

8-1-2021

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Recommended Citation

J. T. Smith, *One Man's Trash: Constitutional Principles of Federalism and Privacy Implicated in San Francisco's Mandatory Recycling Ordinance and Future Similar Legislation*, 28 Buff. Envtl. L.J. 111 (2021). Available at: <https://digitalcommons.law.buffalo.edu/belj/vol28/iss1/4>

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Buffalo Environmental Law Journal

VOLUME 28

2021

ONE MAN'S TRASH: CONSTITUTIONAL PRINCIPLES OF FEDERALISM AND PRIVACY IMPLICATED IN SAN FRANCISCO'S MANDATORY RECYCLING ORDINANCE AND FUTURE SIMILAR LEGISLATION

J. Tyler Smith[†]

INTRODUCTION

According to the Environmental Protection Agency, in 2017, Americans sent 139.6 million tons of garbage to landfills, of which about twenty-two percent was food.¹ To combat the United States' landfill waste problem, municipalities across the country are promoting initiatives to encourage their residents to consider environmentally friendly alternatives. San Francisco went one step further: in 2009, the city mandated recycling for all residents and introduced steep fines for those who threw away recyclable materials.² The city also reduces the amount of recycling it needs by mandating composting throughout the city in addition to recycling and landfill bins.³ It enforces these mandates by having sanitation workers conduct audits of individual trash containers which involve those

[†] J.D., May, 2022, University of Illinois College of Law. This note is submitted with gratitude to my constitutional law professor, Jason Mazzone; my environmental ethics professor, Heidi Hurd; and my mother, Tiffany Euler.

¹ *National Overview: Facts and Figures on Materials, Wastes, and Recycling*, EPA, <https://www.epa.gov/facts-and-figures-about-materials-waste-and-recycling/national-overview-facts-and-figures-materials> (last visited Aug. 10, 2020).

² S.F., CAL., ENVIRONMENT CODE, ch. 19 (2020).

³ *Id.*

workers physically examining what residents choose to throw away versus what they choose to divert.⁴

On a larger scale, the entire state of Connecticut has mandatory recycling.⁵ Public Act No. 10-87 requires “[e]ach person who generates solid waste from a residential property” to “separate from other solid waste items designated for recycling.”⁶ Such legislation is becoming increasingly common: twenty-one states and the District of Columbia have adopted some type of mandatory recycling as of May 1, 2017.⁷ While the materials required under each state differ and the enforcement mechanisms are not uniform, it is clear that mandatory recycling is becoming more commonplace.

Although many jurisdictions across the United States are not as extreme in their positions on recycling, San Francisco’s policies implicate important constitutional questions. Namely, can the federal government mandate that Americans recycle? If so, can it search a person’s garbage bin to certify compliance with the ordinance? Perhaps most importantly, *should* the government be allowed to audit a person’s trash? Where does the Fourth Amendment come into effect with warrantless searches of refuse?

This Article analyzes both the federalism and privacy concerns inherent in legislation similar to Ordinance 100-09. First, it discusses principles of power-sharing in recycling mandates to determine whether the federal government or the states should be the body creating such laws. Second, it discusses the privacy implications ingrained in an audit system that both permits the government to search one’s trash without a warrant and to provide penalties

⁴ Erick Trickey, *San Francisco’s Quest to Make Landfills Obsolete*, POLITICO (Nov. 21, 2019, 5:01 A.M.), <https://www.politico.com/news/magazine/2019/11/21/san-francisco-recycling-sustainability-trash-landfills-070075>.

⁵ H.B. 5120, 2010 Gen. Assemb., Feb. Sess. (Conn. 2010).

⁶ *Id.*

⁷ NORTHEAST RECYCLING COUNCIL, DISPOSAL BANS & MANDATORY RECYCLING IN THE UNITED STATES 1 (2017), https://nerc.org/documents/disposal_bans_mandatory_recycling_united_states.pdf [https://web.archive.org/web/20191121022913/https://nerc.org/documents/disposal_bans_mandatory_recycling_united_states.pdf].

for noncompliance. This portion of the analysis splits the privacy rules into two categories of cases based on the location of the garbage receptacle: whether it is in the curtilage of one's house or whether it is outside of the curtilage of one's house. Finally, this Article provides recommendations for government bodies attempting to create mandates similar to Ordinance 100-09.

I. CONSTITUTIONAL FOUNDATION

Article I, Section 8 of the Constitution establishes Congress' enumerated powers.⁸ Two important clauses provide Congress with seemingly broad authority. The first is the power to regulate interstate commerce "among the several States."⁹ The second is the power to "lay and collect taxes" to provide for the "general welfare of the United States."¹⁰ Any power not enumerated in Article I, Section 8 is reserved to the states under the Tenth Amendment.¹¹

The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people."¹² A key carveout of the Tenth Amendment is that certain powers are expressly prohibited to the States under Article I, Section 10: including, for example, the power to make treaties,¹³ coin money,¹⁴ and declare war.¹⁵ The power of states is also limited under the doctrine of selective incorporation, with most of the Constitution's Amendments being interpreted as restrictions on state power.¹⁶

⁸ U.S. CONST. art. I, § 8.

⁹ U.S. CONST. art. I, § 8, cl. 3.

¹⁰ U.S. CONST. art. I, § 8, cl. 1.

¹¹ U.S. CONST. amend. X.

