

# Commandeering and Its Alternatives: A Federalism Perspective

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## INTRODUCTION

Imagine another terrorist strike on United States soil similar to the events of September 11, 2001. Within days, Congress considers amending federal law to specify that under defined conditions in the wake of a terrorist attack, the United States military would have exclusive authority to maintain law and order within the affected area.<sup>1</sup> Members of Congress, however, take pause at the Supreme Court's previous admonitions that criminal law enforcement is a traditional subject of state concern in our federal system. They therefore decide not to replace state and local law enforcement personnel with the military. Instead, they put state and local officers under federal command (with federal pay) for the duration of the emergency conditions.

Under the Rehnquist Court's Tenth Amendment jurisprudence, Congress would not have this option; the authorizing legislation would clearly fall within the Court's categorical ban on "commandeering" state and local officials. "Commandeering" refers to a federal requirement that state officials enact, administer, or enforce a federal regulatory program. Under the same Tenth Amendment decisions, however, there would be no constitutional impediment were Congress to authorize the military to maintain law and order within the targeted area until the emergency had passed. The Court has circumscribed Congress's freedom of action in the name of federalism. Yet the impermissible, commandeering option potentially leaves room for a state role in maintaining law and order, while the permissible, preemptive alternative does not allow states to exercise regulatory control.<sup>2</sup> The primary purpose of this Article is first to suggest that this legal regime makes scant sense from a federalism perspective, and then to offer a better alternative in its place.

The Tenth Amendment experienced something of a federalism revival during the 1990s,<sup>3</sup> when the Rehnquist Court breathed new

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1. See *infra* Part V for a more detailed exploration of this hypothetical.

2. This Article uses the term "preemption" in the sense of direct federal regulation, not necessarily in the sense of a complete federal ouster of state regulatory authority. Preemption does not always remove states from the regulatory scene, at least not entirely, because federal law may set a regulatory floor or ceiling instead of a specific requirement, and states may exercise their authority consistently with the federal mandate.

3. Other doctrinal areas—specifically, the Commerce Clause, the Eleventh Amendment, and Section Five of the Fourteenth Amendment—experienced similar federalism revivals. See *infra* notes 30, 164-65 (citing the relevant case law). Noticeably absent from this list is the Spending Clause. See, e.g., Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 765 (2003) ("It seems plain that truly imposing substantive limits on Congress's regulatory reach, which the rhetoric of *Lopez* and *Morrison* describe, and thereby carving out areas of state sovereignty, rather than

life into the amendment's seemingly truistic language.<sup>4</sup> First, in *New York v. United States*, the Court held that Congress could not order state legislatures either to regulate low-level radioactive waste in accordance with federal instructions or to take title to the waste.<sup>5</sup> Then, in *Printz v. United States*, the Court decided that Congress could not order state executive officials to help conduct background checks on would-be handgun purchasers on an interim basis.<sup>6</sup> In both cases, the Court supported its conclusion by stressing the importance of political accountability. In *New York*, for example, Justice O'Connor wrote for the Court that

where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.<sup>7</sup>

Five years later, Justice Scalia stressed “sovereignty” in addition to accountability, insisting on behalf of the Court in *Printz* that “[i]t is

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simply directing Congress to work its will in one way or another, will require the Court to address the Spending Clause.”); Neil S. Siegel, *Dole's Future: A Strategic Analysis*, 16 SUP. CT. ECON. REV. (forthcoming 2007) (using doctrinal analysis and game theory to examine the scope of the conditional spending power going forward); *see also infra* note 51 (discussing *South Dakota v. Dole*, 483 U.S. 203 (1987)); *infra* Part II.D (analyzing conditional spending from a federalism perspective).

4. The Tenth Amendment states that “[t]he 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.” The text of the amendment makes explicit what is implicit in both the enumeration of powers allocated to Congress in Article I, Section 8 and the bedrock distinction between a national government of limited powers and state governments of plenary powers. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 156-57 (1992) (“The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.”); *United States v. Darby*, 312 U.S. 100, 123-24 (1941) (“The amendment states but a truism that all is retained which has not been surrendered.”).

5. 505 U.S. 144 (1992) (holding that the “take title” provision of the Low Level Radioactive Waste Policy Amendments Act of 1985 constitutes unconstitutional compulsion and commandeering of the governmental capacity of state governments).

6. 521 U. S. 898 (1997) (relying on a Tenth Amendment anticommandeering rationale in holding unconstitutional certain interim provisions of the Brady Handgun Violence Prevention Act).

7. 505 U.S. at 168-69.

the very *principle* of separate state sovereignty that [commandeering] offends, and no comparative assessment of the various interests can overcome that fundamental defect.”<sup>8</sup> Anticommandeering doctrine thus prohibits the federal government from requiring the states to enact, to administer, or to enforce a federal regulatory program under any circumstances.

Commentators have exposed vulnerabilities in the Court’s anticommandeering logic. In light of the silence of the Constitution on commandeering,<sup>9</sup> the absence of strong support for *New York* and *Printz* in originalist sources,<sup>10</sup> and the only modest backing for these decisions throughout American history and in the U.S. Reports,<sup>11</sup> it is not clear that political accountability is a Tenth Amendment value, let alone one that the Court is charged with vindicating broadly and aggressively through a categorical rule.<sup>12</sup> Nor is it clear that commandeering inevitably generates serious accountability concerns regardless of what Congress, the states, the news media, or citizens may do to address potential problems. Even after factoring in search costs and rational ignorance, it seems likely that citizens who pay attention to public affairs and who care to inquire will be able to discern which level of government is responsible for a government regulation, and citizens who do not care to inquire may be largely beyond judicial or political help on the accountability front. They may not be part of “the public” in whose “full view” the federal government preempts state law.<sup>13</sup> Government officials also have an abiding

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8. 521 U.S. at 932.

9. The text of the Tenth Amendment says nothing of commandeering. *See supra* note 4 and accompanying text. By contrast, Article I, Section 8 speaks explicitly to the broad scope of Congress’s power.

10. *See, e.g., Printz*, 521 U.S. at 971 (Souter, J., dissenting) (“In deciding these cases, which I have found closer than I had anticipated, it is *The Federalist* that finally determines my position. I believe that the most straightforward reading of No. 27 is authority for the Government’s position here, and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45.”).

11. In *Printz*, Justice Scalia conceded for the Court that “[t]he constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but is not conclusive.” *Id.* at 918. As for precedent, which Justice Scalia turned to “most conclusively in the present litigation,” *id.* at 925, the Court focused most of its attention on *New York*. *Id.* at 925-31.

12. *Cf. Vicki C. Jackson, Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2201, 2204 (1998) (Commandeering “can risk confusing the lines of political accountability—but the extent to which this is likely (or more likely than in other forms of federal-state action) depends on the substance and substantiality of the burden. Political accountability may be relevant but does not of itself justify the broad rule adopted by the Court.”); *id.* at 2257 (“Although bright-line rules may offer comparative advantages in reducing risks of error or bias by other decisionmakers (here, lower courts), they do so only at the inevitable cost of being overinclusive or underinclusive in serving their substantive purposes.”).

13. *New York v. United States*, 505 U.S. 144, 168 (1992).

interest in informing voters when they are responsible for popular actions. And when these actions prove unpopular, such that politicians have an incentive to engage in blame shifting, the popular press often serves to advance political accountability. Finally, federal preemption and conditional spending also trigger accountability concerns.<sup>14</sup> So does giving states the choice between commandeering and preemption.<sup>15</sup>

Even if one believes that commandeering triggers political accountability concerns appropriate for judicial vindication, the question arises whether accountability exhausts the relevant constitutional considerations, or whether other federalism values are pertinent to the proper scope of anticommandeering doctrine. This inquiry argues that the constitutional calculus is considerably more complicated than the Court's opinions suggest. The following analysis captures the factors in play by articulating a simple expected-value equation and unpacking its components. The analysis uses this equation to trace out the consequences of anticommandeering doctrine—both widely recognized and potentially counterintuitive—for the Constitution's commitment to federalism.

