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CONSTITUTIONAL LAW

BOARD OF NATURAL RESOURCES V. BROWN: NEW YORK GROWS ROOTS IN WASHINGTON

I. INTRODUCTION

In *Board of Natural Resources v. Brown,*[1] the Ninth Circuit Court of Appeals held that provisions in the Forest Resources Conservation and Shortage Relief Act[2] violated the Tenth Amendment by compelling western states to issue regulations according to Congress' instructions.[3] In so doing, the court recognized the ongoing vitality of the Tenth Amendment as a limitation on the power of Congress to use states as instruments of federal regulation.[4]

II. FACTS AND PROCEDURAL HISTORY

The State of Washington owns several tracts of timber land which it holds in trust for the benefit of various public institutions and various counties.[5] Prior to the passage of the Forest Resources Conservation and Shortage Act (hereinafter

1. Board of Natural Resources v. Brown, 992 F.2d 937 (9th Cir. 1993) (per Wallace, C.J., joined by Wright, J., and Leavy, J.).
2. 16 U.S.C. §§ 620-620j (1988 & Supp. V 1993) (amended in 1993, *see infra* note 17).
3. U.S. CONST. amend. X.
4. *See* New York v. United States, 112 S. Ct. 2408 (1992). The Supreme Court, in an opinion written by O'Connor, J., held that the Tenth Amendment forbids the federal government from compelling the states to issue regulations according to its instructions. *Id.* at 2421.
5. Board of Natural Resources v. Brown, 992 F.2d 937, 941 (9th Cir. 1993).

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"the Act") in 1990, the majority of unprocessed timber harvested from these lands was exported for sale overseas, where it attracted a higher price than in the domestic market.[6]

On October 24, 1990, the United States Secretary of Commerce (hereinafter "the Secretary") delivered an order pursuant to the Act, directing the State of Washington to issue regulations banning from export seventy-five percent of all unprocessed timber harvested from its state-owned lands.[7] The following year, the Secretary issued an order instructing Washington to maintain its timber export ban at the seventy-five percent level.[8] One year later, in 1992, the Secretary issued an order directing Washington to increase the level of its export ban to one-hundred percent of all unprocessed timber harvested from its state-owned lands.[9]

As a result of the timber export restrictions imposed by the Secretary, the expected income from Washington's lands was projected to decrease by an estimated $500 million over the following ten years.[10] In response to this projected reduction in expected future income, seven of the counties (hereinafter, collectively, "the Counties") that were beneficiaries of the Washington land, as well as other plaintiffs, brought suits against the Secretary of Commerce and the federal government.[11] These cases were consolidated in the United States

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Board of Natural Resources*, 992 F.2d at 941.
11. *Id.* at 942. The Counties sought declaratory judgment against the Secretary of Commerce on both Tenth Amendment and Fifth Amendment due process grounds. *Id.* The due process claim was based on the fact that private timber lands in the state were not regulated in a fashion similar to the state-owned lands. *Id.* at 943. This claim, which had been rejected by the District Court, was also rejected by the Ninth Circuit employing the rational basis test. *Id.* The Ninth Circuit held that under the rational basis test, a federal statute passes constitutional muster as long as it is "somewhat related 'to the achievement of any combination of legitimate purposes.'" *Id.* (quoting Kadrmas v. Dickinson Public Schs., 487 U.S. 450, 463 (1988)). The court found that the different treatment of public and private lands at issue was rationally related to Congress's belief that the losses in state revenue induced by the export bans would be offset by state savings in social service expenditures resulting from increased domestic timber mill employment as a result of the Act. Moreover, the court found that because this reciprocal relationship does not obtain with regard to private timber growers, the disparate

District Court for the District of Washington.[12]

The Counties sought a declaratory judgment that the Act violated the Tenth Amendment's prohibition against impermissible federal infringement of state sovereignty.[13] The Counties alleged that the Act abridged the State of Washington's Tenth Amendment rights by compelling the state to enact regulations pursuant to the federal government's instructions.[14]

The Counties and the federal government both moved for summary judgment on this issue.[15] The district court granted summary judgment in favor of the federal government and the Counties appealed.[16]

III. BACKGROUND

A. THE FOREST RESOURCES CONSERVATION AND SHORTAGE RELIEF ACT

In 1990, Congress enacted the Forest Resources Conservation and Shortage Relief Act (hereinafter "the Act").[17] The Act

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treatment of the two groups was constitutionally justified. *Id.* at 943.