¹² *Id.*

¹³ U.S. CONST. art. I, § 10, cl. 1.

¹⁴ *Id.*

¹⁵ U.S. CONST. art. I, § 10, cl. 3.

¹⁶ *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963) (providing that the Sixth Amendment's guarantee of assistance of counsel for criminal defendants applies to the states); Miranda v. Arizona, 384 U.S. 436 (1966) (incorporating the Fifth Amendment's protection from self-incrimination to the states); *Timbs v. Indiana*,

Several constitutional Amendments limit the police powers of the states, perhaps most notably the Fourth Amendment.¹⁷ The Fourth Amendment generally is regarded as the Amendment that gives Americans a so-called right to privacy against certain governmental actions in that it protects people from “unreasonable searches and seizures” of their “persons, houses, papers, and effects” without a warrant.¹⁸ This privacy protection, though not explicit in the Amendment, comes from *Katz v. United States*, where the Court analyzed what is covered by the Amendment¹⁹ based on where the defendant has a “reasonable expectation of privacy.”²⁰

Because obtaining a warrant in every circumstance is impractical, special circumstances exist that permit the police to forego the warrant requirement.²¹ San Francisco’s trash audit program could fall into two categories of exceptions: the consent exception²² or the plain view exception.²³ Additionally, many courts, including the Supreme Court, are reluctant to recognize a

139 S. Ct. 682 (2019) (establishing that the Eighth Amendment prohibition on punishments that are “cruel and unusual” is a restriction on state actions as well as federal punishments).

¹⁷ U.S. CONST. amend. IV; *see, e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the Fourth Amendment to the states).

¹⁸ U.S. CONST. amend. IV.

¹⁹ *Katz v. United States*, 389 U.S. 347, 350 (1967).

²⁰ *Id.* at 360 (Harlan, J., concurring).

²¹ *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968) (allowing the police to “stop and frisk” a person that they have “reasonable suspicion” is armed and dangerous); *Chimel v. California*, 395 U.S. 752 (1969) (allowing a warrantless search after a person is lawfully arrested in order to protect police).

²² *See generally* *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (holding that evidence obtained in a warrantless entry is admissible based on the consent of a party who possesses “common authority” over the premises).

²³ *See, e.g.*, *Harris v. United States*, 390 U.S. 234 (1968) (holding that an automobile registration card that was “plainly visible” was not obtained through an illegal search); *Texas v. Brown*, 460 U.S. 730 (1983) (permitting the admission of evidence that was obtained when a police shined a flashlight into the defendant’s car); *see also* *New York v. Class*, 475 U.S. 106 (1986) (holding moving papers that obstructed the defendant’s vehicle identification number did not constitute an unreasonable search because of governmental efforts to ensure that the vehicle identification number is in plain view).

broad, unconditional “reasonable expectation of privacy” in a person’s garbage.²⁴

II. FEDERALISM, PRIVACY, AND POLICE SURVEILLANCE

Questions of federalism, privacy, and police surveillance are raised by San Francisco’s recycling mandate. As jurisdictions across the United States begin to formulate similar environmental policies, two central questions should be at the heart of legislative debates. First, what level of government is most appropriate to address such pressing environmental concerns? Second, are mandatory recycling laws appropriate under the Fourth Amendment and under common notions of privacy?

A. Principles of Federalism in Recycling Mandates

As previously discussed, the federal government’s lawmaking powers are limited to those enumerated in Article I, Section 8 of the Constitution,²⁵ with all other powers “not delegated to the United States . . . nor prohibited by it to the States . . . reserved to the States” under the Tenth Amendment.²⁶ San Francisco’s mandatory recycling initiative raises important federalism questions: is the city the best body to legislate over such activity? Would a national program with similar requirements be more appropriate to provide uniformity across the country? Does the federal government have such broad powers?

²⁴ See, e.g., *California v. Greenwood*, 486 U.S. 35 (1988) (holding that an expectation of privacy does not exist in garbage placed for collection outside the curtilage of one’s home); *United States v. Crowell*, 586 F.2d 1020 (4th Cir. 1978) (holding that a person does not have a reasonable expectation of privacy in trash when the trash had already been removed from the defendant’s residence); *Pleasant v. Lovell*, 876 F.2d 787 (10th Cir. 1989) (holding that a reasonable expectation of trash can exist when the defendant takes steps that are calculated to avoid snooping).

²⁵ U.S. CONST. art. I, § 8.

²⁶ U.S. CONST. amend. X.

To answer these questions, it is crucial to return to the tension between the Tenth Amendment and the enumerated powers of Congress under Article I, Section 8 of the Constitution.²⁷ The authority of the federal government to hypothetically mandate recycling in the United States could come from one of two sources: the Commerce Clause or the Taxing and Spending Clause.²⁸ The first part of this section analyzes such a program under the Commerce Clause, and the second part conducts an analysis under the Taxing and Spending Clause.

B. Commerce Clause

Commerce Clause jurisprudence in the United States has shifted considerably since the Constitution was drafted.²⁹ While some eras of the Supreme Court took an expansive view of the Commerce Clause, others ruled sharply that Congress was attempting to regulate non-commercial activities. Before understanding the contemporary scope of the Commerce Clause, a discussion of the Court's history with the Clause is necessary.

²⁷ See U.S. CONST. amend. X (providing that all powers not given to the federal government or "prohibited by it to the States" are "reserved for the States"); *id.* art. I, § 8 (listing powers given to the federal government); see also *id.* art. I, § 10 (listing powers denied to the states).

