jones & Laughlin*, Congress has enacted a host of legislation regulating private employer-employee relations.<sup>50</sup> Although Congress has never before attempted to impose the requirements of the NLRA or collective bargaining on states *qua* employers, it has successfully applied to them the requirements of many of these other federal labor laws.<sup>51</sup> In 1966, for example, Congress amended the Fair Labor Standards Act to impose minimum wage and overtime requirements on state-run hospitals and schools.<sup>52</sup> The State of Maryland, however, as an operator of schools and hospitals, challenged the applicability of the federal rules to it as a violation of its sovereignty.<sup>53</sup> In 1968, in *Maryland v. Wirtz*, the Supreme Court rejected the state's argument and stated that the labor relations of hospitals and schools were properly subject to congressional regulation under the Commerce Clause.<sup>54</sup> The Court held that the mere fact that a state, rather than a private actor, is involved in an activity otherwise subject to congressional Commerce Clause regulation does not render the congressional regulation invalid.<sup>55</sup>

The Supreme Court's holding in *Wirtz*, however, did not definitively establish Congress's ability to impose labor standards on the states and, in fact, turned out to be just the beginning of a Supreme Court back-and-forth on the issue.<sup>56</sup> Following *Wirtz*, in 1974, Congress again amended the Fair Labor Standards Act, this time extending its reach to all state and local employers.<sup>57</sup> Several states and localities challenged

<sup>50</sup> See Family & Medical Leave Act of 1993, Pub. L. No. 103-3, §§ 101-109, 301-404, 107 Stat. 6, 7-19, 23-26 (codified as amended at 29 U.S.C.A. §§ 2611-2619, 2631-2654 (West 2000 & Supp. 2008)) (requiring employers to grant employees periods of leave for certain family reasons); Occupational Safety & Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C.A. §§ 651-678 (West 2000 & Supp. 2008)) (imposing safety standards for workplaces); Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C.A. §§ 201-219 (West 2000 & Supp. 2008)) (imposing minimum wage and overtime pay requirements).

<sup>51</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530-31 (1985); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 835-37 (1976), *overruled by Garcia*, 469 U.S. 528; *Maryland v. Wirtz*, 392 U.S. 183, 185-88 (1968), *overruled by Nat'l League*, 426 U.S. 833, *overruled by Garcia*, 469 U.S. 528.

<sup>52</sup> See Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 830, 831; *see also* Fair Labor Standards Act, 29 U.S.C.A. §§ 201-219.

<sup>53</sup> *Wirtz*, 392 U.S. at 193.

<sup>54</sup> *Id.* at 188-99.

<sup>55</sup> *See id.* at 196-97.

<sup>56</sup> *See generally Garcia*, 469 U.S. 528; *Nat'l League*, 426 U.S. 833.

<sup>57</sup> *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, 58-62 (codified as amended at 29 U.S.C.A. § 633a (West 1999 & Supp. 2007)).

this congressional extension of *Wirtz*; they argued that Congress was no longer regulating the states indirectly as operators of “commercial enterprises” but rather directly, in their capacity as sovereign entities.<sup>58</sup> The states and localities did not argue that public employment was beyond the scope of the Commerce Clause, but rather that the constitutional doctrine of “intergovernmental immunity” prevented the direct imposition of the Fair Labor Standards Act provisions on the states *qua* states.<sup>59</sup>

In 1976, in *National League of Cities v. Usery*, the Supreme Court agreed with this view, expressly overruling *Wirtz* and affirming that the Constitution limits the ability of the federal government to override state sovereignty, citing the Tenth Amendment as a declaration of that limitation.<sup>60</sup> The Court further found that an “undoubted attribute of State sovereignty” is the ability to determine the wages and working hours of those whom the state engages to carry out its governmental functions.<sup>61</sup> The Court thus held that the Commerce Clause did not permit Congress to regulate the employment matters of state governments “in areas of traditional governmental functions.”<sup>62</sup>

Following *National League*, courts were forced to determine on a case-by-case basis whether particular state employers were engaged in “traditional governmental functions” and were thus immune from federal labor regulations.<sup>63</sup> The task proved difficult, and the courts

<sup>58</sup> See *Nat'l League*, 426 U.S. at 835–37; see also Fair Labor Standards Amendments of 1974 § 6.

<sup>59</sup> *Nat'l League*, 426 U.S. at 837.

<sup>60</sup> See *id.* at 842–43 (“While the Tenth Amendment has been characterized as a ‘truism,’ stating merely that ‘all is retained which has not been surrendered,’ it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.” (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975) (citation omitted))); *id.* at 852; see also U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

<sup>61</sup> *Nat'l League*, 426 U.S. at 845.

<sup>62</sup> *Id.* at 852 (“[I]nsofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.”); *id.* at 855. Whether the holding in *National League* represented a strict rule or allowed for a “balancing of interests” in cases where the federal interest would be far greater than the states’ is not clear. See *id.* at 852–53, 856 (Blackmun, J., concurring). Balancing language does not appear in the majority opinion, but Justice Blackmun joined in the opinion and gave it a majority only to the extent that it did endorse a balancing scheme. See *id.* at 856.

<sup>63</sup> See, e.g., *Equal Employment Opportunity Comm’n v. Wyoming*, 460 U.S. 226, 239 (1983) (determining the applicability of a federal employment discrimination statute to the Wyoming Game and Fish Department).

reached seemingly inconsistent and irreconcilable conclusions with respect to various state activities.<sup>64</sup> In 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court declined the opportunity to decide whether public transit is a “traditional governmental function” and instead narrowly overruled *National League*, just nine years after it was decided.<sup>65</sup> The outcome in *Garcia* hinged on the vote of Justice Blackmun, who had cautiously concurred in *National League*.<sup>66</sup> Writing for the majority in *Garcia*, Blackmun stated that the Court had come to the realization that the “traditional governmental function” standard was unworkable insofar as the role of government continues to evolve, which, therefore, makes it impossible to determine what constitutes a “traditional” role for government.<sup>67</sup>

Justice Blackmun effectively went on to strip the Tenth Amendment of its independent role as a preserver of state sovereignty by holding that “the sovereignty of the States is limited by the Constitution itself.”<sup>68</sup> In other words, the sovereignty retained by the states is only as great as remains after the federal government exercises its delegated powers to their full extent.<sup>69</sup> On the facts of *Garcia*, the Court held that so long as the Federal Labor Relations Amendments of 1974 were a valid exercise of the Commerce Clause power, the Amendments’ effects on state sovereignty are wholly permissible under the Constitution.<sup>70</sup> Furthermore, Justice Blackmun found that protection of state sovereignty is not a proper job for the courts because the states are afforded the opportunity to protect their interests through the structure of the federal government.<sup>71</sup> The states retain indirect influence over the

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<sup>64</sup> See *Garcia*, 469 U.S. at 538–39. Compare *Molina-Estrada v. P.R. Highway Auth.*, 680 F.2d 841, 845–46 (1st Cir. 1982) (road building is a traditional governmental function), *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1196 (6th Cir. 1981) (waste disposal is a traditional governmental function), and *United States v. Best*, 573 F.2d 1095, 1102–03 (9th Cir. 1978) (issuing drivers’ licenses is a traditional governmental function), with *Williams v. Eastside Mental Health Ctr., Inc.*, 669 F.2d 671, 680–81 (11th Cir. 1982) (providing mental health services is not a traditional governmental function), *Pub. Serv. Co. of N.C. v. Fed. Energy Regulatory Comm’n*, 587 F.2d 716, 721 (5th Cir. 1979) (sale of natural gas is not a traditional governmental function), and *P.R. Tel. Co. v. Fed. Commc’n Comm’n*, 553 F.2d 694, 700–01 (1st Cir. 1977) (operation of a telephone company is not a traditional governmental function).

<sup>65</sup> See *Garcia*, 469 U.S. at 530–31.

<sup>66</sup> See *Nat’l League*, 426 U.S. at 856 (Blackmun, J., concurring); see also *Garcia*, 469 U.S. at 556.

<sup>67</sup> See *Garcia*, 469 U.S. at 539–47.

<sup>68</sup> See *id.* at 548.

<sup>69</sup> See *id.* at 548–50.

<sup>70</sup> See *id.*

<sup>71</sup> See *id.* at 550–54.

composition of the House of Representatives and the election of the President insofar as the states control electoral qualifications, and the states, until ratification of the Seventeenth Amendment in 1913, had direct control over the composition of the Senate.<sup>72</sup> Thus, Justice Blackmun concluded that “the political position of the States in the federal system has served to minimize the burdens that the States bear under the Commerce Clause.”<sup>73</sup>

The 5–4 *Garcia* decision was announced over vociferous dissent.<sup>74</sup> Justice Rehnquist, in one of three dissenting opinions, asserted confidently that the *National League* conception of state sovereignty and its limitation on congressional power would “in time again command the support of a majority of this Court.”<sup>75</sup> To a large degree, Justice Rehnquist’s prediction has come true, albeit indirectly.<sup>76</sup> In 1992, in *New York v. United States*, the Court revived state sovereignty as a limitation on Congress’s exercise of its Commerce Clause powers.<sup>77</sup> In that case, the Court was confronted with a federal statute attempting to deal with the interstate disposal of radioactive waste by requiring states either to enact specific legislation regulating the waste or to take title to the waste from the in-state hospitals that were producing it.<sup>78</sup> The Court recognized the authority of Congress to regulate the interstate market in waste disposal under the Commerce Clause but held that state sovereignty is an inherent limitation on the Commerce Clause, preventing Congress from directing state legislatures to enact federally prescribed legislation.<sup>79</sup> Essentially, the Court held that whatever Congress can regulate under the Commerce Clause it must regulate directly.<sup>80</sup>

Without expressly affirming or disapproving of any prior cases, the Court stated in *New York* that it was not revisiting any of its decisions pertaining to Congress’s ability to subject states to generally applicable

<sup>72</sup> See *Garcia*, 469 U.S. at 551.