Edward McLarney joined the Counties' suit in the District Court as a county resident, taxpayer and county commissioner. *Id.* at 942. McLarney's role as a party in the suit played no significant part in the Ninth Circuit's decision. *Id.* at 946.

The Washington State Boards of Education and Natural Resources, as trustees of public lands adversely affected by the Act, also brought suit for declaratory judgment against the Secretary of Commerce. *Id.* at 942. Their suit repeated the due process claim asserted by the Counties and also alleged that by passing the Act the federal government had breached a duty that it owed Washington as the original grantor of the trust lands to the state. *Id.* at 942-44. Both claims were rejected by the lower court as well as by the Ninth Circuit Court of Appeals. *Board of Natural Resources*, 992 F.2d at 942-44.

12. *Id.* at 942.

13. *Id.* at 942, 946-47.

14. *Id.* at 946-47.

15. *Id.* at 942.

16. *Board of Natural Resources*, 992 F.2d at 942. This note will limit itself in scope to the Ninth Circuit Court of Appeals' treatment of the Counties' Tenth Amendment claim.

17. 16 U.S.C. §§ 620-620j (Supp. III 1990). Throughout this note all references to the Forest Resources Conservation and Shortage Relief Act, 16 U.S.C. §§ 620-620j, pertain to the original version of the Act as enacted in 1990. The Act was amended in 1993 primarily to cure the constitutional defects discussed. *See infra*, notes 50-78 and accompanying text. 16 U.S.C. §§ 620c, 620d (Supp. V 1993). The

was designed to conserve timber within the United States and increase the supply of unprocessed timber to domestic timber mills.[18] The Act sought to accomplish these goals by restricting the export of unprocessed timber from federal and state-owned lands located in the western continental United States.[19]

As enacted, the Act consisted of two essentially independent parts.[20] The first part restricted the export of unprocessed timber harvested from federal lands within the continental United States west of the 100th meridian.[21] The second part of the Act restricted the export of unprocessed timber from state-owned lands within this geographical area.[22]

The Act divided states into two categories for purposes of the export restrictions.[23] In states where the total annual sales volume of unprocessed timber harvested from state-owned lands constituted less than four hundred million board feet, the Act placed a complete ban on the export of state-owned unprocessed timber.[24] In states where the annual sales volume exceeded that amount,[25] the Act called for an initial seventy-five percent export ban on state-owned unprocessed timber together with a scheduled increase in the percentage banned over time.[26] In this latter category, the Act also provided the Secretary of Commerce with the discretionary power to increase the level of the export bans if certain conditions were met.[27]

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amended Act currently requires the Secretary of Commerce to directly prescribe timber export bans rather than directing the states to enact the bans under their own state law. 16 U.S.C. § 620c (Supp. V. 1993).

18. Board of Natural Resources v. Brown, 992 F.2d 937, 941 (9th Cir. 1993).

19. *Id.*

20. *Id.*

21. *Id.* The 100th meridian refers to that line of longitude one-hundred degrees west of the prime meridian. As a rough indication of the geographical area within the Act's reach, the 100th meridian runs just east of Bismarck, North Dakota. THE WORLD ALMANAC AND BOOK OF FACTS 1994 486 (Robert Famighetti ed., Funk & Wagnills Corp. 1993).

22. *Board of Natural Resources*, 992 F.2d at 941.

23. *Id.*

24. *Id.*

25. *Id.* At the time of the Ninth Circuit's decision on May 4, 1993, only Washington fell into this category. *Id.*

26. *Board of Natural Resources*, 992 F.2d at 941.

27. *Id.* The Secretary of Commerce may increase the percentage of unprocessed

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As part of the regulatory scheme addressed to the states, the Act required the states to issue or enact regulations implementing the timber export bans.[28]

B. THE SUPREME COURT'S RECENT INTERPRETATION OF THE TENTH AMENDMENT IN *NEW YORK V. UNITED STATES*

In reaching its decision concerning the Counties' Tenth

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timber to be banned from export based on a determination that the purposes of the Act are not being adequately served by the current level of export prohibitions. Factors to consider in making this determination are:

> (1) actions or decisions taken, for the purpose of conserving or protecting exhaustible natural resources in the United States, which have affected the use or availability of forest products;
> (2) whether the volume of timber from public lands that is under contract has increased or decreased by an amount greater than 20 percent within the previous 12 months; and
> (3) the probable effects of unprocessed timber exports on the ability of timber mills to acquire unprocessed timber.