This investigation shows that several distinct concerns are at stake—values central to the project of federalism—and further

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14. See, e.g., Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 213, 231 (Kalypso Nicolaidis & Robert Howse eds., 2001) (“[T]he danger of blurring lines of accountability in the case of commandeering is not categorically different from what happens in the case of federal pre-emption, which the Court accepts. In both cases, the component State’s actions or inactions are only partially determined by State politicians, yet citizens are likely to view the component State officials as fully responsible whenever the latter are the most salient agents involved. In both cases proper lines of accountability can be preserved when component States are vigilant in publicizing the respective roles of the federal and State policy-makers on any given issue. Given proper information, citizens should find the lines of accountability reasonably clear.”); Evan H. Caminker, *State Sovereignty and Subordination: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1054-55 (1995) (“Commandeering precludes state officials from being directly and exclusively responsive to their constituency’s desires, but so does conventional preemption. Although one can use verbal wordplay to make it sound as though commandeering and preemption frustrate accountability in different ways, this is merely definitional manipulation without substance. Prohibiting commandeering but not preemption in the name of securing the accountability of state government is simply arbitrary.”) (footnote omitted); Jackson, *supra* note 12, at 2202 (“Standard preemption—the effect of federal law in negating the area in which state law can operate—can obscure the causes of inaction by state officials. Conditional spending regulatory requirements, though nominally involving a state’s choice to accept federal funds, can result in a very confusing picture of responsibility to voters. Why, then, would commandeering be different?” (footnote omitted)). See also *infra* Parts II.D, IV.E (discussing accountability concerns in various regulatory contexts).

15. See Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 386 n.51 (2005) (“It is possible that this attenuation of political accountability is one reason cooperative federalism is popular.”).

demonstrates that anticommandeering doctrine causes net harm to federalism values under certain circumstances.<sup>16</sup> Specifically, *New York* and *Printz* vindicate federalism values to some extent by addressing any accountability problems caused by commandeering and by requiring the federal government to internalize more of the costs of federal regulation before engaging in regulation. At the same time, however, anticommandeering doctrine undermines federalism values when the (clearly constitutional) alternative of preemption is reasonably available and the commandeering ban thus places states in danger of losing regulatory control in a greater number of future instances.<sup>17</sup> This consequence of the doctrine is problematic from a federalism perspective because direct federal regulation limits state regulatory power to a greater extent than does commandeering as a general matter, and states must retain regulatory control in order to realize the values typically associated with federalism.<sup>18</sup>

This investigation demonstrates that anticommandeering doctrine is seriously over- and under-inclusive, whether considered in light of federalism values as a whole or in light of the accountability concerns on which the Court has inappropriately fixated. This disconnect between legal doctrine and animating values suggests that the Rehnquist Court's Tenth Amendment legacy has more to do with a symbolic and judicially manageable gesture in the direction of "states' rights" than with the substance of federalism as constitutional law intended to safeguard state autonomy. For a federalism concerned with state retention of regulatory control, the relevant questions sound in a distinctly constitutional form of cost-benefit analysis.<sup>19</sup> The

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16. For a discussion of the values that federalism is thought to advance and their dependence upon meaningful levels of state regulatory control, see *infra* notes 87-95 and accompanying text.

17. Preemption is the constitutional principle derived from the Supremacy Clause, U.S. CONST. art. VI, providing that if a conflict exists between valid federal law and state or local laws, federal law controls and the state or local laws are invalidated on the ground that federal law is supreme. See, e.g., *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." (internal quotation marks omitted)); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (concluding that federal law trumps state laws that "interfere with, or are contrary to the laws of Congress" because "[i]n every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it"). In *New York*, Justice O'Connor stated that preemption, unlike commandeering, does not trigger Tenth Amendment concerns. See *supra* text accompanying note 7.

18. This consequence is also problematic because preemption raises accountability concerns of its own. See *supra* note 14.

19. While cost-benefit analysis is arguably external to constitutional law (though balancing tests are similar), here the values determining the range of cognizable costs and benefits are internal to constitutional doctrine in the sense that the Court's federalism opinions have

decisive issues are (1) whether the proffered accountability benefits generated by current Tenth Amendment doctrine are cost-justified by exceeding the expected damage to state regulatory control (and political accountability) caused by preemption, and (2) whether the relative financial and temporal costs to the states of commandeering, as opposed to preemption, tip the balance one way or the other.

The upshot of this analysis is that instances of commandeering should carry a presumption of unconstitutionality when preemption is not a feasible alternative in the short run, the federal mandate is unfunded and expensive, and the federal government makes little effective effort to alleviate reasonable accountability concerns. Only a substantial governmental interest should suffice to overcome this presumption. By contrast, commandeering should be held constitutional as far as the Tenth Amendment is concerned when preemption constitutes a feasible alternative in the short run and such preemption would reduce state regulatory control relative to the commandeering at issue, the federal mandate is fully funded or relatively inexpensive to carry out, and the federal government takes effective measures to maintain lines of accountability (or accountability is for some other reason not seriously threatened).

Thus, this approach to commandeering turns the conventional wisdom about *New York* and *Printz* on its head. According to the standard accountability story, the “hard” commandeering of the state legislative process at issue in *New York* was more invasive and thus more problematic than the relatively “soft,” interim commandeering of state and local executive officials implicated in *Printz*.<sup>20</sup> Incorporating concerns about regulatory control into the analysis, however, changes the calculus significantly. Because federal preemption was reasonably available (and indeed had already been threatened<sup>21</sup>) in *New York* but not in *Printz*, and because *New York* did not in fact involve more serious accountability concerns, this inquiry submits that *Printz* remains the closer case and *New York* the easier one—but that *New York* was easier in the opposite direction. Instead of an “easy kill,” the federal law at issue in *New York* should have been upheld against the state’s Tenth Amendment challenge.

Part I briefly surveys the Supreme Court’s Tenth Amendment cases, focusing on the decisions between 1990 and the present. Part II conducts a theoretical analysis of anticommandeering doctrine from a federalism perspective, and Part III applies this analysis to *New York*

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identified these values as relevant to the practice of constitutional adjudication. See *infra* Part IV.A.

20. See *infra* Part III for a discussion of this issue.

21. See *id.*

and *Printz*. Part IV anticipates various potential objections to the argument, and Part V employs a war-on-terror hypothetical to illustrate the argument's potential force. The Conclusion defends substantive standards and balancing and rejects categorical rules sounding mostly in symbolism as the proper approach to federalism questions in constitutional law.

## I. A SHORT SURVEY OF TENTH AMENDMENT DOCTRINE

Throughout American history, one of two conceptions of the Tenth Amendment has prevailed at a given time. During the 1800s, the Supreme Court viewed the amendment not as an independent limit on legislative authority that Congress might violate, but rather as a reminder that the federal government is one of limited powers, such that Congress may legislate in a certain area only if the Constitution grants it authority to do so.<sup>22</sup>

During the early 1900s and up until 1937, the Court embraced the very different understanding that the Tenth Amendment safeguards state autonomy from federal overreaching. According to this view, the amendment reserves a zone of exclusive regulatory authority to the states, and courts must hold unconstitutional federal laws that disregard this exclusive reservation of power. Specifically, the pre-1937 Court concluded that the Tenth Amendment left to the states sole control over the production of goods, so that federal laws aimed at regulating production were invalid.<sup>23</sup>

From 1937 until the early 1990s, the Court reverted to its nineteenth-century view of the Tenth Amendment.<sup>24</sup> During this period, the Court found only one Tenth Amendment violation. That decision—*National League of Cities v. Usery*<sup>25</sup>—was overruled less

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22. See *Gibbons*, 22 U.S. (9 Wheat.) at 196-97 (“[If], as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce . . . among the several states . . . is vested in Congress as absolutely as it would be in a single government.”).