²⁸ U.S. CONST. art. I, § 8, cl. 1 & 3.

²⁹ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (establishing the "direct" versus "indirect" test for the validity of Commerce Clause legislation); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (abandoning the "direct" versus "indirect" test and establishing the "close and substantial relation" test). Compare *Lottery Case (Champion v. Ames)*, 188 U.S. 321, 347 (1903) (holding that the Commerce Clause "acknowledges no limitations, other than are prescribed in the Constitution"), and *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (permitting congressional action to prevent one farmer from growing wheat for personal consumption), with *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 573–75 (2012) (prohibiting use of the Commerce Clause to force a person to engage in commerce), and *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (establishing the contemporary three-category framework that Congress may legislate under the Commerce Clause).

The Clause was first examined in detail in *Gibbons v. Ogden*, in which the Court considered whether Congress could regulate navigation over New York's waters.³⁰ Justice Marshall, writing for the majority, wrote that commerce included navigation, "but it is something more: it is intercourse."³¹ Thus, Congress could regulate nearly anything under the Commerce Clause as long as it relates to "commercial intercourse" and is "prescribing rules for carrying on that intercourse."³² An analysis under *Gibbons v. Ogden* would indicate that the federal government could in fact mandate recycling: requiring consumers to dispose of products in a specific way is simply an attached condition on the purchase of goods. It is "prescribing a rule for carrying on" the sale of products.³³

The Court in the *Lottery Case* would likely also agree with a national recycling mandate. Here, the Court considered a congressional ban on lottery tickets across state lines.³⁴ Justice Harlan reasoned that Congress can regulate interstate commerce by any means necessary, including an outright ban on items that are considered harmful to the general welfare.³⁵ The *Lottery Case* Court might consider a mandatory recycling law to actually be a general prohibition of certain goods (e.g. organic waste and plastics) in landfills. Thus, under this analysis, the federal government would be well within its authority to mandate recycling under the Commerce Clause.

The Court later took a more restrictive, conservative approach to its understanding of the Commerce Clause. In *A.L.A. Schechter Poultry Corp. v. United States*, for example, Justice Hughes distinguished between "direct" and "indirect" effects on interstate commerce and ruled that activities indirectly affecting interstate commerce can only be regulated by the states under the

³⁰ *Gibbons v. Ogden*, 22 U.S. 1, 1–2 (1824).

³¹ *Id.* at 189.

³² *Id.* at 189–90.

³³ *Id.* at 190.

³⁴ *Lottery Case*, 188 U.S. at 322–23.

³⁵ *See id.* at 346–47.

Tenth Amendment.³⁶ In *Carter v. Carter Coal Co.*, decided just one year later, Justice Sutherland defined commerce to mean “intercourse for the purposes of trade,” which included the sale and transportation of commodities but not the manufacture or production of them.³⁷ While Justice Hughes might argue that a mandatory recycling program is too indirectly related to interstate commerce to be within Congress’ power, Justice Sutherland would likely contend that the disposal of a commodity would not fall under the definition of commerce because recycled goods ultimately become important in manufacturing. In either case, a mandatory recycling law would be patently unconstitutional.

After the more conservative approaches in *A.L.A. Schechter Poultry Corp.* and *Carter*, the Court shifted back to an extremely expansive view of the Commerce Clause.³⁸ A particularly liberal view of the Clause is found in *Wickard v. Filburn*, in which the Court ruled that Congress has the authority to regulate a single person’s production of wheat intended for personal consumption on the grounds that it takes away from the open market.³⁹ *Heart of Atlanta Motel v. United States*—as another example of this more liberal approach—allowed Congress to prohibit discrimination at a hotel under the Clause because it placed an artificial restriction on the market.⁴⁰ While neither of these cases are particularly analogous

³⁶ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 456 (1935).

³⁷ *Carter v. Carter Coal Co.*, 298 U.S. 238, 298 (1936).

³⁸ Compare *A.L.A. Schechter*, 295 U.S. 495 (restricting congressional regulation under the Commerce Clause to “direct” effects on interstate commerce), and *Carter Coal*, 298 U.S. 238 (holding that the Commerce Clause cannot be used to regulate the manufacture or production of commodities), with *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (permitting Congress to regulate a single person’s agricultural habits on the basis that it would have a “substantial effect” on the interstate economy), and *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (“[The Commerce Clause] extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . .”).

³⁹ *Wickard*, 317 U.S. at 128–29.

⁴⁰ *Heart of Atlanta Motel*, 379 U.S. at 258.

to the hypothetical at hand, both illustrate a willingness of the Court to expand the definition of commerce greatly in order to give Congress sweeping legislative power.

The current jurisprudence surrounding the Commerce Clause stems from *United States v. Lopez*. In this case, the Court ruled that Congress can only regulate three categories of activities under the Commerce Clause: (1) the “channels of interstate commerce”; (2) the “instrumentalities of,” or persons or things in, interstate commerce; and (3) activities that have “a substantial relation to interstate.”⁴¹ The use of these categories was repeated in *United States v. Morrison*, where the Court emphasized a key constraint: simply showing an economic connection between an activity and interstate commerce is not sufficient under the *Lopez* precedent.⁴²

An important additional restriction was created in *National Federation of Independent Business v. Sebelius*: Congress cannot use the Commerce Clause to force individuals to engage in commerce.⁴³ Justice Robert’s opinion in this case creates a substantial obstacle for the federal government in attempting to mandate recycling: there probably could not be any costs associated with the program. If, for example, Congress passed a law requiring each person to take out his or her recycling weekly, Congress likely could not force the person to pay for pickup services related to that recycling because to do so would force the person to engage in commerce.