16 U.S.C. § 620(c) (Supp. III 1990).

28. *Board of Natural Resources*, 992 F.2d at 941. Two of the Act's provisions, 16 U.S.C. § 620c(d)(2) and § 620c(d)(3)(A), explicitly required states to issue regulations in accordance with the Act. Section 620c(d)(2) stated in relevant part:

> Each State shall determine the species, grade, and geographic origin of unprocessed timber to be prohibited from export . . . and shall administer such prohibitions consistent with the intent of sections 620 to 620j of this title.

Id. at 947 (ellipses in opinion by the Ninth Circuit). (The purpose behind the requirement that states determine the characteristics of the timber to be banned from export was to ensure that such timber represented a fair cross-section of the species, grades and geographic origin of all unprocessed timber harvested for sale from the state-owned lands. 16 U.S.C. § 620c(d)(2) (Supp. III 1990)). Section 620c(d)(3)(A) stated in relevant part:

> [T]he Governor of each State to which [the Act] applies . . . shall . . . issue regulations to carry out the purposes of this section, the promulgation of which shall be consistent with section 553 of Title 5. Such regulations in each State shall remain in effect until such time as the legislature of that State enacts such requirements as it deems appropriate to carry out this section. Before issuing such regulations, the Governor shall enter into formal consultation . . . with appropriate state officials.

Board of Natural Resources, 992 F.2d at 947 (ellipses in opinion by the Ninth Circuit).

The federal government argued that these two provisions actually worked to the benefit of the states by "insuring the participation of state officials who are attuned to the needs and concerns of their constituents." *Id.* at 945.

Amendment challenge to the Forest Resources Conservation and Shortage Relief Act,[29] the Ninth Circuit Court of Appeals relied heavily on the Supreme Court's 1990 decision in *New York v. United States*.[30]

In *New York*, the Supreme Court was faced with a Tenth Amendment challenge by the State of New York[31] to the Low-Level Radioactive Waste Policy Amendments Act of 1985 (hereinafter "the Waste Policy Act").[32] One provision in that Act, labeled "the take-title provision," required the State of New York to choose between adopting the Waste Policy Act's regulatory scheme for the disposal of low-level radioactive waste and taking legal title to and assuming liability for the low-level radioactive waste generated within the state.[33] Upon review, the Supreme Court declared that the take-title provision violated the Tenth Amendment.[34]

After reviewing the history of the original Constitutional Conventions, the Court declared that the Founders had envisioned the Tenth Amendment as the embodiment of the general principle that the new federal government was to "exercise its legislative authority over individuals" rather than "attempt to coerce [the] states . . . in their political capacity."[35] From

29. *See infra* notes 50-78 and accompanying text for a full description of the Counties' Tenth Amendment challenge.

30. 112 S. Ct. 2408 (1992).

31. *Id.*

32. 42 U.S.C. §§ 2021b-2021 (Supp. III 1985) *amended by* 42 U.S.C. § 2021d (1988).

33. *New York*, 112 S. Ct. at 2427.

34. *Id.* at 2429. As an initial matter the Supreme Court was forced to consider existing Tenth Amendment precedent which held that the principal constitutional protection of state sovereignty against federal overreaching resided in each state's political representation in Congress. *Id.* at 2420. *See, e.g.,* Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528 (1985). Reviewing its past cases in this area, the Court declared that this rule had been applied only in situations where Congress enacted legislation generally applicable to both the states and private persons alike. *New York*, 112 S. Ct. at 2420. The Court distinguished the instant case on the ground that it involved federal legislation directed exclusively at the state governments themselves. *Id.*

35. *Id.* at 2422. Beyond the history of the Amendment, the Court bolstered its rationale for this new rule by pointing out the destructive effect a contrary rule would have on political accountability at both the state and federal levels. *Id.* at 2424. The Court reasoned that were Congress allowed to conscript the states as agents of federal regulation, on the one hand, Congress would be shielded from ac-

this principle the Court deduced the "new" constitutional rule that the Tenth Amendment serves to prohibit Congress from compelling the states to enact regulations according to its instructions.[36]

While the "new" Tenth Amendment rule prohibited Congress from coercing the states into adopting regulatory schemes, the Court made clear that not all Congressional efforts directed at inducing the states to regulate amounted to illegitimate coercion.[37] The Court noted that Congress may legitimately encourage the states to regulate by conditioning the use of an enumerated federal power upon the enactment of such regulation.[38] The Court stated the two primary means by which Congress may legitimately encourage the states to act: (1) Congress may condition federal regulatory preemption of an activity upon state adoption of a regulatory scheme under the federal Commerce Power; and (2) Congress may condition the delivery of federal funds upon adoption of a regulatory scheme under its Spending Power.[39]