<sup>73</sup> *Id.* at 553–54. Implicit in this rejection of state sovereignty as a bar to congressional action is a repudiation of the “balancing of interests” approach articulated by Justice Blackmun in his *Garcia* concurrence. See *id.* at 556–57; *Nat’l League*, 426 U.S. at 856 (Blackmun, J., concurring).

<sup>74</sup> See *Garcia*, 469 U.S. at 557–79 (Powell, J., dissenting); *id.* at 579–80 (Rehnquist, J., dissenting); *id.* at 580–89 (O’Connor, J., dissenting).

<sup>75</sup> *Id.* at 580 (Rehnquist, J., dissenting).

<sup>76</sup> See *Printz v. United States*, 521 U.S. 898, 932 (1997); *New York v. United States*, 505 U.S. 144, 177–78, 181–83 (1992).

<sup>77</sup> See *New York*, 505 U.S. at 177–78, 181–83.

<sup>78</sup> *Id.* at 149–54.

<sup>79</sup> *Id.* at 159–66.

<sup>80</sup> See *id.* at 166.

federal laws, citing, among other cases, *Garcia*.<sup>81</sup> The Court proceeded, however, to undermine *Garcia* in two important respects.<sup>82</sup> First, it refused to recognize as settled the issue of the states' subjection to generally applicable federal laws—the primary issue in *Garcia*—and recognized that a weighing of relative interests may be required.<sup>83</sup> Second, in response to an argument that the State of New York should be barred from challenging the waste disposal legislation because its own officials had supported the legislation in Congress, the Court held that congressional authority cannot be expanded beyond its constitutional limits simply because the affected entity consents to the expansion.<sup>84</sup> The Court stated that federalism exists for the protection of individuals, not for states in and of themselves or their officials, and thus asserted its duty to protect states from unconstitutional federal encroachment.<sup>85</sup> This pronouncement essentially abrogated one of the analytical pillars supporting Justice Blackmun's holding in *Garcia*—that the states' position in the constitutional structure and their participation in the political process negate any need for the courts to protect encroachments on their sovereignty.<sup>86</sup> The Court's treatment of *Garcia* in *New York* represents a clear limitation on that case's holding and even calls into question the case's continued viability generally.<sup>87</sup>

### C. *The Post-Garcia Limitations on the Commerce Clause Power*

Despite the seemingly severe limitations placed on the Supreme Court's holding in *Garcia*, the Court has not yet expressly overruled the case; therefore, it presumably remains good law insofar as it allows

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<sup>81</sup> *Id.* at 160.

<sup>82</sup> See *New York*, 505 U.S. at 177–78, 182–83.

<sup>83</sup> See *id.* at 177–78 (citing both *National League* and *Garcia* but not reaching the question of “whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable federal regulation . . .”). Five years later, in *Printz*, the Supreme Court again stated that the question remains open and again cited both *National League* and *Garcia*. See *Printz*, 521 U.S. at 932.

<sup>84</sup> *New York*, 505 U.S. at 182.

<sup>85</sup> See *id.* at 181–83.

<sup>86</sup> See *id.*; see also *Garcia*, 469 U.S. at 550–54 (presenting the “structural” argument against court protection of state sovereignty). In an almost direct affront to *Garcia*, the Court supported its holding by citing a footnote from *National League* that dismissed a similar “structural” argument made by Justice Brennan in his dissent from that case. See *New York*, 505 U.S. at 182 (citing *Nat'l League*, 426 U.S. at 841 n.12). The Court did not mention or cite *Garcia* directly. See *id.*

<sup>87</sup> See *New York*, 505 U.S. at 177–78, 182–83; see also *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 860–61 (4th Cir. 1999) (en banc) (recognizing the invalidity of *Garcia*'s “structural” analysis), *aff'd sub nom.* *United States v. Morrison*, 529 U.S. 598 (2000).

Congress to subject the states as employers to generally applicable federal labor laws under the Commerce Clause.<sup>88</sup> But even if *Garcia* remains intact, an open question remains as to whether state employment—particularly the employment of public safety officers—is subject to the Commerce Clause.<sup>89</sup> In both *National League* and *Garcia*, the state challengers did not raise the issue, ceding state employment regulation as within the scope of the Commerce Clause.<sup>90</sup> In 1976 and 1985, this was undoubtedly a good strategy on the part of the challenger-states, as the Commerce Clause had been read by the Supreme Court to permit congressional regulation of virtually any activity for which a link to interstate commerce could be articulated.<sup>91</sup>

The Supreme Court, however, ended its *laissez faire* deference to congressional determinations of Commerce Clause authority in 1995 in *United States v. Lopez*—the first case in nearly eighty years in which the Court struck down a federal statute as beyond the scope of the Commerce Clause.<sup>92</sup> At issue in the case was a provision of the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a firearm within 1000 feet of a school (the “possession provision”).<sup>93</sup> A high school student charged with violating the possession provision challenged it as beyond the scope of Congress’s powers, but the U.S. District Court for the Western District of Texas found the statute to be a valid exercise of the Commerce Clause power.<sup>94</sup> On appeal, however, the U.S. Court of Appeals for the Fifth Circuit agreed with the student and struck down the provision.<sup>95</sup> In a landmark opinion, the Supreme Court affirmed the decision of the court of appeals.<sup>96</sup>

The Supreme Court enumerated three purposes for which the Commerce Clause permits Congress to act: (1) to regulate the use of

<sup>88</sup> See *Garcia*, 469 U.S. at 554 (“[The San Antonio Metropolitan Transit Authority] faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.”).

<sup>89</sup> See *Morrison*, 529 U.S. at 608–13; *United States v. Lopez*, 514 U.S. 549, 558–60 (1995); *Garcia*, 469 U.S. at 575 (Powell, J., dissenting).

<sup>90</sup> See *Garcia*, 469 U.S. at 537; *Nat’l League*, 426 U.S. at 837.

<sup>91</sup> See, e.g., *Wirtz*, 392 U.S. at 194–95 (stating in dicta that schools and hospitals are “major users of goods imported from other states” and, therefore, congressional regulation of school and hospital employment is permitted because strikes or work stoppages would interrupt the flow of the imported goods).

<sup>92</sup> See *Lopez*, 514 U.S. at 551.

<sup>93</sup> *Id.* at 551; see also 18 U.S.C. § 922(q)(2)(A) (1988 & Supp. V 1993) (the possession provision), *invalidated by Lopez*, 514 U.S. 549.

<sup>94</sup> *Lopez*, 514 U.S. at 551–52.

<sup>95</sup> *Id.* at 552.

<sup>96</sup> *Id.*

the channels of interstate commerce; (2) to regulate and protect the instrumentalities of interstate commerce (i.e., people or things *in* interstate commerce); and (3) to regulate activities that “substantially affect” interstate commerce.<sup>97</sup> The Court noted that the legislative history of the possession provision lacked any findings by Congress as to the relationship between interstate commerce and gun possession near schools, thus denying the Court the ability to evaluate any connection not readily apparent but understood by Congress.<sup>98</sup> The government, nevertheless, argued that the possession provision was valid under the third category of Commerce Clause authority.<sup>99</sup> It asserted that guns near schools might (1) result in violent crime, which would result in the expenditure of insurance money, which would be spread across the country; (2) result in violent crime, which would reduce the willingness of people to travel; or (3) handicap the educational process, which would result in a less productive citizenry, which would eventually adversely affect the national economy.<sup>100</sup> The Court refused to “pile inference upon inference” in order to establish the connection.<sup>101</sup> Instead, it held simply that gun possession is “in no sense an *economic activity* that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”<sup>102</sup>

Five years later, in *United States v. Morrison*, the Court affirmed *Lopez* in full when it struck down a provision of the Violence Against Women Act of 1994, which created a federal cause of action for victims of gender-motivated violence against their attackers (the “civil remedy provision”), as beyond the scope of the Commerce Clause authority.<sup>103</sup> At issue in *Morrison* was whether the civil remedy provision regulated an activity “substantially affecting” interstate commerce and was thus a valid exercise of the Commerce Clause power.<sup>104</sup> Unlike the statute in question in *Lopez*, the legislative history of the civil remedy provision contained several congressional “findings” as to the effects of gender-

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<sup>97</sup> *Id.* at 558–59.

<sup>98</sup> *Id.* at 562–63.

<sup>99</sup> *Lopez*, 514 U.S. at 563–64.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 567.

<sup>102</sup> *Id.* (emphasis added).

<sup>103</sup> *Morrison*, 529 U.S. at 605–06, 611, 618; see also 42 U.S.C. § 13981 (1994) (the civil remedy provision), *invalidated by Morrison* 529 U.S. 598.