Sebelius would also cause problems because current practice shows that most recycling goes overseas. Whereas each state has its

⁴¹ *United States v. Lopez*, 514 U.S. 549, 559 (1995).

⁴² *See United States v. Morrison*, 529 U.S. 598, 613 (2000) (“[T]hus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”); *see also Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring) (“[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”).

⁴³ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 540 (2012).

own landfill system for waste,⁴⁴ much of the United States' recycling tends to be exported. For example, the United States sends over one million metric tons of plastic each year abroad.⁴⁵ Therefore, if Congress mandated recycling, it would be forcing Americans to engage in interstate commerce when they would ordinarily only be interacting with intrastate landfill systems.

A key implication of using the Commerce Clause to mandate recycling is that the Dormant Commerce Clause doctrine would apply. In *Wilson v. Black Bird Creek Marsh Co.*, Justice Marshall ruled that the Commerce Clause is not simply an enumerated power of the federal government; rather, it is a limitation placed on the states.⁴⁶ A state law will be preempted,⁴⁷ even if the federal government has not yet exercised its Commerce Clause power, if it is "repugnant" to the federal government's ability to regulate interstate commerce.⁴⁸ Therefore, any ruling that Congress can use the Commerce Clause to mandate recycling would immediately take that power away from the states under this doctrine.

It is likely under the precedent of *Lopez* and *Morrison* that a federal recycling mandate would be unconstitutional under the Commerce Clause. Recycling is patently not a channel of interstate commerce, and it is probably not an instrumentality of interstate commerce. While an argument could be made that recycling is a key component of manufacturing and thus an activity that has "a substantial relation to" interstate commerce, *Morrison* precedent would likely prevail and show that recycling is simply not an economic activity—it is rather an act of disposal, wholly unrelated

⁴⁴ *Project and Landfill Data by State*, EPA, <https://www.epa.gov/lmop/project-and-landfill-data-state> (last visited Aug. 15, 2020).

⁴⁵ Renee Cho, *Recycling in the U.S. Is Broken. How Do We Fix It?*, STATE OF THE PLANET (Mar. 13, 2020), <https://blogs.ei.columbia.edu/2020/03/13/fix-recycling-america>.

⁴⁶ *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 250 (1829).

⁴⁷ See *Arizona v. United States*, 567 U.S. 387, 399 (2012) (holding that state laws are preempted when they conflict with federal law and when they regulate a field over which Congress has "exclusive governance").

⁴⁸ *Black Bird*, 27 U.S. at 251.

to commerce. If, however, a mandate were to survive the *Lopez* test, it would likely fail under *Sebelius* because current infrastructure limitations would require consumers to engage in commerce.

C. Taxing and Spending Clause

As an alternative to using the Commerce Clause, Congress could attempt to enact legislation to make recycling mandatory using its taxing and spending clause powers.⁴⁹ While these two powers are used together, they have separate rules about their usage. An analysis of the power to tax turns on the tension between *Bailey v. Drexel Furniture* and *National Federation of Independent Business v. Sebelius*,⁵⁰ while an analysis of the power to spend relies on the test established in *South Dakota v. Dole*.⁵¹ Each of these analyses show that the power to tax and spend can be used to enact mandatory recycling initiatives, but the use of each power comes with unique restrictions and problems.

In the *Child Labor Tax Case*, Justice Taft held that Congress may exercise a “prohibitory and regulatory effect” when the matter is typically reserved to the states under the Tenth Amendment.⁵² However, this ruling noted that a tax that simply imposed an “incidental restraint” is valid.⁵³ Under *Bailey*, then, a recycling mandate would only be constitutional if it imposed an “incidental restraint,” such as financially incentivizing recycling while penalizing sending

⁴⁹ See generally *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (holding that Congress cannot use the Commerce Clause to create the individual mandate of the Affordable Care Act but it can use the Taxing and Spending Clause).

⁵⁰ Compare *Sebelius*, 567 U.S. 519 (holding that the individual mandate of the Affordable Care Act is valid under the Taxing Clause on the grounds that it functions as a tax on deciding not to enroll in health insurance), with *Child Labor Tax Case* (*Bailey v. Drexel Furniture Co.*), 259 U.S. 20 (1922) (holding that child labor cannot be taxed under the Taxing Clause because Congress is attempting to use the Clause with a “prohibitory and regulatory” effect).

⁵¹ *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987).

⁵² *Child Labor Tax Case*, 259 U.S. at 37.

⁵³ *Id.* at 38.

recyclables to landfills. It could not prohibit or regulate sending recyclable goods to landfills, and thus the mandate would lose its intended effect.