Finally, the Court held that just as Congress may not coerce the states into regulating by direct fiat, Congress is also prohibited by the Tenth Amendment from forcing the states to choose between a requirement to regulate and consequences that lie beyond Congress' power to impose.[40]

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countability by the veneer of state action, while, on the other hand, the states would be able to avoid political responsibility by pointing to the federal legislative mandate. *Id.* Either way, the important principle of direct political accountability would be vitiated with harmful results for both state and nation. *New York*, 112 S. Ct. at 2424. The Court asserted that by denying Congress the power to coerce states into adopting regulations the new rule would work to obviate the potential for this type of accountability vacuum. *Id.*

36. *Id.* at 2423, 2428. *See* National League of Cities, et al. v. Usery, 426 U.S. 833 (1976) (holding that Congress could not use its Commerce Power "to force directly upon the States its choices to how essential decisions regarding the conduct of integral government functions are to be made") (*overruled by* Garcia v. San Antonio Transit Authority et al., 469 U.S. 528 (1984)).

37. *Id.* at 2423-24.

38. For example, under its Spending Power, Congress may condition the receipt of federal highway funds by the states upon their adoption of fifty-five mile-per-hour highway speed limits as state law. *See id.*

39. *New York*, 112 S. Ct. at 2423, 2424. U.S. CONST. art. I, § 3 cl. 3 (Commerce Power). U.S. CONST. art. I, § 3 cl. 1 (Spending Power).

40. *New York*, 112 S. Ct. at 2427-29.

It was this last aspect of its "new" Tenth Amendment jurisprudence that the Court brought to bear on the case at hand in *New York*.[41] The Court found that the Waste Policy Act's take-title provision in essence constituted a forced choice for the State of New York between adopting the federal waste disposal scheme and taking title to and assuming any attendant liability for the low-level radioactive waste within its borders.[42] The Court declared that the first option, the fiat requirement that New York adopt the federal waste disposal scheme, clearly violated the "new" Tenth Amendment rule and that, in addition, the second option, the take-title provision also lay beyond the power of Congress.[43] In the Court's view, the alternative that New York take title to the waste was tantamount to a Congressional command to the government of New York to subsidize its radioactive waste producers.[44] As such, the take-title provision represented an attempt by Congress to "commandeer" the New York State government and therefore violated the Tenth Amendment.[45] The Court held that since each alternative offered to the State of New York by the take-title provision — the requirement to regulate and the requirement to take title — violated the Court's newly announced Tenth Amendment principles, the provision in its entirety also violated the Tenth Amendment.[46]

The "new" Tenth Amendment rule established by the Supreme Court in *New York* marked a departure from the principle that state sovereignty is protected through the states' representation in Congress.[47] As such, at least in the context of federal legislation directed exclusively at the states, *New York* provided a new constitutional beachhead from which litigants could challenge Congressional Acts.[48] It was from this beachhead that the attack on the Forest Resources Conservation and Shortage Relief Act of 1990, giving rise to *Board of Natural*

41. *Id.* at 2427-28.
42. *Id.*
43. *Id.*
44. *Id.* at 2428.
45. *New York*, 112 S. Ct. at 2428.
46. *Id.*
47. *See Garcia*, 469 U.S. 528 (holding that in the vast majority of cases the fact that members of the national legislature represent the states is sufficient to protect the states' interests).
48. *See Board of Natural Resources*, 992 F.2d 937.

Resources v. Brown, was launched.[49]

IV. THE COURT'S ANALYSIS

The Ninth Circuit resolved a preliminary standing issue in the Counties' favor[50] and turned to consideration of the merits of the Counties' Tenth Amendment challenge.[51]

A. THE NINTH CIRCUIT'S APPLICATION OF *NEW YORK V. UNITED STATES* TO THE FOREST RESOURCES CONSERVATION AND SHORTAGE RELIEF ACT

The Ninth Circuit began its analysis by stating that the Counties' challenge fell within the Tenth Amendment principles recently pronounced by the Supreme Court in *New York v. United States*.[52] The Ninth Circuit reiterated the broader holding of *New York*, that the Tenth Amendment protects the sovereignty interests of the states against undue federal encroachment by placing limits on "Congress's power to use the states as implements of regulation."[53] The court also restated the derivative rule developed in *New York* that while Congress possesses broad powers to directly regulate activities in many areas, "including . . . areas of intimate concern to the States," it nevertheless lacks the power to directly compel the states "to govern according to [its] instructions."[54]