23. See, e.g., *Hammer v. Dagenhart* (*The Child Labor Case*), 247 U.S. 251, 273-74 (1918) (invalidating a federal law prohibiting the shipment in interstate commerce of goods produced in factories employing child labor because “[t]he grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture”).

24. See *United States v. Darby*, 312 U.S. 100, 124 (1941) (overruling *Hammer v. Dagenhart* in rejecting a constitutional challenge to the Fair Labor Standards Act of 1938 (FLSA), which prohibited the shipment in interstate commerce of goods made by employees whose wages or hours contravened the Act's protections, in part because the Tenth “Amendment states but a truism that all is retained which has not been surrendered”). See also *supra* note 4 (quoting the Court's opinion in *Darby*).

25. 426 U.S. 833 (1976).



than a decade later after being distinguished into oblivion. In *National League of Cities*, the Court held 5-4 that applying the minimum-wage provisions of the federal Fair Labor Standards Act (“FLSA”) to state and local employees violated the Tenth Amendment because the statute “operate[d] to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions.”<sup>26</sup> The Court did not explain how to identify a “traditional governmental functio[n],” and it unpersuasively distinguished *National League of Cities* in a series of subsequent decisions.<sup>27</sup> The Court finally overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>28</sup> holding that the FLSA could constitutionally be applied to state and local governments. Writing for himself and the four *National League of Cities* dissenters, Justice Blackmun “reject[ed], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular government function is ‘traditional’ or ‘integral.’”<sup>29</sup>

The Rehnquist Court’s reinvigoration of the Tenth Amendment began in 1991 in a case raising a question of statutory interpretation, not constitutional law. In *Gregory v. Ashcroft*,<sup>30</sup> Missouri state-court judges challenged, as violative of the federal Age Discrimination in Employment Act (“ADEA”),<sup>31</sup> the mandatory retirement age set forth in the state constitution.<sup>32</sup> In so doing, the Supreme Court issued a “clear statement” rule of statutory interpretation: Justice O’Connor wrote for the majority that the Court will construe federal law to apply to important state government activities only if Congress issues

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26. *Id.* at 852. Justice Blackmun cast the decisive vote. He wrote ambiguously and ominously that the majority had adopted “a balancing approach [that] . . . does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.” *Id.* at 856 (Blackmun, J., concurring).

27. *See, e.g.*, *EEOC v. Wyoming*, 460 U.S. 226 (1983) (rejecting a Tenth Amendment challenge to the application of the Age Discrimination in Employment Act to the states); *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742 (1982) (rejecting a Tenth Amendment challenge to the Public Utilities Regulatory Policies Act of 1978, which required state utility commissions to consider FERC proposals). In each decision, the majority was composed of Justice Blackmun and the four *National League of Cities* dissenters.

28. 469 U.S. 528 (1985).

29. *Id.* at 546-47. Because *Garcia* remains good law, states have a legal duty to comply with the FLSA. But the Rehnquist Court severely limited *Garcia*’s impact by holding that state sovereign immunity prohibits most private suits for money damages to remedy even willful state violations of concededly valid federal law in federal or state courts. *See Alden v. Maine*, 527 U.S. 706 (1999); *infra* notes 164-65 and accompanying text (citing the relevant case law).

30. 501 U.S. 452 (1991).

31. 29 U.S.C. §§ 621-634 (2006).

32. 501 U.S. at 456.

a clear statement that it wants the law to apply to the states in these circumstances.<sup>33</sup> Because the ADEA lacked such a clear statement, the Court concluded that the law did not preempt the state's mandatory retirement age.<sup>34</sup> In so holding, the Court underscored the role of the states in preventing tyranny and the importance of the Tenth Amendment in protecting state regulatory autonomy.<sup>35</sup>

A year later, the Court issued an arguably novel constitutional holding in a Tenth Amendment case.<sup>36</sup> At issue in *New York v. United States*<sup>37</sup> was the validity of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985,<sup>38</sup> which required states to arrange for the safe disposal of radioactive waste produced within their borders. The statute gave states monetary and access incentives to comply with its requirements, permitting states to impose a surcharge on waste coming from other states and eventually to deny access to disposal sites.<sup>39</sup> The most controversial part of the law, included to secure adequate state regulatory action,<sup>40</sup> mandated that states would "take title" to any radioactive waste within their borders that was not appropriately disposed of by a certain date and would then "be liable for all damages directly or indirectly incurred."<sup>41</sup>

The Court affirmed Congress's power under the Commerce Clause to regulate the disposal of radioactive waste.<sup>42</sup> The Court also upheld the act's financial incentives as within Congress's power under

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33. *Id.* at 461.

34. *Id.* at 467.

35. *Id.* at 458 ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); *id.* at 461 ("This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."); *id.* at 463 ("[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is an authority that lies at the heart of representative government. It is a power reserved to the States under the Tenth Amendment . . ." (internal quotations omitted)).

36. One could argue that the 1990s anticcommandeering decisions were not entirely novel. *National League of Cities* could be viewed as an indirect form of anticcommandeering, preventing Congress from forcing states to increase taxes or to reduce services in order to comply with the FLSA's minimum-wage provisions. Moreover, the Court in *Hodel v. Virginia Surface Mining & Reclamation Association* cited lower court opinions, *see infra* note 183, in writing that "there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 452 U.S. 264, 288 (1981).

37. *See supra* notes 5-7 and accompanying text.

38. 42 U.S.C. § 2021b to 2296b-7 (2006).

39. *New York v. United States*, 505 U.S. 144, 152-53 (1992).

40. *See infra* Part III for a discussion of the rationale behind the commandeering provision.

41. *New York*, 505 U.S. at 153.

42. *Id.* at 159-60.

the Commerce and Spending Clauses,<sup>43</sup> and sustained the law's access incentives as a conditional exercise of Congress's commerce power. Congress, in other words, was constitutionally giving states the choice between "regulat[ing] the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency" and having "their residents who produce radioactive waste . . . be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites."<sup>44</sup>

The Court, however, held the "take title" provision unconstitutional. Writing for a six-Justice majority, Justice O'Connor stated that this provision forced states to choose between "accepting ownership of waste" and "regulating according to the instructions of Congress."<sup>45</sup> Neither imposition was permissible, she concluded, because requiring states to accept ownership would unconstitutionally "commandeer" state governments, and mandating compliance with federal regulatory acts would unlawfully force states to implement federal statutes.<sup>46</sup> Justice O'Connor declared that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."<sup>47</sup>

As noted above,<sup>48</sup> the Court's constitutional concerns in *New York v. United States* centered on the issue of political accountability. In the Court's view, Congress was requiring the states to regulate, yet the states (not the federal government) might be held politically accountable for the regulatory activity. The Court reasoned that citizens affected by the regulations would see who was doing the regulating, not who had made the decision to order regulation in the first place.<sup>49</sup>

Despite holding that Congress may not force state legislatures to pass laws or require state administrative agencies to promulgate regulations, the *New York* Court stressed that Congress was hardly impotent. The Court stated that Congress could bypass state regulatory regimes entirely by establishing federal standards that all actors, public and private, must meet. Congress, in other words, could

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43. *Id.* at 171-73.

44. *Id.* at 174. See *infra* Part IV.D for an analysis of federal laws that give states the choice between commandeering and preemption.

45. *New York*, 505 U.S. at 175. It is noteworthy that Justice Souter joined the majority in *New York* and dissented in *Printz*.

46. *Id.*

47. *Id.* at 188.