Some cases since *Bailey*, however, demonstrate a tendency of courts to permit the use of the tax power to accomplish certain goals.⁵⁴ For example, in *Helvering v. Davis*, Justice Cardozo upheld the old age benefits of the Social Security Act because the problem was national in scope and needed a national response to deal with financial realities associated with old age.⁵⁵ Additionally, in *United States v. Kahriger*, Justice Reed wrote that a tax is not invalid simply because it deters activity.⁵⁶ This ruling noted that courts cannot “limit the exercise of the taxing power” without evidence that provisions of a tax bill are unrelated to tax needs.⁵⁷ Further, the Court has tended to be highly deferential to the determinations of Congress.⁵⁸

In *National Federation of Independent Business v. Sebelius*, the Court shifted substantially when Justice Roberts noted that the individual mandate of the Affordable Care Act could be viewed as simply a tax on those who do not buy insurance.⁵⁹ He wrote that

⁵⁴ See, e.g., *Helvering v. Davis*, 301 U.S. 619, 644 (1937) (allowing Congress to use the Taxing Clause to solve an issue that is “national in area and dimensions” that “the laws of the states cannot deal with . . . effectively.”); *United States v. Kahriger*, 345 U.S. 22 (1953); see also *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937) (permitting use of the Taxing Clause to require a \$200 license tax on firearm dealers).

⁵⁵ *Helvering*, 301 U.S. at 644.

⁵⁶ *Kahriger*, 345 U.S. at 28; see also *Sonzinsky*, 300 U.S. at 513 (“But a tax is not any the less a tax because it has a regulatory effect.”).

⁵⁷ *Kahriger*, 345 U.S. at 31.

⁵⁸ See *Sonzinsky*, 300 U.S. at 513–14 (“Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.”); *Helvering*, 301 U.S. at 640 (“The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.”); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 594 (1937) (“Congress must have the benefit of a fair margin of discretion.”); *Kahriger*, 345 U.S. at 31 (“Unless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power.”).

⁵⁹ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563 (2012).

when there are two possible meanings to a congressional law, Courts should assume the meaning that does not violate the Constitution.⁶⁰ Under this analysis, imposing a fine on those that do not recycle could be seen as a tax on the act of sending something recyclable to a landfill. Thus, the mandate to recycle could potentially be upheld under the taxing power of Congress.

However, Justice Frankfurter's dissent in *Kahriger* notes a serious problem with using the tax power: Congress could potentially then use the taxing power to regulate behaviors and activities beyond its enumerated powers.⁶¹ Even if the taxing power could be used to mandate that every American recycle, it would create troubling precedent that could allow Congress to mandate nearly any type of behavior. Although a mandatory recycling law might be constitutional under *Sebelius*, it would be more appropriate to rely on precedent from *Bailey* to prevent an overreach of congressional power.

Using the spending power is not susceptible to the same slippery-slope problems implicated by the taxing power: use of the spending power has a much clearer test for what is acceptable behavior. This test, set out in *South Dakota v. Dole*, states that the receipt of federal funds can be conditional if (1) the exercise of the spending power is "in pursuit of 'the general welfare'"; (2) the conditions are laid out "unambiguously"; (3) the conditions are related "to the federal interest in" a specific national project or program; and (4) the conditions are themselves constitutional.⁶² In *Dole*, Justice Rehnquist held that federal highway funds could be withheld from states that did not raise the minimum drinking age to 21.⁶³

Consider a congressional act mandating that all states impose compulsory recycling laws with fines for those who do not compost wasted food, and any state who chooses not to enact such a law loses food-related federal grants such as WIC. Under this test,

⁶⁰ *Id.* at 562.

⁶¹ *Kahriger*, 345 U.S. at 38 (Frankfurter, J., dissenting).

⁶² *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987).

⁶³ *Id.* at 209.

such an act would surely be constitutional. It is in pursuit of the general welfare because the national landfill crisis affects each state;⁶⁴ it is unambiguous because the conditions clearly state the consequences of noncompliance; and withholding food-related federal grants surely relates to the effort to reduce food waste and does not violate any other parts of the Constitution.

Some critics of such a law might argue that it is far too much of a temptation to enact the food composting law or that losing WIC funding would be an unrealistic option for the states under precedent from *National Federation of Independent Business v. Sebelius*.⁶⁵ After all, nearly eight million people participated in the program in 2018.⁶⁶ However, the temptation argument would fail under *Steward Machine Co. v. Davis*, wherein the Court held that temptation does not equate coercion.⁶⁷ While the *Sebelius* argument would be persuasive, it too would ultimately fail on because of a key distinction between the cases: in *Sebelius*, Congress attempted to ensure compliance with a federal regulatory program,⁶⁸ while in the hypothetical at hand, Congress is simply asking the states to enact their own regulatory programs.

Ultimately, the use of the Taxing and Spending Clause to mandate recycling would be a constitutional use of congressional power, but it would be highly controversial and antithetical to the doctrine of separation of powers. While the taxing power could potentially be used to fine residents who send recyclables to landfills, allowing such an exercise of this power would be, as Justice

⁶⁴ Ann M. Simmons, *The World's Trash Crisis, and Why Many Americans Are Oblivious*, L.A. TIMES (Apr. 22, 2016, 3:00 A.M.), <https://www.latimes.com/world/global-development/la-fg-global-trash-20160422-20160421-snap-htmlstory.html>.

⁶⁵ *Sebelius*, 567 U.S. at 581 (holding that losing Medicaid funding for not implementing the individual mandate of the Affordable Care Act was not a realistic choice for state governments).

⁶⁶ *WIC Participant and Program Characteristics 2018 – Charts*, USDA (last visited Aug. 13, 2020), <https://www.fns.usda.gov/wic/participant-and-program-characteristics-2018-charts>.