<sup>104</sup> *Morrison*, 529 U.S. at 608–09. Also at issue in *Morrison* was an alternative argument that the civil remedy provision was valid as an exercise of Congress’s remedial power under Section 5 of the Fourteenth Amendment. *Id.* at 619. The Court held that it was not. *Id.* at 625–27.

motivated violence on interstate commerce: gender-motivated violence deters victims from interstate travel, employment in interstate business, and interstate business transactions; diminishes national productivity; increases medical costs; and decreases the supply of and demand for “interstate products.”<sup>105</sup> Despite Congress’s efforts, the Supreme Court asserted the duty to review the strength of the legislative findings.<sup>106</sup> The Court confirmed its *Lopez* holding, that for an activity to “substantially affect” interstate commerce it at least must be “some sort of economic endeavor,” and determined that gender-motivated violence does not qualify.<sup>107</sup> The Court held that the reasoning behind the legislative findings (i.e., that the non-economic regulated activity eventually affects interstate commercial activity at some point along an attenuated causal chain) cannot be permitted because it could allow Congress to regulate virtually any activity, even areas of “traditional state regulation.”<sup>108</sup>

In 2005, in *Gonzales v. Raich*, the most recent Supreme Court case addressing the scope of congressional Commerce Clause power, the Court upheld the applicability of a federal statute prohibiting drug possession to a cancer patient who grew marijuana at her home solely for personal, medicinal use.<sup>109</sup> The Court did not alter its decisions in *Lopez* or *Morrison* to reach its conclusion but affirmed a longstanding holding that Congress may regulate local economic activities that are part of a “class of activities” substantially affecting interstate commerce.<sup>110</sup> This, the Court held, allows Congress to regulate the local “production, distribution, and consumption of commodities for which there is an . . . interstate market.”<sup>111</sup>

The Commerce Clause, as interpreted today, thus permits congressional regulation of the channels and instrumentalities of interstate commerce and of activities substantially affecting interstate commerce.<sup>112</sup> To substantially affect interstate commerce, an activity must be economic and must either have a direct, nonattenuated impact on inter-

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<sup>105</sup> *Id.* at 614–15 (quoting H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.), as reprinted in 1994 U.S.C.C.A.N. 1801, 1853).

<sup>106</sup> *Id.*

<sup>107</sup> *See id.* at 611 (citing *Lopez*, 514 U.S. at 559–60); *id.* at 613.

<sup>108</sup> *See id.* at 615–16. The Court’s concern for protecting from federal intrusion “areas of traditional state regulation,” *see id.*, further calls into doubt the continued force of *Garcia*, which declared as unworkable judicial inquiries into “traditional governmental functions,” *see Garcia*, 469 U.S. at 531.

<sup>109</sup> *See* 545 U.S. 1, 6–7, 17 (2005).

<sup>110</sup> *See id.* at 17 (citing *Perez v. United States*, 402 U.S. 145, 151 (1971) & *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942)); *id.* at 23–25.

<sup>111</sup> *See id.* at 25–26.

<sup>112</sup> *See id.* at 16–17; *Morrison*, 529 U.S. at 608–09; *Lopez*, 514 U.S. at 558–59.

state commerce or must be part of a “class of activities” having such an impact (i.e., involve commodities with interstate markets).<sup>113</sup> The courts will not simply defer to congressional findings of Commerce Clause applicability and will determine for themselves whether an activity qualifies for federal regulation under the Clause.<sup>114</sup>

## II. CONGRESSIONAL AUTHORITY AND LIMITATIONS WITH RESPECT TO NATIONAL EMERGENCIES AND LOCAL FIRST-RESPONDERS

Congressional authority derives from many constitutional sources in addition to the Commerce Clause.<sup>115</sup> This Part examines the sources of authority for Congress’s ability to legislate concerning domestic-front national emergencies.<sup>116</sup> It then reviews the ways in which Congress actually exercises its authority.<sup>117</sup> Finally, this Part examines the restraints on congressional power over states (including the power to legislate concerning national emergencies) imposed by the anti-commandeering doctrine.<sup>118</sup>

### A. *The Federal Role in National Emergencies*

The federal government’s powers in the area of foreign affairs are unquestioned and, unlike other federal powers, are generally regarded as plenary.<sup>119</sup> Although issues involving these plenary foreign affairs powers have been rarely litigated, some courts have inferred from this authority a somewhat broader “national defense” power that authorizes some forms of *domestic* congressional activity.<sup>120</sup> The limits

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<sup>113</sup> See *Raich*, 545 U.S. at 17, 23–25; *Morrison*, 529 U.S. at 611, 615–16; *Lopez*, 514 U.S. at 567.

<sup>114</sup> See *Morrison*, 529 U.S. at 614–15.

<sup>115</sup> See, e.g., U.S. CONST. art I, § 8, cls. 1–2, 4–18.

<sup>116</sup> See *infra* notes 119–136 and accompanying text.

<sup>117</sup> See *infra* notes 119–136 and accompanying text.

<sup>118</sup> See *infra* notes 137–152 and accompanying text.

<sup>119</sup> See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315–16 (1936) (“The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.”); see also *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 417–20 (2003) (invalidating a state insurance law because of a perceived conflict with federal foreign policy); *Zschernig v. Miller*, 389 U.S. 429, 432, 440 (1968) (invalidating a state inheritance law because it was an impermissible “intrusion” into the field of foreign affairs insofar as it required the state’s officials to inquire into the internal policies of foreign countries).

<sup>120</sup> See, e.g., *United States v. Peace Info. Ctr.*, 97 F. Supp. 255, 261–62 (D.D.C. 1951) (recognizing a “national defense” power and upholding under it a federal statute aimed at “propaganda carried on in this country by foreign agents”); cf. *Youngstown Sheet & Tube*

of this power have not been well-defined, but the Supreme Court has held that, at the very least, it cannot be used to infringe constitutional rights without a careful case-by-case balancing by the courts.<sup>121</sup> With regard to issues of federalism, specifically whether Congress could invoke “national defense” as authority to direct the states’ responses to national emergencies, the extent of congressional authority is not at all clear because, thus far, such an attempt has not been made.<sup>122</sup>

Instead, Congress has largely relied on its spending power to gain federal influence over national emergencies, which include natural disasters (e.g., floods), large-scale accidents (e.g., hazardous chemical spills), and terrorist attacks.<sup>123</sup> The Spending Clause of the Constitution permits Congress 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 . . . .”<sup>124</sup> The Supreme Court has interpreted this grant of power broadly: Congress, essentially, may spend federal money as it sees fit.<sup>125</sup> Included in this power is the ability to condition monetary grants to the states; in other words, Congress may exact state action that it could not otherwise impose,

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Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 587 (1952) (suggesting that Congress, but not the President, could effect the seizure of private industrial concerns in order to quell labor disputes because of the importance of industry to national defense efforts).

<sup>121</sup> See *United States v. Robel*, 389 U.S. 258, 264 (1967).

<sup>122</sup> *Cf. id.* In *Robel*, the Court stated that the

concept of “national defense” cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term “national defense” is the notion of defending those values and ideals which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.

*Id.* One may wonder whether the Court would include the vertical separation of powers among the liberties making the defense of the nation worthwhile. See *id.*; *cf.* *New York v. United States*, 505 U.S. 144, 181 (1992) (“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))).

<sup>123</sup> See, e.g., Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C.A. §§ 5121–5207 (West 2000 & Supp. 2008). Congress’s spending authority is granted in the Spending Clause of the Constitution, the first of Congress’s enumerated powers. See U.S. CONST. art. I, § 8, cl. 1.

<sup>124</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>125</sup> See *Sabri v. United States*, 541 U.S. 600, 605 (2004) (“Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare . . . .”); *United States v. Butler*, 297 U.S. 1, 66 (1936) (“[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”); see also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* § 3.4.1, at 273–75, § 3.4.3, at 278–81 (3d ed. 2006).

through the promise of money.<sup>126</sup> So, to assert a federal role in emergencies, Congress uses this power and conditions federal grants and assistance on the states' acceptance of federal policies.<sup>127</sup>

The Robert T. Stafford Disaster Relief and Emergency Assistance Act, the principal federal legislation pertaining to national emergencies, is a prime example of an exercise of the congressional spending power.<sup>128</sup> The Act gives federal agencies a secondary role in emergencies, leaving state and local officials as first responders.<sup>129</sup> Congress has been careful to respect the states' autonomy in responding to emergencies occurring within their borders, authorizing the federal government to provide post-disaster assistance—either in the form of money or manpower—only upon request by governors.<sup>130</sup> States thus have the choice of whether to request and accept federal emergency assistance and to comply with any federal mandates attached to it.<sup>131</sup>

Closely related to responding to emergencies is preparing for them, and Congress has mostly taken the same states-first approach in its preparedness efforts.<sup>132</sup> The federal government makes prepared-

<sup>126</sup> See *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987) (affirming Congress's ability to require states to enact a minimum drinking age in exchange for federal highway money); *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 142–44 (1947) (affirming Congress's ability to impose requirements for state employment in exchange for federal funds); see also CHEMERINSKY, *supra* note 125, § 3.4.3, at 279–81. Congress's power to condition grants is not absolute; the condition must be explicit, so that states accept it knowingly, and it must bear some relation to the federal interest being advanced. See *Dole*, 483 U.S. at 207–08.

<sup>127</sup> See, e.g., 42 U.S.C.A. §§ 5121–5207.

<sup>128</sup> See *id.*

<sup>129</sup> See *id.* § 5121(b) (“It is the intent of Congress . . . to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out *their* responsibilities to alleviate the suffering and damage which result from such disasters . . . .” (emphasis added)).

<sup>130</sup> See *id.* § 5170 (authorizing the President to declare a “major disaster” only upon request by the state governor); *id.* § 5170b(c) (authorizing the President to allow the use of Department of Defense resources upon request by the state governor); *id.* § 5191(a) (authorizing the President to declare an “emergency” only upon request by the state governor). *But see id.* § 5191(b) (authorizing the President to declare an “emergency” independently in cases involving “a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority” but still requiring that the President “consult the Governor of any affected State, if practicable”).