48. See *supra* text accompanying note 7.

49. *Id.* See *infra* Part III for an argument that the Court's concerns were misplaced on the facts of *New York*.

preempt state and local regulatory activity.<sup>50</sup> Moreover, the Court affirmed that Congress could condition federal funding of state and local government activities on their compliance with related regulatory requirements that Congress could not impose directly:

This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. . . . [U]nder Congress' spending power, "Congress may attach conditions on the receipt of federal funds."<sup>51</sup>

Accordingly, Congress could induce states to clean up radioactive waste by placing conditions on federal grants, even though Congress could not force states to clean up the waste. Finally, the Court declared that the Constitution allows Congress to give states the choice between being commandeered and being preempted.<sup>52</sup>

The Justices fought their next Tenth Amendment battle five years later. In *Printz v. United States*,<sup>53</sup> the question presented was whether the federal Brady Handgun Violence Prevention Act<sup>54</sup> contravened the Tenth Amendment by requiring state and local law enforcement officers to conduct background checks on would-be handgun buyers on an interim basis until a federal computer database was created.<sup>55</sup> Writing for a five-Justice majority, Justice Scalia declared the law unconstitutional. He stressed, among other things,<sup>56</sup> that Congress was unlawfully commandeering state executive officers to enforce federal law. In the early years of the Republic and

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50. See *supra* text accompanying note 7; see also *supra* note 17.

51. *New York*, 505 U.S. at 166-67 (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)). In *South Dakota v. Dole*, the Supreme Court held 7-2 that Congress may condition five percent of federal highway funds on a recipient state's adopting a 21-year-old drinking age, even assuming (but not deciding) that the Twenty-First Amendment would prohibit Congress from imposing a national minimum drinking age directly. 483 U.S. at 217-18. Chief Justice Rehnquist stressed for the Court that the condition was "clearly stated," was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel," and was not "so coercive as to pass the point at which pressure turns into compulsion." *Id.* at 208, 211.

52. *New York*, 505 U.S. at 174; see also *infra* note 172 (quoting this portion of the Court's opinion in *New York*). For an analysis of this option, see *infra* Part IV.D. See *infra* Part III for a discussion of Justice White's dissent in *New York*.

53. See *supra* notes 6, 8.

54. 18 U.S.C. § 922 (2006).

55. See *infra* note 190 for a discussion of the federal database, which is now operating.

56. The Court also concluded that the Act violated the separation of powers because Congress had taken some of the executive power that Article II vests exclusively in the President and given it to state and local law enforcement officers. *Printz v. United States*, 521 U.S. 989, 922 (1997). For a critical discussion of "unitary executive theory" in the commandeering context published just before *Printz* came down, see Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075 (1997) (citing and analyzing the relevant literature).

throughout American history, Justice Scalia wrote, Congress had not engaged in such commandeering. The Court reaffirmed *New York* and concluded that the Tenth Amendment prohibits Congress from conscripting state governments.<sup>57</sup>

The Rehnquist Court decided just one other Tenth Amendment case. In *Reno v. Condon*,<sup>58</sup> the Justices *rejected* a Tenth Amendment challenge to a federal statute. At issue was the federal Driver's Privacy Protection Act ("DPPA"), which prohibited states from disclosing personal information gained by departments of motor vehicles ("DMVs"), including home addresses, phone numbers, and social security numbers.<sup>59</sup> The Court unanimously reversed the judgment of the United States Court of Appeals for the Fourth Circuit, which had held that the DPPA unconstitutionally commanded states not to disclose the information.<sup>60</sup> Writing for the Court, Chief Justice Rehnquist distinguished *New York* and *Printz*. He reasoned that in *Condon* Congress was not regulating private actors indirectly by commandeering the regulatory apparatus of the states; rather, Congress was regulating directly all entities that possess the driver's license information—states and private entities alike.<sup>61</sup> Accordingly, the Court concluded that the DPPA did not trigger accountability concerns.

The Court has not issued a Tenth Amendment holding since 2000. Federal courts of appeals have invalidated only two other federal laws on Tenth Amendment grounds in recent years.<sup>62</sup>

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57. *Printz*, 521 U.S. at 923. In a dissent joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens underscored the need for the Brady Act and rejected the animating principle of *Printz*: "When Congress exercises the powers delegated to it by the Constitution, it may impose affirmative obligations on executive and judicial officers of state and local governments as well as ordinary citizens." *Id.* at 939 (Stevens, J., dissenting).

58. 528 U.S. 141 (2000).

59. 18 U.S.C. § 2721 (2006).

60. *Condon v. Reno*, 155 F.3d 453, 465 (4th Cir. 1998), *rev'd*, 528 U.S. 141 (2000).

61. *Condon*, 528 U.S. at 146-51.

62. See *Ass'n of Comm. Orgs. for Reform Now v. Edwards (ACORN)*, 81 F.3d 1387, 1392-94 (5th Cir. 1996) (invalidating part of the Lead Contamination Control Act of 1988, 42 U.S.C. §§ 300j-21 to 300j-26 (2006), which required each state to "establish a program" to assist local educational agencies, schools, and day care centers in remedying potential lead contamination in their drinking water systems on threat of civil enforcement proceedings); *Bd. of Natural Res. v. Brown*, 992 F.2d 937, 946-47 (9th Cir. 1993) (invalidating part of the Forest Resources Conservation and Shortage Relief Act, 16 U.S.C. §§ 620-620j (2006), which significantly restricted the export of unprocessed timber harvested from state, but not privately owned, public lands in the western continental United States, and which required states to issue regulations implementing the export ban). A question worth exploring is why *New York* and *Printz* have had so little generative force to date. Possible explanations include: (1) few federal laws commandeer; (2) states do not want to challenge some federal statutes that commandeer because of agreement with them; (3) sometimes the costs to the states imposed by commandeering are minimal; and (4)

In sum, the Court has categorically prohibited the federal government from requiring states to enact, to administer, or to enforce a federal regulatory program. Anticommandeering doctrine thus disables the federal government from using the states as regulators; it does not preclude the federal government from treating the states as regulated entities.

## II. A THEORETICAL ANALYSIS OF ANTICOMMANDEERING DOCTRINE

### A. *The Federalism Costs of Commandeering*

A comprehensive examination of anticommandeering doctrine—one that includes but transcends the Supreme Court’s focus on accountability—must account for the impact of federal regulation on federalism values as a whole in light of the full range of congressional options. The components of such an examination can be captured by the following expected-value equation:

$$E(C_{\text{fed reg}}) = p_{\text{fed reg}} * C_{\text{fed reg}}.^{63}$$

$E(C_{\text{fed reg}})$  represents the expected costs to federalism values of a federal regulation, whether commandeering, preemption, a choice between commandeering and preemption, or conditional federal spending.<sup>64</sup>  $p_{\text{fed reg}}$  is the probability that the federal government will regulate, and  $C_{\text{fed reg}}$  identifies the costs to federalism values imposed by the federal regulation. The probability of federal regulation ( $p_{\text{fed reg}}$ ) is a function of the financial and political accountability costs associated with engaging in federal regulation. The costs to federalism values ( $C_{\text{fed reg}}$ ) sound in economics, public policy, and politics. They include: (1) the costs to states, in terms of time and money, of complying with or implementing a federal regulation,<sup>65</sup> including

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states may fear that preemption would follow a successful challenge to a commandeering law, and preemption would be worse from their perspective.

63. The equation in the text is not essential to advance the argument. But the equation usefully underscores that federalism values are affected by both the probability of federal regulation and the federalism costs imposed by such regulation. As explored below, moreover, the equation captures the counterintuitive theoretical tradeoff among federalism values that anticommandeering doctrine can generate.

64. This inquiry uses the term “regulation” in a generic, non-technical sense, a sense that includes use of the conditional spending power. See *infra* note 74 (distinguishing mandatory from non-mandatory forms of federal regulation).

65. Professor Vicki Jackson notes the possible “difference . . . between Congress requiring the states to do something that costs a lot (in terms of time or money) [and] something that does not.” Jackson, *supra* note 12, at 2202. She argues that such a concern “would not justify a flat

opportunity costs;<sup>66</sup> (2) the loss (or imposition) of regulatory control that federal regulation may demand; and (3) the accountability costs (and associated voter disapproval) that federal regulation may require states to incur and allow the federal government to avoid.<sup>67</sup>

Thus, accountability concerns implicate both the probability of federal regulation and the federalism costs that such regulation imposes. Professor Jackson usefully identifies three distinct dimensions to the “political accountability” argument:

First, voters may hold state officers politically accountable for a choice that was not theirs, or which the officers were forced by federal law to make, without appreciating the source of the substantive rule or the forced nature of the decision, respectively. Second, voters may fail to hold federal officials politically accountable for choices they do make that impose further choices, or costs, on state governments. And third, federal legislators may not themselves feel as politically accountable, and responsible, if they can direct states to carry out programs (especially if these programs are not financed from federal revenues).<sup>68</sup>

Professor Jackson’s third type of accountability concern affects the probability of federal regulation; her first and second categories implicate both the probability of federal regulation and the federalism costs imposed by such regulation.