⁶⁷ *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937).

⁶⁸ *Sebelius*, 567 U.S. at 581.

Frankfurter wrote, the Court “shut[ting] its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States.”⁶⁹ Additionally, while the spending power could be used to condition federal funds, doing so would really just be forcing the states to create legislation. Thus, while the federal government cannot use the Commerce Clause to enact a recycling mandate, it could use the taxing and spending powers; however, the more appropriate avenue for mandatory recycling would be the use of state governments under the Tenth Amendment.⁷⁰

III. FOURTH AMENDMENT IMPLICATIONS OF A STATE GOVERNMENT ENFORCING A MANDATORY RECYCLING LAW BY AUDITING GARBAGE: TWO POSSIBLE OUTCOMES BASED ON CURTILAGE

In addition to the federalism questions raised by San Francisco’s mandatory recycling ordinance, basic privacy rights are implicated by permitting sanitation workers to audit a person’s trash and check compliance with the law. There are several legal questions raised by such a practice; namely, can the government search a person’s garbage and use what it finds to issue fines? What are the privacy rights a person has in his or her own refuse? When does someone’s property right in garbage end?

The Fourth Amendment prohibits “unreasonable” searches and seizures.⁷¹ Warrantless searches are “per se unreasonable” under the Fourth Amendment.⁷² When information is obtained by officers by “physically intruding” on the defendant’s property, a search has occurred.⁷³ Any evidence obtained without a warrant cannot be used against a person in a court of law under the exclusionary rule

⁶⁹ *United States v. Kahriger*, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting).

⁷⁰ U.S. CONST. amend. X.

⁷¹ U.S. CONST. amend. IV.

⁷² *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971).

⁷³ *Florida v. Jardines*, 569 U.S. 1, 5 (2013).

established in *Weeks v. United States*.⁷⁴ Caselaw regarding searches of trash receptacles create two potential rules for whether evidence obtained without a warrant will be excluded: when the trash is located outside of one's curtilage, no warrant is necessary; when the trash is located within one's curtilage, a warrant should be necessary.

A. Garbage Searches Outside the Curtilage of One's Home

In the landmark case *Katz v. United States*, the Supreme Court interpreted a so-called right to privacy in the Fourth Amendment against certain types of "governmental invasion."⁷⁵ In that case, the Court established that, in order for Fourth Amendment protections to apply, the defendant must have a "reasonable expectation of privacy" over the property in question.⁷⁶ Justice Harlan's concurrence created a test to aid with Fourth Amendment search analysis and establish an expectation of privacy under the majority's view: first, the complainant must have "an actual expectation of privacy" (the subjective prong), and second, the expectation of privacy "must be one that society is prepared to recognize as reasonable" (the objective prong).⁷⁷

The Supreme Court has already heard one claim regarding Fourth Amendment protections as they apply to trash in *California v. Greenwood*.⁷⁸ In that case, Justice White held that a person does not have a reasonable expectation of privacy in garbage and that the Fourth Amendment does not prohibit the warrantless search of garbage "left for collection outside the curtilage of a home."⁷⁹ Thus, it is settled that San Francisco's policy of auditing trash to ensure compliance with its mandatory recycling law is constitutional as

⁷⁴ *Weeks v. United States*, 232 U.S. 383, 392 (1914); see also *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the exclusionary rule to state courts).

⁷⁵ *Katz v. United States*, 389 U.S. 347, 350 (1967).

⁷⁶ *Id.* at 361 (Harlan, J., concurring).

⁷⁷ *Id.*

⁷⁸ *California v. Greenwood*, 486 U.S. 35 (1988).

⁷⁹ *Id.* at 37.

long as the garbage was collected outside the curtilage of the home. However, this case left open an important question: what if the garbage was left for collection within the curtilage of the home and the search took place there? This question requires a return to Justice Harlan's *Katz* test.

*B. Supporting the Warrant Requirement for
Garbage Searches within One's Curtilage*

Crucial to analyzing San Francisco's trash audit system using Justice Harlan's test in *Katz* is first defining what the relevant property interests a person has in his or her trash. Property is considered abandoned if the owner meets two elements: he or she must (1) display an "intention to abandon" the property and (2) commit "an act or omission by which such intention is carried into effect."⁸⁰ Under this theory, trash would seemingly be abandoned property: the owner is literally "throwing away"⁸¹ the property and acting on the intention to abandon it by placing it outside for someone else to collect.

However, simply abandoning property is not sufficient to relinquish all Fourth Amendment protections associated with it. In *Soldal v. Cook County*, the Court noted that "property rights are not the sole measure of Fourth Amendment violations."⁸² This is consistent with the ruling in *Katz*, for example, wherein the defendant's speech in a phonebooth was protected by the Fourth Amendment despite the defendant having no ownership of the booth.⁸³ Thus, I propose that courts should look beyond the mere abandonment theory of property regarding the search of garbage and consider

⁸⁰ 1 C.J.S. *Abandonment* § 4 (2020).

⁸¹ 1 C.J.S. *Abandonment* § 1 (2020).

⁸² *Soldal v. Cook County*, 506 U.S. 56, 64 (1992).

⁸³ See *Katz v. United States*, 389 U.S. 347, 351 (1967) ("[T]he premise that property interests control the right of the Government to search and seize has been discredited.") (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967)).

other relevant factors; namely, whether the garbage is within the curtilage of the residence.