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49. *See id.*

50. Board of Natural Resources v. Brown, 992 F.2d 937, 946 (9th Cir. 1993) (per Wallace, C.J., joined by Wright, J., and Leavy, J.). The court noted that the fact that the State of Washington had not only declined to challenge the Act on behalf of the Counties but had supported it in other litigation did not bar the Counties from bringing this Tenth Amendment challenge. *Id.* Following New York v. United States, 112 S. Ct. 2408 (1992), the court held that Washington's consent to the Counties' litigation was unnecessary because: 1) The support or consent of the state is irrelevant to the question of whether the Tenth Amendment had been violated; 2) Tenth Amendment federalism principles do not serve to protect the states as abstract entities but rather to protect individuals through the diffusion of sovereign power; and 3) consideration of the Counties' claim in this case would serve judicial economy should Washington plan to challenge the Act in the future and the principles of federalism if Washington should not. *Id.* at 945-46.

51. *Id.* at 946.

52. *Id.*

53. *Id.* *See supra* notes 29-49 and accompanying text for a discussion of *New York v. United States*.

54. *Board of Natural Resources*, 992 F.2d at 946-47 (quoting New York v. U.S.,

The Ninth Circuit focused its attention on two provisions contained in the Forest Resources Conservation and Shortage Relief Act (hereinafter "the Act").[55] The first provision directed each state affected by the Act to determine certain characteristics of the timber to be banned from export and to administer export prohibitions consistent with the intent of the Act.[56] The second provision, which applied only to those states in which the annual sales volume of timber exceeded 400 million board feet,[57] directed the governors of these states to formally consult with appropriate state officials and then to issue regulations carrying out the purpose of the Act.[58] The latter provision further required that the regulations so issued should remain in effect until such time as the legislatures of the states enacted similar prohibitions.[59]

Upon review of the two provisions, and without elaboration, the Ninth Circuit concluded that the provisions constituted facial violations of the Tenth Amendment's protections of state sovereignty rights as set out in *New York*.[60] In the court's view, the provisions constituted "direct commands to the states to regulate according to Congress's instructions"[61] and therefore violated the "new" Tenth Amendment rule that the "Federal Government may not compel the States to enact or administer a federal regulatory program."[62]

Having concluded that the two provisions violated the

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112 S. Ct. at 2421).

55. *Id.* at 947.

56. *Id.* (quoting 16 U.S.C. § 620c(d)(2)). *See supra* note 28 for the text of 16 U.S.C. § 620c(d)(3).

57. *Id.* At the time of the case only Washington fell into this category. *See supra* note 25 and accompanying text.

58. *Id.* (quoting 16 U.S.C. § 620c(d)(3)(A)). *See supra* note 28 for the text of 16 U.S.C. § 620c(d)(3)(A).

59. *Board of Natural Resources*, 992 F.2d at 947.

60. *Id.* at 947.

61. *Id.*

62. *Id.* (quoting New York v. U.S, 112 S. Ct. at 2435). The Ninth Circuit considered whether these two provisions were severable from the rest of the provisions in the Act directed at the states (16 U.S.C. § 620c (Supp. II 1990) *amended by* 16 U.S.C. § 620c (Supp. V 1993)). The court determined that while the provisions in question were not severable from the rest of 16 U.S.C. § 620c and thus 16 U.S.C. § 620c must be struck down in its entirety, 16 U.S.C. § 620c was sufficiently independent from the rest of the Act to allow for the remaining provisions (directed at federal lands) to stand. *Id.* at 947-49.

Tenth Amendment, the court, nevertheless, turned to an evaluation of the two major arguments asserted by the federal government in support of the view that the Act did not violate the Tenth Amendment.[63]

B. THE NINTH CIRCUIT'S TREATMENT OF THE GOVERNMENT'S DEFENSES

The Ninth Circuit first addressed the federal government's contention that the Act did not in fact compel Washington to enact the regulatory scheme at issue.[64] The government reasoned that the Act did not compel the State of Washington to enact regulations banning timber exports because the state "could avoid the Act altogether by simply halting all sales of timber."[65]

The Ninth Circuit rejected this argument on two grounds. First, the Act was compulsory in nature because the language of the Act itself was unconditional.[66] Second, even if the Act were construed as containing the implied choice proposed by the government, this choice, as with the choice offered by the statute in *New York*, was one that the federal government had no power to impose upon the state.[67] The court stated that the requirement that Washington halt its timber sales should it choose not to adopt the federal regulations essentially presented the state with a "Hobson's choice."[68] Washington could not simply halt all timber sales from its trust lands, for by doing so, the state would breach its "fiduciary duty to manage the trusts in the best interests of the beneficiaries."[69] The Ninth Circuit declared that Congress had "no authority" to impose

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63. *Board of Natural Resources*, 992 F.2d at 947.