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anticommandeering rule, but might instead lead to rules that focus on the substantiality of the burdens, or the possibility of federal subsidy or waiver for localities for which a requirement is particularly burdensome.” *Id.* at 2202-03 (footnotes omitted).

66. These costs are critical not as ends of federalism in themselves, but because commandeering “absorbs government resources that the states might direct elsewhere.” Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580 & n.65 (1994); see also Jackson, *supra* note 12, at 2204 (“[T]he more substantial the burden, the greater the possibility that state officers will be unable to attend to state business because of the need to carry out federal directives.”). Professor H. Jefferson Powell’s defense of *New York* sounds in the related prudential considerations of state “initiation” and “immunity.” H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 63, 686-87 (1993). Likewise, Professor Caminker, although generally critical of anticommandeering doctrine, agrees that “[w]hen Congress requires states to fund an expensive enforcement program, the state might be forced to respond by diverting energies and funds from existing state programs in order to comply with the federal mandate. In this fashion ‘unfunded mandates’ can generate what might non-technically be called externalities; not only do they constrain state discretion over the subject matter being federally regulated, but the costs they impose can pressure the state to cut back on unrelated programs.” Caminker, *supra* note 14, at 1079-80.

67. The equation in the text might seem oversimplified because it assumes that federal regulation imposes only costs from the standpoint of federalism values, not benefits. Federal regulation may be beneficial for any number of reasons. For instance, the federal government may be best equipped to deal with a problem confronting citizens of the state, perhaps because interstate externalities like pollution are present. This inquiry’s exclusive focus on costs can be justified, however, because the various federalism benefits conferred by federal regulation can be expressed analytically in terms of negative costs. Consider, for example, the “take title” provision at issue in *New York*, which alleviated a collective action problem between the sited and unsited states. See *supra* Part I; *infra* Part III. Such federal legislation is properly viewed as enhancing state regulatory control and thus as reducing the federalism costs imposed by federal regulation.

68. Jackson, *supra* note 12, at 2201.

*B. The Standard Account of Anticommandeering Doctrine*

Anticommandeering doctrine vindicates federalism values<sup>69</sup> not only to the extent that it reduces the financial and accountability costs of federal regulation (the first and third components of  $C_{fed\ reg}$ ), but also to the extent that it forces the federal government to internalize more of the financial and accountability costs associated with regulating.<sup>70</sup> As law and economics posits, actors that do not internalize the full costs of their behavior tend to engage in too much of the behavior.<sup>71</sup> The same holds true for government regulators. All other things being equal, anticommandeering doctrine reduces the expected costs of federal regulation ( $E(C_{fed\ reg})$ ) by lowering the probability of such regulation ( $p_{fed\ reg}$ ).<sup>72</sup>

In this regard, anticommandeering doctrine advances federalism values in two ways. First, the doctrine reduces the probability that preemptive federal regulation will be enacted. It does so because the federal government may not be willing to bear all of the financial costs of such regulation, and anticommandeering doctrine prohibits cost externalization through commandeering.<sup>73</sup> Second, the

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69. For a discussion of the various values that federalism is thought to advance, see *infra* notes 87-95 and accompanying text.

70. Note that the federal government does not internalize *all* of the costs of federal regulation when it preempts state law because states are bound by valid federal law and often must incur costs to comply. See *infra* note 102 and accompanying text.

71. See, e.g., ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 40-42 (3d ed. 2000) (discussing externalities and the role of law in encouraging the internalization of external costs).

72. Accord Caminker, *supra* note 14, at 1073 (“Congress might enact a commandeering statute where, absent this possibility, it would have enacted no federal legislation at all. The result is an increase in the total quantity of federal legislation, shifting exercised regulatory power from the states to the federal government.”); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 35 (2004) (arguing that “the anticommandeering doctrine helps shore up the political safeguards of federalism by forcing the national government to internalize the costs—both fiscal and political—of its actions”); *id.* at 127-28 (discussing the “two kinds of costs” that “[f]orbidden commandeering requires the national government to internalize”). Professor Young assumes that the federal government internalizes all of the benefits of federal regulation. The optimal level of federal regulation would change if this assumption were false in a particular setting. For example, public confusion might allow state officials to reap some of the political rewards for popular federal regulations that the states had no hand in enacting or implementing. In this scenario, cost-benefit efficiency might be advanced by having the federal government externalize some of the costs of federal regulation in addition to some of the benefits.

73. The financial costs to the federal government of preemption vary widely depending on the context. Sometimes the costs are negligible. For instance, if Congress imposed requirements for nuclear-waste disposal, the federal government would externalize most of the financial costs. Private businesses that produce such waste would need to make arrangements with states that possess disposal facilities. At other times, however, the costs are substantial. For example, it likely would have been very expensive for the federal government to have conducted all background checks on would-be firearms purchasers from the moment the Brady Act went into effect. See *supra* Part I (discussing *Printz*); *infra* Part III (same).



ban on commandeering prevents any kind of mandatory federal regulation when preemption does not constitute a feasible congressional alternative.<sup>74</sup> Preemption will not always be reasonably available, at least in the short run, as is suggested by the difficulty of conceiving feasible preemptive alternatives in *Printz*.<sup>75</sup> Anticommandeering doctrine cannot compromise state regulatory authority when more onerous regulatory alternatives are not available to the federal government.

This cost-internalization rationale for anticommandeering doctrine provides a relatively clear, analytically tractable principle that is ideologically evenhanded. Events that occurred shortly after the terrorist attacks of September 11, 2001 illustrate this rationale for anticommandeering doctrine.<sup>76</sup> For example, the federal government asked state and local law enforcement officers to help execute a “nationwide plan to interview as many as 5,000 Mideast men ages 18 to 33 here on visas.”<sup>77</sup> While most state and local law enforcement officials obliged, “[t]he Portland, Ore., chief said his department wouldn’t assist the government, while Ann Arbor Police Chief Daniel Oates—with 79 people in his city to be interviewed—ha[d]n’t committed to allowing his officers to conduct interviews.”<sup>78</sup> Because of anticommandeering doctrine, the federal government could not require state and local law enforcement officers to conduct the interviews. In this instance, the unavailability of commandeering advanced the values not only of federalists but also of civil libertarians.<sup>79</sup>

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74. Conditional federal spending does not constitute a form of mandatory federal regulation because states may escape regulation by declining the associated federal funding. See *infra* Part II.D.

75. See *infra* note 81 and accompanying text.

76. See Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231 (2004) (discussing the several states and many local governments that have resisted the perceived excesses of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT ACT”), Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001), either by announcing their disapproval or by ordering their law enforcement personnel not to cooperate in enforcing the law); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1279 (2004) (arguing that “the question of the national government’s ability to require state and local cooperation with federal anti-terrorism initiatives . . . illustrates the several different ways in which federalism promotes and protects individual freedom”).