<sup>131</sup> See *id.* §§ 5170, 5170b(c), 5191(a); see also *City of San Bruno v. FEMA*, 181 F. Supp. 2d 1010, 1011 (N.D. Cal. 2001) (“After a disaster has been declared [pursuant to 42 U.S.C.A. § 5170], the affected state and FEMA enter into an agreement under which the state is the initial ‘grantee’ and is responsible for dispersing funds pursuant to the agreement with FEMA.”).

<sup>132</sup> See, e.g., 42 U.S.C.A. §§ 5131–5134.

ness funds and training programs available only to states that desire them and that are willing to satisfy federally prescribed requirements attached to them.<sup>133</sup> An ambitious example of federal preparedness efforts includes the National Incident Management System (“NIMS”), implemented originally in 2004 by the Department of Homeland Security and recently revised and reimplemented in August 2007.<sup>134</sup> NIMS is not a specific emergency response plan; it is essentially a framework, which, if adopted universally, would harmonize, and thus facilitate, emergency response methods across jurisdictions.<sup>135</sup> The presidential directive ordering the creation of NIMS also requires all federal departments and agencies to adopt the program and, to achieve widespread adoption by state and local first responders (e.g., police, firefighters, and emergency medical services workers), makes NIMS adoption a condition of the states’ and localities’ receipt of federal preparedness assistance.<sup>136</sup>

#### B. *Restraints on Federal Power Imposed by the Anti-Commandeering Doctrine*

A general limitation on congressional authority over the states, and one with particular importance to domestic national defense and federal emergency response efforts, is the anti-commandeering doctrine, which prevents the federal government from asserting direct control over state governments and state officials.<sup>137</sup> The Supreme Court first articulated the modern anti-commandeering doctrine in 1992 in *New York v. United States*.<sup>138</sup> The Court, finding that the Tenth Amendment is an affirmation of state sovereignty, held that Congress cannot constitutionally violate the states’ sovereignty by compelling their *legislatures* to enact prescribed legislation.<sup>139</sup>

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<sup>133</sup> See 15 U.S.C.A. §§ 2201–2228 (West 2000 & Supp. V 2005); 42 U.S.C.A. §§ 5131–5134.

<sup>134</sup> See generally Homeland Security Presidential Directive/HSPD-5—Management of Domestic Incidents, 1 PUB. PAPERS 229 (Feb. 28, 2003) [hereinafter HSPD-5]; U.S. DEPT. OF HOMELAND SEC., NATIONAL INCIDENT MANAGEMENT SYSTEM (Draft Aug. 2007) [hereinafter NIMS], available at [http://www.fema.gov/emergency/nims/nims\\_doc.shtml](http://www.fema.gov/emergency/nims/nims_doc.shtml) (follow “Draft Revised NIMS—August 2007” hyperlink; then follow “View / Download / Print” hyperlink).

<sup>135</sup> See NIMS, *supra* note 134, at 3.

<sup>136</sup> HSPD-5, *supra* note 134, at 233.

<sup>137</sup> See *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York*, 505 U.S. at 188.

<sup>138</sup> See 505 U.S. at 166; see also *supra* notes 77–87 and accompanying text.

<sup>139</sup> See *New York*, 505 U.S. at 166; see also U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to States, are reserved to the States respectively, or to the people.”).

In 1997, in *Printz v. United States*, the Supreme Court affirmed its holding in *New York* and extended it to Congress's ability to direct state *executive officials* to carry out federal law by striking down a provision of gun control legislation as violating the anti-commandeering doctrine.<sup>140</sup> In 1993, Congress enacted the Brady Handgun Violence Prevention Act, which required the establishment of a background check system for handgun purchasers.<sup>141</sup> The Act contained several interim provisions regulating gun sales during the period that the background check database was being developed.<sup>142</sup> Among these provisions was a requirement that gun sellers provide local law enforcement with information on prospective purchasers and that the law enforcement officers "make reasonable efforts" within five days to determine whether gun sales to those individuals would be lawful.<sup>143</sup> Two law enforcement officers challenged the interim provision by objecting to being "pressed" into federal service and arguing that federal legislation compelling state officers to execute federal laws is unconstitutional.<sup>144</sup> The Supreme Court agreed with them.<sup>145</sup> Noting that the text of the Constitution does not expressly answer the question of the federal government's ability to have local officials execute its laws, the Court turned to three alternative sources: historical practice, the structural elements of the Constitution, and precedent.<sup>146</sup>

First, the Court determined that, historically, the federal government had never imposed obligations on state *executive officials*.<sup>147</sup> Second, the Court examined the structure of the Constitution and found (1) that the protections afforded by "dual sovereignty" would be severely undermined if one sovereign could impress the officials of the other into its service<sup>148</sup> and (2) that the delegation by Congress of executive (i.e., law enforcing) activities to entities and individuals outside of the control of the President runs afoul of Article II of the Constitution.<sup>149</sup> Finally, the Court looked to its precedent, particularly *New*

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<sup>140</sup> *Printz*, 521 U.S. at 935.

<sup>141</sup> *Id.* at 902; *see also* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103, 107 Stat. 1536, 1541-43 (1993).

<sup>142</sup> *Printz*, 521 U.S. at 902-03.

<sup>143</sup> *Id.* at 903.

<sup>144</sup> *Id.* at 904-05.

<sup>145</sup> *See id.* at 935.

<sup>146</sup> *Id.* at 905.

<sup>147</sup> *See Printz*, 521 U.S. at 905-18.

<sup>148</sup> *See id.* at 918-22.

<sup>149</sup> *See id.* at 922-25; *see also* U.S. CONST. art II, sec. 1 ("The executive Power shall be vested in a President of the United States of America.").

*York*, and affirmed that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.”<sup>150</sup>

The Court summarized its anti-commandeering doctrine succinctly and unequivocally:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States’ officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.<sup>151</sup>

The anti-commandeering doctrine thus serves as a clear limit to federal authority and suggests one reason why Congress has not altered its Spending Clause approach to effecting local policies regarding national emergency responses.<sup>152</sup>

### III. OVERVIEW OF THE HISTORY AND PROVISIONS OF THE PENDING PUBLIC SAFETY EMPLOYER-EMPLOYEE COOPERATION ACT

Beginning with the 104th Congress in 1995, Michigan Representative Dale E. Kildee has introduced a version of the Public Safety Employer-Employee Cooperation Act (“PSEEC Act” or the “Act”) in the House of Representatives in each Congress (i.e., every second year), including the current one, the 110th.<sup>153</sup> Beginning with the 106th Congress in 1999, companion legislation has consistently been introduced in the Senate.<sup>154</sup> The goal of the legislation has remained unchanged: to require states and their localities to engage in collective bargaining with the unions representing the public safety officers (i.e.,

<sup>150</sup> *Printz*, 521 U.S. at 933 (quoting *New York*, 505 U.S. at 188).

<sup>151</sup> *Id.* at 935.

<sup>152</sup> See *id.*; *supra* notes 119–136 and accompanying text.

<sup>153</sup> See H.R. 980, 110th Cong. (2007); H.R. 1249, 109th Cong. (2005); H.R. 814, 108th Cong. (2003); H.R. 1475, 107th Cong. (2001); H.R. 1093, 106th Cong. (1999); H.R. 1173, 105th Cong. (1997); H.R. 1484, 104th Cong. (1995).

<sup>154</sup> See S. 2123, 110th Cong. (2007); S. 513, 109th Cong. (2005); S. 606, 108th Cong. (2003); S. 952, 107th Cong. (2001); S. 1016, 106th Cong. (1999).

police officers, firefighters, and emergency medical services workers) whom they employ.<sup>155</sup> In the words of the legislation's supporters, it is designed to extend the collective bargaining right to "the only sizeable group of workers" lacking it.<sup>156</sup> This Part briefly traces the legislative history, to date, of the PSEEC Act, and examines its purported sources of authority: the Commerce Clause and congressional "national defense" power.<sup>157</sup>

The first two PSEEC Act bills, introduced by Representative Kildee in 1995 and 1997, failed to advance out of the House subcommittees to which they were referred.<sup>158</sup> In 1999, both a House and a Senate version of a PSEEC Act bill were introduced, and, although neither advanced out of its committee, both were given committee hearings.<sup>159</sup> The House and Senate bills introduced in 2001, 2003, and 2005 either failed to advance out of their respective committees or subcommittees or failed to receive a vote in the full house in which they were introduced.<sup>160</sup> In February 2007, Representative Kildee introduced the PSEEC Act again as House Bill 980, which advanced out of its subcommittee and committee after two hearings and was passed by the House of Representatives by a vote of 314 to 97 on July 17, 2007.<sup>161</sup> In October 2007, a companion PSEEC Act bill—Senate Bill 2123—was introduced in the Senate and is currently awaiting a committee hearing.<sup>162</sup> It has thirty-six co-sponsors.<sup>163</sup>

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<sup>155</sup> See S. 2123 § 4 (2007); H.R. 980 § 4 (2007); S. 513 § 4 (2005); H.R. 1249 § 4 (2005); S. 606 § 4 (2003); H.R. 814 § 4 (2003); S. 952 § 4 (2001); H.R. 1475 § 4 (2001); S. 1016 § 4 (1999); H.R. 1093 § 4 (1999); H.R. 1173 § 4 (1997); H.R. 1484 § 4(a) (1995).

<sup>156</sup> See 147 CONG. REC. E545 (daily ed. Apr. 5, 2001) (statement of Rep. Kildee).

<sup>157</sup> See *infra* notes 158–189 and accompanying text.

<sup>158</sup> See H.R. 1173 (1997); H.R. 1484 (1995); H.R. REP. NO. 110-232, at 5–6 (2007).