Fourth Amendment protections apply not only to a person's home, but also to the area "immediately surrounding and associated with" the home, known as the curtilage, because the defendant has a reasonable expectation of privacy in the curtilage of his or her home.⁸⁴ The curtilage is "the area outside the home . . . so close to and intimately connected with the home and the activities that normally go on there that it can . . . be considered part of the home."⁸⁵

Determining the extent of curtilage for a given property requires an examination of four factors: (1) the extent of enclosure surrounding the home; (2) the nature and use of the area; (3) the steps the resident took to protect the area from public observation; and (4) the proximity of the area to the home.⁸⁶ These factors are weighed on a case-by-case basis, but it is certainly possible for a garbage collection receptacle to be within the curtilage of the home. For example, while many Americans place their trash at the curb for collection, some jurisdictions allow trash pickup in a person's backyard or other areas in specific circumstances.⁸⁷

In fact, the placement of garbage in the curtilage of a home is a scenario that concerned Chief Judge Posner in *United States v. Redmon*, wherein he suggested in his dissent that "searches, inclu-

⁸⁴ *Oliver v. United States*, 466 U.S. 170, 180 (1984).

⁸⁵ *Siebert v. Severino*, 256 F.3d 648, 653–54 (7th Cir. 2001).

⁸⁶ *See United States v. Dunn*, 480 U.S. 294, 301 (1987).

⁸⁷ *Backyard Pickup Service*, SEATTLE.GOV, <https://www.seattle.gov/utilities/your-services/collection-and-disposal/your-collection-day/backyard-pickup-service> (last visited Aug. 19, 2020) (allowing the pickup of garbage, but not recycling, in Seattle backyards); *I'm Disabled and Can't Carry My Garbage to the Curb? What Can I do?*, TOWN OF WEAVERVILLE, N.C., https://www.weavervillenc.org/sp_faq/im-disabled-and-cant-carry-my-garbage-can-to-the-curb-what-can-i-do (last visited Aug. 19, 2020) (allowing carry out and carry back services under special circumstances, including incapacitation due to age, disability, or infirmity); *70 or Disabled Assistance*, WASTELINE, <https://wasteline.org/garbage-information/70-or-disabled-assistance> (last visited Aug. 18, 2019) (permitting garbage pickup for those age 70 or older and those with disabilities).

ding searches of garbage, that take place within the curtilage of the defendant's property must comply with the Fourth Amendment's restriction on searches."⁸⁸ This dissent is consistent with the curtilage distinction drawn in *Greenwood*.⁸⁹ Jurisdictions across the United States should adopt Judge Posner's curtilage analysis framework for Fourth Amendment garbage claims to best ensure compliance with the spirit of Fourth Amendment privacy jurisprudence.

Consider a trash audit system where sanitation workers physically search a resident's trash on his or her curtilage and issue fines if certain materials are not recycled. Under Judge Posner's rule, this would be a violation of the Fourth Amendment: a warrant would be necessary to conduct such a search. Although it is possible that a search of the garbage could take place after it has been collected because a person would certainly not have an expectation of privacy in trash in the possession of the municipality, this would be more difficult as the trash of one resident is placed in the same truck as the rest of the neighborhood's garbage.

Under the subjective prong of the *Katz* test, a person must have an "actual . . . expectation of privacy."⁹⁰ Justice Stewart wrote for the majority in *Katz* that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."⁹¹ This rule works under the subjective prong because of the understanding that curtilage searches are an invasion of privacy and a violation of the

⁸⁸ *United States v. Redmon*, 138 F.3d 1109, 1129 (7th Cir. 1998) (Posner, J., dissenting).

⁸⁹ *Compare id.* at 1129 (Posner, J., dissenting) ("[S]earches, including searches of garbage, that take place within the curtilage of the defendant's property must comply with the Fourth Amendment's restriction on searches."), *with California v. Greenwood*, 486 U.S. 35, 37 (1988) (holding that garbage can be searched when it is "left for collection outside the curtilage of a home").

⁹⁰ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

⁹¹ *Id.* at 351.

Fourth Amendment.⁹² The placement of the garbage matters greatly under this scenario. For example, while a person placing garbage at the curbside of his property would likely expect anyone to be able to search through it, someone placing garbage for pickup in his or her backyard would not expect someone to enter his or her property.

This rule is consistent with basic understandings of privacy. Many people are deeply uncomfortable with the prospect of neighbors or police digging through their trash, a fact noted in Justice Brennan's dissent in *Greenwood*.⁹³ In fact, this discomfort is so widespread that many municipalities have enacted anti-scavenging laws designed to prevent that exact scenario.⁹⁴ It surely follows that if a person's trash was in fact in the curtilage of his or her own backyard, that expectation of privacy would be present.

The second prong of the *Katz* analysis shows that society is also likely prepared to recognize as reasonable an expectation of privacy in a person's trash. This is exemplified in decisions at state courts throughout the country. For example, the Oregon Supreme Court interpreted the Oregon State Constitution to include a right to privacy in trash when a sanitation worker gave garbage to the police for an unauthorized search.⁹⁵ Additionally, Alaska refused to permit police to search a person's garbage without a warrant, as a general rule, because it was "profoundly committed to the preservation of personal privacy."⁹⁶ These holdings make clear that in several parts

⁹² See, e.g., *Oliver v. United States*, 466 U.S. 170, 180 (1984) (holding that a defendant has a "reasonable expectation of privacy" over the curtilage of his own home); *United States v. Dunn*, 480 U.S. 294, 301 (1987) (establishing a test for determining the extent of curtilage for Fourth Amendment purposes).