77. David Shepardson, *FBI to Help Question 650 Men*, THE DETROIT NEWS, Nov. 27, 2001, at 1A.

78. *Id.*

79. To recognize the force of this example, one need not agree that the PATRIOT Act in particular compromises civil liberties. The ratio of state and local to federal law enforcement personnel in the United States is greater than 10 to 1. See Young, *supra* note 76, at 1281

*C. Problematizing the Standard Theory*

All other things being equal, therefore, anticommandeering doctrine reduces the expected costs of federal regulation by lowering the probability of such regulation. But—and this is a potentially big “but”—all other things are not always equal when the Court removes commandeering as an option. Anticommandeering doctrine may increase the costs of federal regulation ( $C_{fed\ reg}$ ) because the unavailability of commandeering may result in more instances of federal preemption going forward. And preemption, an obvious and constitutional alternative to commandeering,<sup>80</sup> may impede the vindication of federalism values not only by raising accountability problems of its own, but also by reducing the regulatory roles of the states at the level of policy implementation.<sup>81</sup> When states are commandeered, they retain (often significant) discretion to determine how to implement the federal mandate. Preemption, by contrast, bypasses state regulatory authority.<sup>82</sup> In a *New York*-type situation,

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(contrasting the more than one million state and local law enforcement personnel with the roughly 93,000 full-time federal law enforcement personnel from surveys conducted in 2000 and 2002, respectively); see also William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2181 (2002) (documenting that the overwhelming majority of law enforcement personnel nationwide are state and local police officers). “At least in the short term,” therefore, “the FBI and other federal law enforcement institutions are unlikely to cover the many responsibilities that ‘homeland security’ entails without substantial state and local assistance.” Young, *supra* note 76, at 1281. See also Althouse, *supra* note 76, at 1232 (“[I]n carrying out the massive federal effort needed to deal with terrorism after September 11, 2001, the national government inevitably looks to the vast number of police, health workers, and other personnel employed at the state and local government levels.”). Because anticommandeering doctrine requires Congress to internalize more of the costs of regulation before regulating, the doctrine can help to safeguard civil liberties any time a proposed federal law would compromise them—either by reducing the likelihood of enactment or by reducing enforcement.

Of course, there is a flip side. Federal legislation aimed at protecting constitutional rights would also be less likely to be enacted or enforced in the presence of a commandeering ban. More generally, the ban impedes realization of any national interest, no matter how weighty or legitimate, that the federal government may seek to advance. Examining the various regulatory options “from a federalism perspective,” as this inquiry does, does not take all of the relevant constitutional values into account.

80. See *supra* text accompanying notes 7, 50.

81. Another option at Congress’ disposal is use of the conditional spending power. See *supra* notes 3, 51 and accompanying text (discussing *Dole*); *infra* Part II.D (analyzing the conditional spending power from a federalism perspective). Still another alternative would be for Congress to give states a choice between being preempted and being commandeered. See *supra* notes 44, 52 and accompanying text (discussing the *New York* Court’s validation of this approach); *infra* Part IV.D (analyzing the implications of the availability of this alternative for the legitimacy of commandeering from a federalism perspective).

82. See, e.g., Caminker, *supra* note 14, at 1002, 1006-07 (“In some situations Congress can even use state intermediaries as a means of preserving a significant role for state discretion in achieving specified federal goals, where the alternative is complete federal preemption of any state regulatory role. . . . Indeed, on occasion this approach allows Congress to govern in a

for example, states that regulate low-level radioactive waste in accordance with federal instructions have more say regarding how such waste is regulated than states whose regulatory activities are preempted by federal law. In the *Printz* scenario, to consider another example, Congress (at least theoretically) could have created a federal bureaucracy to conduct the background checks from the moment that the Brady Act went into effect.<sup>83</sup> Federalists, who presumably want states to participate in regulating gun possession, might sensibly prefer commandeering to preemption.

A key factor, therefore, is the likelihood that the federal government will preempt in the future if the Court disallows commandeering. This probability may depend on whether there are constitutional limits on preemption,<sup>84</sup> and whether Congress and the President have incentives to preempt, as opposed to regulating in some other way or not regulating at all. To account for this question, the simple equation that captures the expected costs of federal regulation  $E(C_{fed\ reg})$ <sup>85</sup> can be disaggregated as follows:

$$E(C_{fed\ reg}) = E(C_{commandeer}) + E(C_{cond\ spend}) + E(C_{no\ fed\ reg}) + E(C_{preempt}).$$

$E(C_{commandeer})$  represents the expected costs to federalism values of commandeering;  $E(C_{cond\ spend})$  indicates the expected costs of conditional federal spending;  $E(C_{no\ fed\ reg})$  denotes the expected costs of no federal regulation; and  $E(C_{preempt})$  is the expected costs of preemption. Now let

$$\begin{aligned} E(C_{commandeer}) &= p_{commandeer} * C_{commandeer}, \\ E(C_{cond\ spend}) &= p_{cond\ spend} * C_{cond\ spend}, \\ E(C_{no\ fed\ reg}) &= p_{no\ fed\ reg} * C_{no\ fed\ reg}, \text{ and} \\ E(C_{preempt}) &= (1 - p_{commandeer} - p_{cond\ spend} - p_{no\ fed\ reg}) * C_{preempt}, \end{aligned}$$

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decentralized manner that is more respectful of state autonomy.”); *id.* at 1011 (distinguishing “two basic commandeering techniques”—that is, “ministerial mandates” and “bounded discretion mandates”—the latter of which “order state officials to reach a specified federal objective, but afford these officials some degree of discretion in deciding how to do so,” an approach that “is particularly supportive of states’ political discretion” and “enhances the prospect that the resulting policy will reflect local needs and concerns as well as the national interest”).

83. Congress could not have required licensed gun dealers to abide by the federal regulation directly because a computer database was not immediately available. *See infra* notes 147, 190 and accompanying text.

84. *See infra* Part IV.C.

85. *See supra* text accompanying note 63.

where  $p_x$  represents the probability of  $x$  federal action, and  $(1 - p_{\text{commandeer}} - p_{\text{cond spend}} - p_{\text{no fed reg}})$  stands for the probability of preemption. It follows that

$$E(C_{\text{fed reg}}) = (p_{\text{commandeer}} * C_{\text{commandeer}}) + (p_{\text{cond spend}} * C_{\text{cond spend}}) + (p_{\text{no fed reg}} * C_{\text{no fed reg}}) + [(1 - p_{\text{commandeer}} - p_{\text{cond spend}} - p_{\text{no fed reg}}) * C_{\text{preempt}}].^{86}$$

As this symbolic representation underscores, the critical issue is the size of  $p_{\text{cond spend}}$  and  $p_{\text{no fed reg}}$ . As  $p_{\text{cond spend}}$  and  $p_{\text{no fed reg}}$  approach 0, a judicial ban on commandeering will result in preemptive regulation, for the probability of preemption will approach 1. As  $p_{\text{cond spend}}$  or  $p_{\text{no fed reg}}$  approaches 1, anticommandeering doctrine yields no mandatory federal regulation. To reiterate, the relative sizes of the various probabilities depend upon constitutional constraints and upon the incentives of Congress and the President to condition federal funds on state compliance with federal regulatory demands, to preempt in the areas covered by the Court's anticommandeering doctrine, or to give up on regulating the activity in question.

When  $p_{\text{cond spend}}$  and  $p_{\text{no fed reg}}$  are small, commandeering (absent anticommandeering doctrine) and preemption are left as the only options, creating a potential tradeoff between lines of accountability and the exercise of state regulatory power.<sup>87</sup> The threat that federal preemption—and thus the preemption-encouraging ban on commandeering—poses to state retention of regulatory control is significant not because state regulatory control is important for its own sake. Rather, the key point is that state regulatory autonomy is needed to realize the values that federalism is typically thought to advance, including accountability. That is, state regulatory autonomy remains critical no matter which of the commonly proffered virtues of federalism are under consideration.

Specifically, tyranny prevention is said to be advanced when multiple levels of government compete for political power.<sup>88</sup>

86. One could complicate matters further by including a choice between commandeering and preemption. See *infra* Part IV.D. The text omits this potential option to simplify the exposition. The text could easily be adjusted to incorporate this alternative.

87. Thus the implications for political accountability of Professor Caminker's commandeering categories, see *supra* note 82, are the opposite of their implications for state regulatory control. As Professor Jackson observes, "statutes that offer substantial discretion to the states in carrying out a substantial, federally mandated duty might pose a greater threat to the clarity of responsibility and thus to political accountability than do statutes imposing more limited, ministerial duties." Jackson, *supra* note 12, at 2203-04.

88. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power. The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties. . . . [A] healthy balance of power between

Democratic self-government is supposed to be facilitated when there exists a robust space for participatory politics at levels closer to the people who are governed.<sup>89</sup> Political responsiveness and accountability are believed to be encouraged when states compete for mobile citizens who can vote with not just their hands but also their feet.<sup>90</sup> Value pluralism is promoted when state policies are allowed to differ along various dimensions of cultural difference.<sup>91</sup> Social problem solving can

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the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” (internal citations omitted)); *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 790 (1982) (O’Connor, J., dissenting) (“[O]ur federal system provides a salutary check on governmental power.”); THE FEDERALIST NO. 51 (James Madison) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 S. Ct. REV. 341, 380-95.

89. See, e.g., *Gregory*, 501 U.S. at 458 (“This federalist structure of joint sovereigns . . . increases opportunity for citizen involvement in democratic processes . . .”); *Fed. Energy Regulatory Comm’n*, 456 U.S. at 789 (O’Connor, J., dissenting) (“[F]ederalism enhances the opportunity of all citizens to participate in representative government. Alexis de Tocqueville understood well that participation in local government is a cornerstone of American democracy.”) (discussing 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 181 (H. Reeve trans., 1961)); Rapaczynski, *supra* note 88, at 395-408.

90. See, e.g., *Gregory*, 501 U.S. at 458 (“This federalist structure of joint sovereigns . . . makes government more responsive by putting the States in competition for a mobile citizenry.”); ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 129-30 (2000) (analyzing the circumstances in which mobile citizens contribute to the efficient delivery of local public goods); Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 149 (1992) (arguing for competition among states); Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, in PERSPECTIVES ON PUBLIC CHOICE 73 (Dennis C. Mueller ed., 1997) (providing necessary and sufficient conditions for the existence of an efficient allocation of citizens across jurisdictions); Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (providing the first formulation of the mobility problem). Responsiveness and accountability are interrelated because one way to ensure responsiveness is not through exit but through voice – i.e., voting politicians out of office or pressuring them. This is typically what is meant by accountability. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

91. See, e.g., *Gregory*, 501 U.S. at 458 (“This federalist structure of joint sovereigns . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society . . .”). Contemporary examples abound, including some of the most controversial issues in American culture: abortion, gay marriage, and physician-assisted suicide. Whatever one thinks of value pluralism normatively regarding a particular issue, it is uncontroversial descriptively that uniform federal rules prevent different parts of the country from governing themselves in ways that vary across the nation. This is so regardless of whether the federal rule takes the form of: (1) a constitutional decision by the Court, see, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); (2) a proposed constitutional amendment, see, e.g., Jim Rutenberg, *Bush Calls for an Amendment Banning Same-Sex Nuptials*, N.Y. TIMES, June 4, 2006, § 1, at 30 (quoting President Bush as championing the amendment); or (3) a federal statute interpreted by the federal government to have broad preemptive effect, see, e.g., *Gonzales v. Oregon*, 126 S.Ct. 904 (2006) (holding that the federal Controlled Substances Act does not permit the Attorney General to forbid doctors from prescribing federally regulated drugs for use in physician-assisted suicide under state law permitting the practice).

be encouraged when states are allowed to act as policy “laboratories.”<sup>92</sup> Finally, the efficient delivery of local public goods by states saves various costs when they make more cost-effective choices than the federal government would make for the nation as a whole.<sup>93</sup> When federal preemption reduces state regulatory control—and thus the ability of states to make choices, including resource choices<sup>94</sup>—all of these federalism values can be compromised.<sup>95</sup>

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92. See, e.g., *Gregory*, 501 U.S. at 458 (“This federalist structure of joint sovereigns . . . allows for more innovation and experimentation in government . . .”); *Fed. Energy Regulatory Comm’n*, 456 U.S. at 788-89 (O’Connor, J., dissenting) (“Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth.” (footnotes omitted)); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). *But see* Rapaczynski, *supra* note 88, at 408-14 (criticizing the experimentation rationale for federalism).

93. For example, Rust Belt states favored national emissions standards for factories to reduce or eliminate a competitive advantage enjoyed by Sun Belt states in the competition for new industry. If the only standards were air quality standards, the Sun Belt states could offer less pollution control because their air was cleaner. So the Rust Belt states lobbied for a federal requirement that every new factory of a certain type had to install the same abatement technology. See generally B. Peter Pashigan, *Environmental Protection: Whose Interests are Being Protected?*, 23 *ECON. INQUIRY* 551 (1985) (analyzing votes on critical Clean Air Act amendments and verifying that Rust Belt legislators voted to nationalize these rules); see also Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 *LAW & CONTEMP. PROBS.* 249, 285 (1991) (observing that “when differential geographical benefits are at stake, congressional voting patterns fall out along remarkably congruent geographical lines, suggesting that congresspeople are aware of the legislation’s geographic implications, and that they vote consistently with the theory of pessimistic pluralism”).

94. See, e.g., *Nat’l League of Cities v. Usery*, 426 U.S. 833, 851-52 (1974) (stating that application of federal minimum wage and maximum hour provisions will “significantly alter or displace the States’ abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens.”).

95. For recent discussions of the various values that federalism might be thought to serve, see STEPHEN G. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 56-69 (2005); DAVID SHAPIRO, *FEDERALISM: A DIALOGUE* (1995); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA. L. REV.* 903 (1994). For an overview of the normative federalism debate in American constitutional law and citations to the relevant literature, see ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 109-12 (2d ed. 2005).

Of course, legal and political debates about federalism are relevant beyond the United States and Europe, see *infra* Part II.E. Such debates are particularly significant in societies embroiled in ethnic conflict. For a fascinating study of the circumstances in which federalism can be employed as a structural technique to reduce ethnic conflict, see DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 597-98, 601-28 (1985) (showing how interethnic conflict may be reduced

This is well-trodden intellectual ground, and this inquiry does not take sides in the normative debate regarding the kinds of values that a federal system should secure. Rather, this inquiry maintains that state retention of regulatory control is needed to realize the commonly understood values advanced by federalism,<sup>96</sup> and then argues that anticommandeering doctrine undermines federalism values by reducing state regulatory control insofar as a greater quantity of preemption results from the Court's ban on commandeering. If direct federal regulation removes states from the regulatory scene, there is no meaningful sense in which they can prevent federal tyranny, advance political participation, encourage political responsiveness and accountability through interjurisdictional and intrajurisdictional competition, express the distinctive value commitments of the majority of their populations, serve as laboratories of experimentation, or efficiently deliver public goods. Accordingly, regardless of whether anticommandeering doctrine advances political accountability on balance, the extent to which states lose regulatory control is strongly associated with the extent to which the U.S. federal system can vindicate the other values typically thought to be advanced by federalism.<sup>97</sup>

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through dispersion and arrangement of the governmental structure so that intraethnic conflict is accentuated instead, and explaining the potential role of federalism in achieving these effects).

96. It is possible that state regulatory control could undermine federalism values in certain circumstances. For example, federal preemption might advance accountability to a greater extent than would state regulation if citizens were more attuned to the activities of their national representatives than to the conduct of their local ones. If nationalization were shown systematically to advance federalism values to a greater extent than state regulatory control, the argument advanced in this inquiry would unravel. Of course, defenders of anticommandeering doctrine, including the Court, are highly unlikely to conclude that the values typically associated with federalism would be better advanced without federalism than with it.