<sup>159</sup> See S. 1016 (1999); H.R. 1093 (1999); H.R. REP. NO. 110-232, at 6–7. See generally *Public Safety Employer-Employee Cooperation Act of 1999: Hearing on S.1016 Before the S. Comm. on Health, Educ., Labor, and Pensions*, 106th Cong. (2000) [hereinafter *2000 Senate Hearing*]; *Public Safety Employer-Employee Cooperation Act of 1999: Hearing on H.R. 1093 Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Educ. and the Workforce*, 106th Cong. (2000) [hereinafter *2000 House Hearing*].

<sup>160</sup> See H.R. REP. NO. 110-232, at 7–8; see also S. 513 (2005) (died in committee); H.R. 1249 (2005) (died in subcommittee); S. 606 (2003) (advanced out of committee but died awaiting vote by the full Senate); H.R. 814 (2003) (died in subcommittee); S. 952 (2001) (advanced out of committee but died awaiting vote by the full Senate); H.R. 1475 (2001) (died in subcommittee).

<sup>161</sup> See H.R. 980 (2007); H.R. REP. NO. 110-232, at 8–9 (2007); 153 CONG. REC. H7871–72 (daily ed. July 17, 2007).

<sup>162</sup> See S. 2123 (2007).

<sup>163</sup> See 154 CONG. REC. S4487 (daily ed. May 20, 2008); 154 CONG. REC. S4029 (daily ed. May 12, 2008); 154 CONG. REC. S2232 (daily ed. Mar. 31, 2008); 154 CONG. REC. S1877 (daily ed. Mar. 11, 2008); 154 CONG. REC. S1202 (daily ed. Feb. 26, 2008); 153 CONG. REC.

In its current pending form, the PSEEC Act would require the Federal Labor Relations Authority (“FLRA” or the “Authority”), which currently administers the collective bargaining laws pertaining to federal employees, to survey the laws of the states to determine whether they expressly provide for certain “rights and responsibilities”: (a) the right of public safety officers to unionize; (b) the requirement that the states and their localities bargain collectively with public safety unions over hours, wages, and conditions of employment; and (c) the ability to enforce collective bargaining agreements in state courts.<sup>164</sup> The Act would then require the FLRA to promulgate regulations creating the prescribed “rights and responsibilities” for states whose laws fail to provide for them.<sup>165</sup> The FLRA would then enforce its regulations in those states by supervising and certifying union elections, investigating violations, conducting hearings of complaints, and issuing orders to state and municipal employers, enforcement of which the Authority could seek in the federal courts of appeals.<sup>166</sup>

As with all federal legislation, Congress can constitutionally enact the PSEEC Act only pursuant to one of its constitutionally enumerated powers.<sup>167</sup> Which power enables enactment of the PSEEC Act has not always been made clear by the drafters of its various versions.<sup>168</sup> The first two PSEEC Act bills, introduced in 1995 and 1997, lacked any invocation of a constitutionally enumerated power, asserting simply that the Act served the “health and safety of the Nation and the best interest of public safety employers and employees.”<sup>169</sup>

Beginning with the third iteration of the Act in 1999, however, the drafters added language invoking Congress’s Commerce Clause power:

S15,139 (daily ed. Dec. 11, 2007); 153 CONG. REC. S14,400 (daily ed. Nov. 14, 2007); 153 CONG. REC. S13,990 (daily ed. Nov. 6, 2007); 153 CONG. REC. S13,686 (daily ed. Nov. 1, 2007); 153 CONG. REC. S13,581 (daily ed. Oct. 30, 2007); 153 CONG. REC. S12,937 (daily ed. Oct. 16, 2007); 153 CONG. REC. S12,379 (daily ed. Oct. 1, 2007).

<sup>164</sup> See S. 2123 § 4(a)(1), (b); H.R. 980 § 4(a)(1), (b) (2007).

<sup>165</sup> S. 2123 § 5(a) (2007); H.R. 980 § 5(a) (2007).

<sup>166</sup> S. 2123 § 5(b)–(c) (2007); H.R. 980 § 5(b)–(c) (2007).

<sup>167</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803))).

<sup>168</sup> See S. 2123 § 2 (2007); H.R. 980 § 2 (2007); S. 513 § 2 (2005); H.R. 1249 § 2 (2005); S. 606 § 2 (2003); H.R. 814 § 2 (2003); S. 952 § 2 (2001); H.R. 1475 § 2 (2001); S. 1016 § 2 (1999); H.R. 1093 § 2 (1999); H.R. 1173 § 2 (1997); H.R. 1484 § 2 (1995).

<sup>169</sup> See H.R. 1173 § 2(2) (1997); H.R. 1484 § 2(2) (1995).

The absence of adequate cooperation between public safety employers and employees has implications for the security of employees and *can affect interstate and intrastate commerce*. Additionally, the lack of such labor-management cooperation detrimentally impacts the upgrading of police and fire services of local communities, the health and well-being of public safety officers, and the morale of the fire and police departments. These factors *could have significant commercial repercussions*. Moreover, providing minimal standards for collective bargaining negotiations in the public safety industry will prevent industrial strife between labor and management that *interferes with the normal flow of commerce*.<sup>170</sup>

Both a House subcommittee and a Senate committee held hearings on this version of the PSEEC Act.<sup>171</sup> In neither hearing was there discussion of this language or of the effects of the lack of collective bargaining between public safety officers and their employers on interstate commerce.<sup>172</sup> This commerce-invoking language remained unchanged in the PSEEC Act bills introduced in 2001, 2003, and 2005.<sup>173</sup>

In House Bill 980 and Senate Bill 2123, the current pending versions of the PSEEC Act, the drafters have included similar commerce-invoking language and added additional language invoking a different congressional power—national defense.<sup>174</sup> The new language in House Bill 980 reads:

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<sup>170</sup> H.R. 1093 § 2(4) (1999) (emphasis added); *see also* U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”). The Senate version of the PSEEC Act in 1999 also invoked the Commerce Clause but much more cursorily than the House version. *See* S. 1016 § 2(2) (1999) (“[T]o maintain the normal flow of commerce the public safety industry requires minimal standards for collective bargaining.”).

<sup>171</sup> *See generally* 2000 Senate Hearing, *supra* note 159; 2000 House Hearing, *supra* note 159.

<sup>172</sup> *See generally* 2000 Senate Hearing, *supra* note 159; 2000 House Hearing, *supra* note 159.

<sup>173</sup> *See* S. 513 § 2(3) (2005); H.R. 1249 § 2(4) (2005); S. 606 § 2(3) (2003); H.R. 814 § 2(4) (2003); S. 952 § 2(3) (2001); H.R. 1475 § 2(4) (2001).

<sup>174</sup> *See* S. 2123 § 2(2), (4) (2007); H.R. 980 § 2(2), (5) (2007). House Bill 980’s commerce-invoking language has been largely abbreviated:

The potential absence of adequate cooperation between public safety employers and employees has implications for the security of employees, impacts the upgrading of police and fire services of local communities, the health and well-being of public safety officers, and the morale of the fire and police departments, and *can affect interstate and intrastate commerce*.

H.R. 980 § 2(5) (2007) (emphasis added). The language in Senate Bill 2123 remains the same as in the prior versions of the PSEEC Act. *See* S. 2123 § 2(4).

State and local public safety officers play an essential role in the efforts of the United States to detect, prevent, and respond to terrorist attacks, and to respond to natural disasters, hazardous materials, and other mass casualty incidents. As the first to arrive on scene, State and local public safety officers must be prepared to protect life and property and to preserve scarce and vital Federal resources, avoid substantial and debilitating interference with interstate and foreign commerce, and to protect the national security of the United States. Public safety employer-employee cooperation is essential in meeting these needs and is, therefore, in the National interest.<sup>175</sup>

The language in Senate Bill 2123 differs only slightly:

State and local public safety officers play an essential role in the efforts of the United States to detect, prevent, and respond to terrorist attacks, and to respond to natural disasters, hazardous materials, and other mass casualty incidents. State and local public safety officers, as first responders, are a component of our Nation's National Incident Management System, developed by the Department of Homeland Security to coordinate response to and recovery from terrorism, major natural disasters, and other major emergencies. Public safety employer-employee cooperation is essential in meeting these needs and is, therefore, in the National interest.<sup>176</sup>

The Subcommittee on Health, Employment, Labor, and Pensions of the House Committee on Education and Labor held hearings on House Bill 980 in June 2007 in which constitutional issues were discussed.<sup>177</sup> The Commerce Clause received little attention during the actual hearing but was addressed briefly in the written testimony of a Syracuse University law professor, who posited that the Supreme Court has permitted Congress to regulate labor relations under the Commerce Clause since 1937 and that Congress can regulate local activities "on the theory that the aggregate number of such local incidents might

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<sup>175</sup> H.R. 980 § 2(2) (2007).

<sup>176</sup> S. 2123 § 2(2) (2007).

<sup>177</sup> See generally *Rep. Robert E. Andrews Holds a Hearing on First Responder Collective Bargaining Rights* [Before the Subcomm. on Health, Employment, Labor & Pensions of the H. Educ. & Labor Comm.], 110th Cong. (June 5, 2007) [hereinafter *2007 House Hearing*], available at LEXIS, CQ Transcriptions database (official transcript not yet available). Unofficial copies of written testimony, as well as video of the hearing itself, are available at <http://edworkforce.house.gov/hearings/help060507.shtml> (last visited February 29, 2008).

affect interstate commerce.”<sup>178</sup> The Committee Report on House Bill 980, in its portion on the Commerce Clause, borrowed largely from that written testimony and stated:

The Supreme Court has acknowledged that Congress has considerable discretion to determine what activities affect interstate commerce, to the extent that it held events of purely local commerce . . . might, because of market forces, negatively affect interstate commerce, and thus could be regulated.