64. Board of Natural Resources v. Brown, 992 F.2d 937 (9th Cir. 1993) (per Wallace, C.J., joined by Wright, J., and Leavy, J.).

65. *Id.*

66. *Id.*

67. *Id.* (citing *New York*, 112 S. Ct. at 2428). The choice expressly offered the State of New York by the federal statute in *New York* was between enacting the federal low-level radiation waste disposal scheme or taking title to and assuming liability for the low-level radioactive waste within the state. *New York*, 112 S. Ct. at 2428. *See supra* notes 29-49 and accompanying text for a discussion of *New York v. United States*.

68. *Board of Natural Resources*, 992 F.2d at 947.

69. *Id.*

this requirement upon the state as alternative to adopting the federal regulations.[70]

The Ninth Circuit then addressed the government's argument that "because the provisions in question could not be enforced in court, they constitute[d] precatory admonitions rather than commands to the states."[71] The court rejected this argument as well, holding that the Act's provisions were commands to the states for two reasons. First, the provisions were enforceable by the federal courts under the long line of Supreme Court cases upholding "the power of federal courts to order State officials to comply with federal law."[72] Second, the provisions were mandatory upon the states as well as enforceable by the federal courts under the Supremacy Clause of the Constitution.[73] The Supremacy Clause "makes federal law paramount over the contrary positions of state officials," and also grants the federal courts the "authority to order [the states] to comply."[74] Thus, under both case precedent and constitutional mandate, the provisions in the Act did not constitute mere precatory admonitions directed toward the discretion of the states.[75] Instead, the provisions in the Act constituted direct commands to the states by the federal government with which the states were legally bound to comply.[76]

In sum, the Ninth Circuit rejected both arguments offered by the federal government in defense of the Act. The court rejected the government's "implied choice" argument because

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70. *Id.*

71. *Id.*

72. *Id.* (quoting *New York v. U.S.*, 112 S. Ct. at 2430).

73. *Board of Natural Resources*, 992 F.2d at 947. U.S. CONST. art. VI, cl. 2. The text of the clause reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

74. *Board of Natural Resources*, 992 F.2d at 947 (quoting New York v. U.S., 112 S. Ct. at 2430).

75. *Id.*

76. *Id.*

the language of the Act simply would not support it and, moreover, because the choice itself was illegitimate under the Tenth Amendment.[77] Similarly, the court rejected the "mere precatory admonitions" argument because the Supremacy Clause of the Constitution binds the states by federal law and, in conjunction with federal case precedent, provides for the enforcement of federal law against the states in the federal courts.[78]

V. CONCLUSION

In *Board of Natural Resources v. Brown*,[79] the Ninth Circuit Court of Appeals continued the line of new Tenth Amendment jurisprudence begun by the Supreme Court in *New York v. United States*.[80] The Ninth Circuit applied the newly fashioned principle that Congress is denied the constitutional power to conscript the state governments as agents of federal regulation and struck down federal statutory provisions requiring the State of Washington to enact regulations according to congressional instructions.[81] The Ninth Circuit left unresolved, as had the *New York* Court, the exact boundaries of illegitimately conscriptive practices in this regard. However, there is little doubt that given the appropriate case, the Supreme Court will draw at least some of these lines and thereby provide guidance in the future for both the Ninth Circuit and all other students of the Tenth Amendment. Until that time, the legal community should be content that, by its decision in *Board of Natural Resources*, the Ninth Circuit has put its mark on this new and interesting area of Tenth Amendment jurisprudence engendered by the Supreme Court in *New York v. United States*.

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77. *Id.*
78. *Id.*
79. Board of Natural Resources v. Brown, 992 F.2d 937 (9th Cir. 1993).
80. New York v. United States, 112 S. Ct. 2408 (1992).
81. *Board of Natural Resources*, 992 F.2d at 946-47.

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