⁹³ See *Greenwood*, 486 U.S. at 45 (Brennan, J., dissenting) ("Scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior.").

⁹⁴ See, e.g., *Beyond the Curb—Scavenging*, TRI-CITIES DISPOSAL & RECYCLING SERV., INC., <http://www.tri-citiesdisposal.com/new-page-3> (last visited Aug. 20, 2020) (providing that the Tri-City area does not permit scavenging within residential and business waste receptacles).

⁹⁵ *State v. Lien*, 441 P.3d 185, 190–91 (Or. 2019).

⁹⁶ *Smith v. State*, 510 P.2d 793, 795 (Alaska 1973) (limiting its ruling in favor of police to the particular case in order to avoid creating a general rule permitting police to search garbage without a warrant).

of the country, Americans are uneasy about letting police use evidence obtained in trash.⁹⁷ Judge Posner's curtilage carveout acknowledges these fears without overturning *Greenwood* entirely.

In addition to meeting the *Katz* test, this rule would follow other Fourth Amendment philosophy. Recent jurisprudence regarding the Fourth Amendment's application is enlightened by two principles: (1) "that the Amendment seeks to secure 'the privacies of life' against 'arbitrary power,'" and (2) that the Framers wrote the Amendment to "place obstacles in the way of a too permeating police surveillance."⁹⁸ These principles set out in *Carpenter*, are both satisfied by Judge Posner's rule. The first component, securing the privacies of life, are discussed in detail above.

Second, not allowing the search of trash on someone's curtilage would reinforce an obstacle to police surveillance. In order to conduct a search on the curtilage of one's home, a warrant is ordinarily required.⁹⁹ However, if Judge Posner's rule were not in effect, the warrant requirement could be bypassed by a Machiavelian officer seeking to obtain evidence by any means necessary. Bypassing the warrant requirement is exactly what the Supreme Court sought to prevent in *Katz*, stating "that the mandate of the [Fourth] Amendment requires adherence to judicial processes."¹⁰⁰

Short of overturning *Greenwood* entirely, jurisdictions across the United States should adopt Judge Posner's curtilage rule regarding trash searches to ensure that basic privacy rights of Americans everywhere are protected. The right to privacy in one's trash on one's curtilage is both subjectively and objectively reasonable. Moreover, recognizing this right is crucial to promoting robust Fourth Amendment protections and preventing overbearing police surveillance.

⁹⁷ See also *Pleasant v. Lovell*, 876 F.2d 787, 802 (10th Cir. 1989) (holding that a reasonable expectation of privacy in trash can exist when the defendant takes steps that are calculated to avoid snooping).

⁹⁸ *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018).

⁹⁹ *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971).

¹⁰⁰ *Katz v. United States*, 389 U.S. 347, 357 (1967).

IV. BALANCING MANDATORY RECYCLING AND PRIVACY

Crucial to San Francisco's mandatory recycling ordinance is the principle of federalism. Although the federal government might be tempted to enact similar environmental mandates on a national level, it should not do so to respect the power-sharing principles of the Tenth Amendment. However, if such a program were created by the federal government, several restrictions must be in place. First, it cannot be done through use of the Commerce Clause under *Lopez*. Second, although it could potentially be legal under the Taxing and Spending Clause, the Spending portion of the Clause would provide the best method of creating such legislation: restricting access to related federal funds for waste-reduction initiatives. This would still be a problematic approach but would ultimately leave crucial decisions up to the states.

For states and municipalities that enact mandatory recycling legislation, privacy considerations should be at the forefront of all components of every such law. Although *California v. Greenwood* permitted police officers to search a suspect's garbage without a warrant¹⁰¹ and thereby made Ordinance 100-09 and similar initiatives constitutional, this ruling should not be taken as absolute. Instead, a distinction should be made between searches that take place on one's curtilage and searches that take place outside of one's curtilage. A search within one's curtilage should adhere strictly to the requirements and protections of the Fourth Amendment. In adopting mandatory recycling programs, states and municipalities should only permit the searches of trash receptacles that are located off of one's curtilage.

V. CONCLUSION

San Francisco's mandatory recycling ordinance raises important questions about federalism, privacy, and police surveillance. If the federal government were to attempt to create a national

¹⁰¹ See *California v. Greenwood*, 486 U.S. 35, 37 (1988) (finding no reasonable expectation of privacy in garbage).

recycling mandate, the use of the taxing and spending clause would be the best use of Congress' power to do so. Use of the Commerce Clause would ultimately fail under modern jurisprudence since *Lopez*. Moreover, the federalism issues invoked in recycling legislation indicate that state and municipal governments should ultimately be leading such charges in order to respect the limitations of congressional power contained in the Tenth Amendment.

The Supreme Court has not yet recognized a right to privacy in trash, but this does not mean that such a right is without a foundation. Many people are uncomfortable with the idea that a nosy neighbor can simply search through their trash, and this discomfort likely extends to searches by police as well. A search of the curtilage of one's home should still be protected under the Fourth Amendment, and the privacy concerns of Americans across the country should be at the front of lawmakers' minds as mandatory recycling initiatives become more and more commonplace.