The economic impact of terrorism and natural disasters is not limited to the locality where these events occur. Rather, such events have regional and national economic impacts for which the federal government must be responsive. In addition to the devastating loss of life of September 11th, the City of New York estimates that the economic costs from the attacks is somewhere between \$83 billion and \$95 billion. . . . Furthermore, it is estimated that that [sic] the economic loss from Hurricane Katrina and subsequent flooding in New Orleans is expected to exceed \$100 billion. By improving the cohesiveness and effectiveness of public safety employers and their employees, H.R. 980 assists in stemming these costs.<sup>179</sup>

The Report goes on to address the issue of whether Congress can regulate states under the Commerce Clause:

Congress’[s] authority to provide collective bargaining rights to public safety employees is an extension of the Court’s 1995 [sic] decision in *Garcia v. San Antonio Metropolitan Transit Authority*. The Court in *Garcia* determined that Congress had the authority to extend wage and hour protections to state and local workers. If Congress determined that wage and hour protections should be extended to public sector workers, the Court reasoned that Representatives from those districts followed their constituents’ policy preferences. Additionally, ensuring individual liberty would be advanced by permitting Congress to extend [sic] wage and hour protections. Over the last twelve years, the Public Safety Employer-

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<sup>178</sup> See 2007 House Hearing, *supra* note 177 (written testimony of William Banks) (citing *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941) & *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)), available at <http://edworkforce.house.gov/testimony/060507WilliamBanksTestimony.pdf>.

<sup>179</sup> H.R. REP. NO. 110-232, at 18–19 (citation omitted) (citing *Darby*, 312 U.S. 100 & *Wickard*, 317 U.S. 111).

Employee Cooperation Act has garnered the support of no less fifty and as many as two-hundred and seventy-four co-sponsors. It is clear that not only a majority of the Congress, but the majority in this country support extending collective bargaining rights to public safety officers.<sup>180</sup>

A great deal of discussion during the subcommittee hearing on House Bill 980 regarding the constitutional basis for the PSEEC Act did not concern the Commerce Clause, but instead focused on national defense.<sup>181</sup> Witnesses testified that public safety officers were the first responders on September 11th and during Hurricane Katrina, and one firefighters' union representative asserted in written testimony that "[i]n light of the new, expansive federal role in Homeland Security, we do not believe any constitutional challenge would succeed."<sup>182</sup> The Committee Report relied heavily on this testimony, and, although the Report tied homeland security concerns to its Commerce Clause reasoning, national defense is also ubiquitous throughout the document as an independent source of authority for the Act.<sup>183</sup> Most notably, the Report asserts:

The federal government has a compelling interest in protecting the rights of public safety officers as part of protecting homeland security. The Public Safety Employer-Employee Cooperation Act intends to help ensure the effective delivery of emergency services by establishing minimal standards for collective bargaining between public safety employees and their employers.

The federal government utilizes local emergency response personnel to carry out federal disaster response activities, both at home and abroad and it retains the authority to send local government employees anywhere they are needed. Since the terrorist attacks of September 11, 2001, Congress and the President have given significant attention to the role of first responders in the nation's homeland security efforts.<sup>184</sup>

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<sup>180</sup> *Id.* at 19 (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

<sup>181</sup> See 2007 House Hearing, *supra* note 177 (testimony of Kevin O'Connor, Assistant to the General President, International Association of Firefighters, and Paul Nunziato, Vice President, Port Authority Police Benevolent Association).

<sup>182</sup> See *id.* (written testimony of Kevin O'Connor), available at <http://edworkforce.house.gov/testimony/060507KevinOConnorTestimony.pdf>.

<sup>183</sup> See H.R. REP. No. 110-232, at 12–13, 15, 17–18.

<sup>184</sup> *Id.* at 17.

The text of House Bill 980 and Senate Bill 2123, along with their legislative histories, to date, reveal that Congress is attempting to invoke two sources of authority to enact the PSEEC Act: the Commerce Clause and “national defense” authority.<sup>185</sup> As for the former, Congress has asserted that the types of situations to which public safety officers respond (e.g., terrorist attacks and natural disasters) have adverse effects on interstate commerce.<sup>186</sup> Imposing collective bargaining on the employers of public safety officers (i.e., states and their localities), Congress believes, will improve morale and working conditions and will improve the delivery of emergency services.<sup>187</sup> Thus, according to Congress, the PSEEC Act will mitigate any potential adverse effects on interstate commerce posed by unhappy first responders.<sup>188</sup> As for “national defense,” Congress has asserted that public safety officers play a role in the federal government’s national emergency prevention and response efforts and, therefore, imposing collective bargaining is in furtherance of those efforts.<sup>189</sup>

#### IV. CONSTITUTIONAL ISSUES PRESENTED BY THE PUBLIC SAFETY EMPLOYER-EMPLOYEE COOPERATION ACT

The Public Safety Employer-Employee Cooperation Act (“PSEEC Act” or the Act), passed by the House of Representatives in July 2007 as House Bill 980 and currently pending in the Senate as Senate Bill 2123, raises several constitutional questions, each of which threatens the Act’s validity.<sup>190</sup> Chief among these is the source of Congress’s authority to enact the legislation.<sup>191</sup> The two sources of authority readily

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<sup>185</sup> See S. 2123 § 2(2), (4); H.R. 980 § 2(2), (5); *2007 House Hearing, supra* note 177; H.R. REP. NO. 110-232, at 12–13, 17–19; *see also supra* notes 167–184 and accompanying text.

<sup>186</sup> See S. 2123 §§ 2(4), 4; H.R. 980 §§ 2(5), 5; *2007 House Hearing, supra* note 177; H.R. REP. NO. 110-232, at 18–19.

<sup>187</sup> See S. 2123 §§ 2(4), 4; H.R. 980 §§ 2(5), 5; *2007 House Hearing, supra* note 177; H.R. REP. NO. 110-232, at 18–19.

<sup>188</sup> See S. 2123 §§ 2(4), 4; H.R. 980 §§ 2(5), 5; *2007 House Hearing, supra* note 177; H.R. REP. NO. 110-232, at 18–19; *see also supra* notes 170–173, 177–180, and accompanying text.

<sup>189</sup> See S. 2123 § 2(2); H.R. 980 § 2(2); *2007 House Hearing, supra* note 177; H.R. REP. NO. 110-232, at 12–13, 15, 17–18; *see also supra* notes 174–176, 181–184, and accompanying text.

<sup>190</sup> See *United States v. Morrison*, 529 U.S. 598, 617–18 (2000); *Printz v. United States*, 521 U.S. 898, 935 (1997); *United States v. Lopez*, 514 U.S. 549, 566–67 (1995); *New York v. United States*, 505 U.S. 144, 181–83 (1992); Public Safety Employer-Employee Cooperation Act, S. 2123, 110th Cong. (2007); Public Safety Employer-Employee Cooperation Act, H.R. 980, 110th Cong. (2007).

<sup>191</sup> See *Morrison*, 529 U.S. at 617–18; *Printz*, 521 U.S. at 935; *Lopez*, 514 U.S. at 566–67; *New York*, 505 U.S. at 181–83. In addition to Congress’s ability to enact the PSEEC Act in the first instance, the federal government’s ability to enforce the Act may also present constitutional issues under the Eleventh Amendment, which, in certain cases, excludes the states from the

apparent from the Act itself—the Commerce Clause and “national defense” authority—do not provide solid footing; Congress’s ability to regulate the states’ and their localities’ employment of public safety officers is doubtful under either source.<sup>192</sup> This Part examines the viability of the PSEEC Act under both the Commerce Clause and national defense authority.<sup>193</sup> First, this Part argues that public safety employment does not substantially affect interstate commerce and, thus, does not fall within the purview of the Commerce Clause.<sup>194</sup> Next, this Part argues that, even if such employment substantially affects interstate commerce, the Supreme Court would likely hold the PSEEC Act barred by virtue of state sovereignty.<sup>195</sup> Finally, this Part argues that Congress’s national defense and national emergency powers are not sufficient to empower enactment of the Act because, first, the federal government does not play a primary role in emergency responses<sup>196</sup> and, second, even if the federal government did assert a primary role, Congress could not compel state and local public safety officers to carry out any federal directives.<sup>197</sup>

### A. *Problems Under the Commerce Clause*

#### 1. Public Safety Employment Does Not Substantially Affect Interstate Commerce

For Congress to regulate a local activity under the Commerce Clause, that activity must “substantially affect” interstate commerce.<sup>198</sup>

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jurisdiction of federal courts. See U.S. CONST. amend. XI; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress cannot abrogate a state’s Eleventh Amendment sovereign immunity under the Commerce Clause). This issue was addressed in the House subcommittee hearing on House Bill 980 but was left out of the majority portion of the Committee Report. See *2007 House Hearing*, *supra* note 177 (written testimony of Neil Reichenberg, Executive Director, International Public Management Association for Human Resources), available at <http://edworkforce.house.gov/testimony/060507NeilReichenbergTestimony.pdf>; *id.* (written testimony of R. Theodore Clark, Jr., Partner, Seyfarth Shaw LLP), available at <http://edworkforce.house.gov/testimony/060507RTheodoreClarkTestimony.pdf>; see also H.R. REP. NO. 110-232, at 18–20 (2007). But see *id.* at 33–34 (discussing the sovereign immunity issue from the minority’s view).

<sup>192</sup> See *Morrison*, 529 U.S. at 617–18; *Printz*, 521 U.S. at 935; *Lopez*, 514 U.S. at 566–67; *New York*, 505 U.S. at 181–83.

<sup>193</sup> See *infra* notes 198–252 and accompanying text.

<sup>194</sup> See *infra* notes 198–217 and accompanying text.

<sup>195</sup> See *infra* notes 218–228 and accompanying text.

<sup>196</sup> See *infra* notes 232–245 and accompanying text.

<sup>197</sup> See *infra* notes 246–252 and accompanying text.

<sup>198</sup> *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005); *Morrison*, 529 U.S. at 608–09; *Lopez*, 514 U.S. at 558–59.

In 1995, in *United States v. Lopez*, and in 2000, in *United States v. Morrison*, the Supreme Court delineated the limits of this power, holding that the activity must be economic and that its connection to the interstate or national market cannot be so attenuated as to obliterate the historical limits on federal authority.<sup>199</sup> Under this standard, it is not clear that the pending PSEEC Act, seeking to regulate the employment of states' and localities' law enforcement officers, firefighters, and emergency medical services workers, would regulate an activity that "substantially affects" interstate commerce.<sup>200</sup>

First, public safety employment does not seem to satisfy the Supreme Court's understanding of an "economic activity."<sup>201</sup> Police work, firefighting, and emergency medical services are not economic enterprises or activities arising out of commercial transactions but are public services provided by states and localities to their citizens.<sup>202</sup> Furthermore, in imposing a collective bargaining requirement on states, the PSEEC Act would not be regulating the production, distribution, or consumption of any commodity for which there is an interstate market.<sup>203</sup>

Even the House of Representatives, in passing House Bill 980, did not assert that public safety is an economic activity.<sup>204</sup> Instead, the House, through its Committee Report, simply attempted to draw the connection between public safety employment and interstate commerce: public safety officers are first responders to terrorist attacks and natural disasters, and terrorist attacks and natural disasters incur high economic costs, which affect the interstate market for goods and services.<sup>205</sup> This is precisely the sort of "remote chain of inferences" that the Supreme Court has twice rejected.<sup>206</sup> In *Lopez*, the Court refused to accept the argument that guns near schools affect interstate commerce because the guns might cause commerce-affecting violence or might result in a less educated, and thus less productive, citizenry.<sup>207</sup> In *Morri-*

<sup>199</sup> See *Morrison*, 529 U.S. at 608–13; *Lopez*, 514 U.S. at 558–67.

<sup>200</sup> See *Morrison*, 529 U.S. at 611; *Lopez*, 514 U.S. at 567; see also S. 2123 §§ 4–5; H.R. 980 §§ 4–5.

<sup>201</sup> See *Raich*, 545 U.S. at 25–26; *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561.

<sup>202</sup> See *Lopez*, 514 U.S. at 561.

<sup>203</sup> See *Raich*, 545 U.S. at 25–26.

<sup>204</sup> See generally H.R. REP. NO. 110-232.

<sup>205</sup> See *id.* at 19.

<sup>206</sup> See *Morrison*, 529 U.S. at 615–16; *Lopez*, 515 U.S. at 563–64; see also *Raich*, 545 U.S. at 36 (Scalia, J., concurring) ("In *Lopez* and *Morrison*, the Court . . . rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences.").

<sup>207</sup> *Lopez*, 514 U.S. at 563–64.

son, the Court rejected a congressional finding that gender-motivated violence deters victims from engaging in interstate commercial activities.<sup>208</sup> In both cases, the Court reasoned that if it sanctioned the government's arguments, then Congress's Commerce Clause power would be virtually limitless because any activity that could affect a school or influence an individual's choice to engage in interstate business would be subject to congressional regulation.<sup>209</sup> Similarly, the reasoning behind the PSEEC Act would allow Congress to regulate any activity with a possible connection to the aftermath of a natural disaster or terrorist attack—which is, of course, any activity.<sup>210</sup>

The only way that public safety employment could be regulated by Congress under the Commerce Clause, therefore, would be to characterize that employment as part of a “class of activities” substantially affecting interstate commerce, as articulated by the Supreme Court in 2005, in *Gonzales v. Raich*.<sup>211</sup> Because Congress already regulates private employment under the Commerce Clause through the National Labor Relations Act (“NLRA”) in a manner similar to that in which the PSEEC Act would regulate public safety employment—private employers must participate in collective bargaining with their employees' unions<sup>212</sup>—one might argue, under *Raich*, that similar regulation of *all* employment is necessary to achieve the overall purpose of the NLRA.<sup>213</sup> The purpose of the NLRA, however—and the basis on which the Supreme Court found it constitutional—is to mitigate the effects of “industrial strife” on interstate commerce.<sup>214</sup> Police officers, firefighters, and emergency medical services workers, of course, cannot engage in *industrial* strife.<sup>215</sup> To the extent that the term may be interpreted to mean labor strikes, generally, public safety officers are almost universally already barred from engaging in strikes under state law, and the PSEEC Act itself would bar public safety

<sup>208</sup> *Morrison*, 529 U.S. at 615.

<sup>209</sup> See *Morrison*, 529 U.S. at 615; *Lopez*, 514 U.S. at 564.

<sup>210</sup> See *Morrison*, 529 U.S. at 615; *Lopez*, 514 U.S. at 564.

<sup>211</sup> See 545 U.S. at 17.

<sup>212</sup> See National Labor Relations Act §§ 7–8, 29 U.S.C. §§ 157–158 (2000).

<sup>213</sup> See *Raich*, 545 U.S. at 18–19, 23–24.

<sup>214</sup> See 29 U.S.C. § 151 (“The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . . .”); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937).

<sup>215</sup> See 29 U.S.C. § 151; *Jones & Laughlin*, 301 U.S. at 41–42.

strikes.<sup>216</sup> Additionally, the Supreme Court would have to extend its *Raich* holding, which concerned the regulation of a *commodity* for which there was a national market, to cover the PSEEC Act, which would regulate employment for non-commercial purposes.<sup>217</sup>

## 2. State Sovereignty May Bar Congressional Use of the Commerce Clause to Regulate Public Safety Employment

Even if the PSEEC Act represents a valid exercise of the Commerce Clause power insofar as public safety employment substantially affects interstate commerce, Congress's authority to regulate the states and their localities directly under the Commerce Clause is not clear.<sup>218</sup> In some way, the shift in the Supreme Court's Commerce Clause jurisprudence in *Lopez* and *Morrison* was in response to the Court's 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*, which held that state sovereignty cannot prevent Congress from regulating the states under the Commerce Clause.<sup>219</sup> In his dissent in that case, Justice Powell stated:

In *National League of Cities*, we spoke of fire prevention, police protection, sanitation, and public health as "typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Not only are these activities remote from any normal concept of interstate commerce, they are also activities that epitomize the concerns of local, democratic self-government.*<sup>220</sup>

In fact, the current Commerce Clause jurisprudence may be, in part, an attempt to rein in congressional regulation of state employment.<sup>221</sup>

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<sup>216</sup> See S. 2123 § 6(a); H.R. 980 § 6; Michael A. DiSabatino, Annotation, *Who Are Employees Forbidden to Strike Under State Enactments or State Common-Law Rules Prohibiting Strikes by Public Employees or Stated Classes of Public Employees*, 22 A.L.R.4th 1103 §§ 5, 8 (1983 & Supp. 2007).

<sup>217</sup> See *Raich*, 545 U.S. at 18–19.

<sup>218</sup> See *New York*, 505 U.S. at 177–78, 182–83; *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530–31 (1985); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 835–37 (1976), *overruled by Garcia*, 469 U.S. 528.

<sup>219</sup> See *Garcia*, 469 U.S. at 548–50; *id.* at 575 (Powell, J., dissenting); *id.* at 583–87 (O'Connor, J., dissenting).

<sup>220</sup> *Id.* at 575 (Powell, J., dissenting) (quoting *Nat'l League*, 426 U.S. at 851) (alteration in original) (citation omitted) (emphasis added).

<sup>221</sup> See *Morrison*, 529 U.S. at 615–16; *Lopez*, 514 U.S. at 564; *Garcia*, 469 U.S. at 583–87 (O'Connor, J., dissenting).

Justice O'Connor, in her *Garcia* dissent, characterized the majority's dismissal of judicially enforced state sovereignty as reneging on a promise to the states.<sup>222</sup> Justice O'Connor believed that the Court had assumed the duty to protect the states' sovereignty from the ever-growing federal government by limiting the reach of otherwise valid federal regulation but that, in *Garcia*, it was shirking that responsibility.<sup>223</sup> In *Lopez* and *Morrison*, Justice O'Connor, in joining the Court's majority opinions, was able to protect the states from the other side—by halting the continued growth of federal regulation.<sup>224</sup>

In the majority opinion in *New York*, however, Justice O'Connor seemed to go even further in suggesting the Court's willingness to return to the pre-*Garcia* conception of state sovereignty as a bar to federal regulation.<sup>225</sup> *New York* undermined *Garcia* significantly by asserting the duty of courts to protect the status of states in the federalist system.<sup>226</sup> Additionally, the Court in *New York*, and again five years later in *Printz v. United States*, refused to recognize that states are necessarily subject to generally applicable federal labor laws, by simply stating that the issue has been "unsteady" in the Court.<sup>227</sup> The PSEEC Act would certainly give the courts an opportunity to address this question directly, and when confronted with regulation of police officers, firefighters, and emergency medical services workers, rather than transit employees, the Supreme Court would very likely reject *Garcia* expressly and strike down the legislation on state sovereignty grounds.<sup>228</sup>

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<sup>222</sup> See 469 U.S. at 583–84 (O'Connor, J., dissenting). Justice O'Connor stated,

This Court has been increasingly generous in its interpretation of the commerce power of Congress, primarily to assure that the National Government would be able to deal with national economic problems . . . .

Incidental to this expansion of the commerce power, Congress has been given an ability it lacked prior to the emergence of an integrated national economy. Because virtually every *state* activity, like virtually every activity of a private individual, arguably "affects" interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers . . . .

It would be erroneous, however, to conclude that the Supreme Court was blind to the threat to federalism when it expanded the commerce power.

*Id.*

<sup>223</sup> See *id.* at 587 ("This principle [of state sovereignty] requires the Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power.")

<sup>224</sup> See *Morrison*, 529 U.S. at 608–16; *Lopez*, 514 U.S. at 558–67.

<sup>225</sup> See *New York*, 505 U.S. at 177–78, 182–83.

<sup>226</sup> See *id.* at 181–83.

<sup>227</sup> See *id.* at 160; see also *Printz*, 521 U.S. at 932.

<sup>228</sup> See *New York*, 505 U.S. at 177–78, 182–83.

### B. Problems Under “National Defense” Authority

In addition to the Commerce Clause, House Bill 980 and Senate Bill 2123 invoke congressional power to provide for the national defense as another source of authority for the PSEEC Act.<sup>229</sup> Insofar as the bills describe local public safety officers as first responders in national emergencies, the bills seem to perceive local police officers, fire-fighters, and emergency medical services workers as agents of the federal government in times of emergency, with duties to protect federal property and to take on federal responsibilities.<sup>230</sup> The problems with this approach to asserting federal authority over state employer-employee labor relations are that it mischaracterizes the federal role in responses to national emergencies and that it presupposes a federal function for state and local public safety officers in the face of those emergencies.<sup>231</sup>

#### 1. The Federal Government Does Not Play a Primary Role in Responses to and Preparedness for National Emergencies

First, regardless of whether the federal government *can* act as the first responder to a national emergency, in practice it does not.<sup>232</sup> Congress has given federal agencies only a secondary role in emergencies, and, under current law, federal assistance—for both preparedness efforts and actual emergency response—can be provided to states and their localities only upon the states’ request.<sup>233</sup> Thus, the House of Representatives’ Committee Report assertion that the “federal government utilizes local emergency response personnel to carry out federal disaster response activities”<sup>234</sup> is not accurate because, in fact, the reverse is true: state and local governments use federal personnel and money to assist them in carrying out *their* emergency response activities.<sup>235</sup>

This inaccuracy in characterization leads to an inconsistency with the language of Senate Bill 2123, which states that local public safety officers are a “component” of the National Incident Management System (“NIMS”).<sup>236</sup> They are a “component” only insofar as they have

<sup>229</sup> See S. 2123 § 2(2); H.R. 980 § 2(2).

<sup>230</sup> See S. 2123 § 2(2); H.R. 980 § 2(2).

<sup>231</sup> See *supra* notes 119–152 and accompanying text.

<sup>232</sup> See generally Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C.A. §§ 5121–5207 (West 2000 & Supp. 2008).

<sup>233</sup> See 42 U.S.C.A. §§ 5170, 5170b(c), 5191(a).

<sup>234</sup> H.R. REP. NO. 110-232, at 17.

<sup>235</sup> See 42 U.S.C.A. §§ 5170, 5170b(c), 5191(a).

<sup>236</sup> See S. 2123 § 2(2).

agreed to participate.<sup>237</sup> As with all existing federal national emergency programs involving states, the federal government compels the states' NIMS participation by conditioning federal money on participation,<sup>238</sup> which is a legitimate exercise of Congress's Spending Clause power.<sup>239</sup> The ability to condition federal money, however, is not unlimited: any condition on the states' acceptance of federal funds must be explicit prior to the states' acceptance of the conditioned funds.<sup>240</sup> To the extent that Senate Bill 2123 invokes NIMS participation as a basis for imposing collective bargaining on states and their localities, the PSEEC Act effectively would impose an additional condition—collective bargaining—on NIMS-linked funds after the states have accepted federal money and without the opportunity to withdraw from the scheme altogether.<sup>241</sup>

In fact, neither the House nor the Senate version of the PSEEC Act actually purports to impose a funding condition.<sup>242</sup> Instead, both bills simply ignore the legal authority for the federal government's national emergency response and preparedness efforts: the Spending Clause.<sup>243</sup> Congress could, perhaps, prescribe a first responder role for the federal government;<sup>244</sup> however, the PSEEC Act itself would not achieve this by merely mischaracterizing the current reality.<sup>245</sup>

## 2. The Federal Government Cannot Compel State and Local Public Safety Officers to Carry Out Federal Responses to National Emergencies

Second, even assuming that the federal government does or could have a primary role in preparing for and responding to national emergencies, any use of state and local police officers, firefighters, and emergency medical services workers to carry out such a role would directly contradict the Supreme Court's anti-commandeering jurispru-

<sup>237</sup> See HSPD-5, *supra* note 134, at 230, 233.

<sup>238</sup> See *id.*; see also 42 U.S.C.A. §§ 5121–5207.

<sup>239</sup> See *supra* notes 124–126 and accompanying text (discussing conditional grants as an exercise of the Spending Clause).

<sup>240</sup> See *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987); see also CHEMERINSKY, *supra* note 125, § 3.4.3, at 279–81.

<sup>241</sup> See *Dole*, 483 U.S. at 207–08; S. 2123 §§ 3–4; HSPD-5, *supra* note 134, at 233.

<sup>242</sup> See generally S. 2123; H.R. 980.

<sup>243</sup> See, e.g., 42 U.S.C.A. §§ 5170, 5170b(c), 5191(a); HSPD-5, *supra* note 134, at 233.

<sup>244</sup> Cf. *United States v. Robel*, 389 U.S. 258, 264 (1967); *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 587 (1952); *United States v. Peace Info. Ctr.*, 97 F. Supp. 255, 261–62 (D.D.C. 1951).

<sup>245</sup> See 42 U.S.C.A. §§ 5170, 5170b(c), 5191(a); S. 2123 §§ 3–4; H.R. 980 §§ 3–4; HSPD-5, *supra* note 134, at 1747.

dence.<sup>246</sup> The current versions of the PSEEC Act, however, seem to envision just that: they characterize local public safety officers as agents of the federal government in carrying out federal emergency responses.<sup>247</sup> But not only do local public safety officers not carry out federal responses to national emergencies,<sup>248</sup> they cannot be forced to do so.<sup>249</sup>

The Court has expressly held that the federal government cannot compel state or local officials to carry out federal programs because the Constitution reserves the exercise of federal executive power to the federal executive branch and recognizes that the sovereignty of both the states and the federal government prevents either from pressing the other's officials into its service.<sup>250</sup> Police officers, firefighters, and emergency medical services workers, as *state* officials, are neither part of the federal executive branch nor subject to impressment by the federal government; therefore, Congress could never require them to participate or take on a federal role in any federal emergency response activities.<sup>251</sup> Thus, the PSEEC Act's premise that Congress is regulating the employment of personnel who might be brought into federal service is constitutionally impossible and cannot serve as a legitimate source of authority for enactment of the legislation.<sup>252</sup>

### CONCLUSION

The Public Safety Employer-Employee Cooperation Act, which was passed by the House of Representatives and is currently pending in the Senate, would require states and their localities to engage in collective bargaining with their police officers', firefighters', and emergency medical services workers' unions. The Act is constitutionally suspect because Congress does have the authority to enact the legislation, either under the Commerce Clause or under its "national defense" power. The Commerce Clause permits Congress to regulate activities substantially affecting interstate commerce (i.e., economic endeavors with a direct impact on interstate commercial activity). Employment of public safety officers does not squarely fit within this grant of legislative authority. Even if the Commerce Clause could be

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<sup>246</sup> See *Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 188.

<sup>247</sup> See S. 2123 § 2(2); H.R. 980 § 2(2).

<sup>248</sup> See *supra* notes 232–245 and accompanying text.

<sup>249</sup> See *Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 188.

<sup>250</sup> *Printz*, 521 U.S. at 918–25, 935; *New York*, 505 U.S. at 188.

<sup>251</sup> See *Printz*, 521 U.S. at 918–25, 935; *New York*, 505 U.S. at 188.

<sup>252</sup> See *Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 188; S. 2123 § 2(2); H.R. 980 § 2(2).

understood to permit Congress to reach an activity such as public safety officer employment, however, state sovereignty would probably act as a bar to the legislation's enforceability against states and their localities. Although the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority* held that state employers are subject to generally applicable federal labor regulations enacted pursuant to the Commerce Clause, the Court has reasserted its role as a guardian of state sovereignty in more recent cases, including *New York v. United States*, and has largely abandoned the reasoning underpinning its *Garcia* holding. Given the opportunity, which this legislation would afford, the Court would likely resurrect its pre-*Garcia* conceptions of state sovereignty and strike down the Act.

Furthermore, as an exercise of "national defense" authority, the Act would also fail. Congress's ability to regulate domestic activities under this power is ill-defined, but the fact that Congress has never before invoked the power to regulate state public safety officers suggests that the power is insufficient to permit congressional regulation of public safety employment. The way in which Congress has historically inserted itself into state-level public safety concerns is through its ability to condition federal money on local compliance with federal policies. This Act is not conditional but, mischaracterizing the federal role in national emergencies, would impose federal policies directly on states and their localities. In addition, the Act presupposes that state public safety officers act as agents of the federal government in times of national emergencies. But the Supreme Court has not permitted the use of state officials to carry out federal programs, and, thus, the Act's very premise is unconstitutional. If the Act were to pass in the Senate and become law, the Supreme Court likely would—and should—strike it down.

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