97. In response, one could invoke Professors Edward Rubin and Malcolm Feeley's distinction between federalism as a constitutional requirement and the managerial concept of decentralization. See Rubin & Feeley, *supra* note 95, at 910 ("Decentralization is a managerial concept; it refers to the delegation of centralized authority to subordinate units of either a geographic or a functional character."). Even in a world without judicially enforced federalism, they argue, Congress and federal agencies could design experiments and try different approaches to social problems in different regions of the nation. Similarly, the federal government could preempt in such a way as to allow for regional participation, competition, expressions of value, and efficient delivery of local public goods. (Tyranny prevention is another matter because the central authority decides how much decentralization takes place in a world without federalism.) Professors Feeley and Rubin make some powerful political points and raise an intriguing theoretical possibility. But as the various federal laws discussed throughout this article illustrate, experience shows that regional experimentation and encouragement of participation, competition, diversity, and local efficiency are not what tends to happen when Congress preempts state and local law. See, e.g., Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1582 (2004) ("[I]t seems doubtful that the national government has the right incentives to decentralize when it should."). This is not to say,

Of course, commandeering can trigger not just accountability concerns, but also concerns about some of the other federalism values discussed above. The Rehnquist Court stressed accountability,<sup>98</sup> but that Court's focus should not control a comparative normative analysis of commandeering and preemption from a federalism perspective. Theoretically, Congress could commandeer in ways that sap state regulatory control to as great an extent as would preemption. As a general matter, however, such equivalence seems unlikely.<sup>99</sup> Preemption bypasses the regulatory authority of the states; commandeering does not. Thus, when commandeering allows states to exercise discretion and make regulatory choices, a constitutional rule that categorically bans commandeering while allowing preemption with respect to the same subject matter makes little sense insofar as federalism is supposed to preserve state regulatory autonomy.

The Court and commentators are correct that commandeering, particularly an unfunded mandate, requires states to devote their scarce resources to a particular issue while preemption leaves them free to redirect their resources elsewhere.<sup>100</sup> But if our federal system would be better served if a state dedicated its time and money to Issue #1 but not to Issue #2, then it is not much consolation, when the federal government preempts regarding Issue #1, that the state can redirect its energies to addressing Issue #2. From a federalism perspective, it might be better if the state had been commandeered—and funded by the federal government—regarding Issue #1. Furthermore, if the federal government preempted the states as much as constitutionally possible regarding all sorts of important problems, federalism would not be well served just because the states were free to commit their resources to the relatively trivial issues that remained. Commandeering with respect to the more important policy matters would likely be preferable.<sup>101</sup>

When preemption is a feasible alternative, the relevant cost-benefit questions for a federalism concerned with state regulatory control are: (1) whether anticommandeering doctrine causes the probability of federal regulation (*p<sub>fed reg</sub>*) to decline; (2) whether

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however, that Congress could not choose to do some significant decentralizing. Indeed, decentralization is a concept that is analytically connected to a central or national perspective.

98. See, e.g., *supra* note 7 and accompanying text (quoting *New York*).

99. It is also conceptually unclear how Congress could commandeer in ways that sap state regulatory control to a greater extent than preemption when both are available. See *infra* Part IV.E.

100. See *supra* note 66 and accompanying text.

101. Cf. BREYER, *supra* note 95, at 59 (arguing that “the Court’s recent federalism decisions” such as *New York* and *Printz* “paradoxically threaten to shift regulatory activity from the state and local to the federal level—the likely opposite of their objective”).



anticommandeering doctrine causes the federalism costs of federal regulation ( $C_{fed\ reg}$ ) to increase; and (3) whether it causes  $p_{fed\ reg}$  to decline more than it causes  $C_{fed\ reg}$  to increase.<sup>102</sup> As with many unresolved empirical questions, there is room for reasonable disagreement on this issue. But even pre-empirically, some important points can be made with some measure of confidence.

To begin with, anticommandeering doctrine may cause  $p_{fed\ reg}$  to decline little as a general matter. The doctrine, it is true, has taken away a congressional option, and having fewer options with which to accomplish a desired legislative objective should increase the costs of imposing federal regulations, at least in some circumstances. The upshot, theoretically, is less federal regulation.

The problem with such reasoning, however, is that the federal government has numerous regulatory options at its disposal that anticommandeering doctrine leaves untouched, from preemption, to conditional federal spending, to giving states a choice between commandeering and preemption. It is unlikely that all of these alternatives would be significantly more expensive for the federal government to exercise in a particular situation than commandeering would be.

Moving from financial to accountability costs, it is difficult to think of an instance in which Congress chose the commandeering option with the intent or effect of externalizing political accountability to a greater extent than exists when Congress regulates in some other way. Nor is it straightforward conceptually to envision how Congress could pursue such a course with any confidence that it would succeed in “getting away with it.” If this is right, then requiring the federal government to preempt (or regulate some other way) rather than to commandeer—which the federal government has almost always chosen to do voluntarily anyway<sup>103</sup>—does not lower  $p_{fed\ reg}$  to a significant extent, at least in many situations.

The claim that the probability of federal regulation is relatively insensitive to the form that it takes raises some interesting questions. First, it may not be apparent why the federal government would ever choose to commandeer. Two possibilities, discussed further below in

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102. When preemption is not a feasible alternative (and the Court bans commandeering), the federalism costs imposed by mandatory federal regulation are irrelevant because the probability of such federal regulation goes to zero.

103. In *Printz*, Justice Scalia observed for the majority that historically Congress has not engaged in commandeering. *Printz v. United States*, 521 U.S. 989, 907 (1997). *See supra* text accompanying note 56. For Justice Scalia, this historical lesson indicated that commandeering is unconstitutional. Ironically, his observation may suggest that anticommandeering doctrine does not advance federalism values to a significant extent because the doctrine does not appreciably lower the probability of federal regulation.

Parts III and IV, respectively, are that (1) the states sometimes prefer commandeering to preemption, and they influence the federal legislative process to this end, and (2) preemption is not always a feasible alternative in the short run. Second, the suggestion that anticommandeering doctrine causes the probability of federal regulation to decline little may seem empirically suspect because Congress did not impose a preemptive solution after *New York*.<sup>104</sup> But what happened ex post regarding the legislative problem reviewed in *New York* or any other case proves nothing one way or the other. The argument advanced by this inquiry is not that the Court should allow commandeering with respect to issue X because otherwise Congress will likely respond by preempting state action regarding issue X. There are any number of reasons why a future Congress might not (re)turn its attention to issue X: for example, different priorities, resources, or members. The point, rather, is that if Congress knows it cannot commandeer under any circumstances, ex ante it will be more likely to preempt state and local regulations in enacting future laws regarding issues X, Y, and Z.

Even if anticommandeering doctrine does not lower the probability of federal regulation ( $p_{fed\ reg}$ ) to a significant extent because the federal government will preempt (or regulate some other way) rather than commandeer, the question remains whether preemption, as compared with commandeering, imposes greater federalism costs ( $C_{fed\ reg}$ ) in the form of lost regulatory control than it potentially saves states in terms of both accountability and scarce financial resources.<sup>105</sup>

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104. See, e.g., U.S. NUCLEAR REGULATORY COMM'N, OUR GOVERNING LEGISLATION, LOW-LEVEL RADIOACTIVE WASTE POLICY AMENDMENTS ACT OF 1985, <http://www.nrc.gov/who-we-are/governing-laws.html#llrpaa-1985> (last visited Oct. 12, 2006) ("This Act gives States the responsibility to dispose of low-level radioactive waste generated within their borders . . ."); CRS ISSUE BRIEF FOR CONGRESS IB92059: CIVILIAN NUCLEAR WASTE DISPOSAL, July 30, 2001, [http://www.ncseonline.org/NLE/CRSreports/Waste/waste-2.cfm?&CFID=569153&CFTOKEN=46244765#\\_1\\_19](http://www.ncseonline.org/NLE/CRSreports/Waste/waste-2.cfm?&CFID=569153&CFTOKEN=46244765#_1_19) (last visited Oct. 12, 2006) ("Disposal of low-level radioactive waste, which generally consists of low concentrations of relatively short-lived radionuclides, is a state responsibility under the 1980 Low-level Radioactive Waste Policy Act and 1985 amendments.").

105. Typically, the financial costs to the states associated with preemption are lower than the costs associated with commandeering because states incur implementation costs only when they are commandeered. Commandeering requires states to devote state resources to federal priorities; preemption usually prevents states from using their resources in federally prohibited ways. Preemption, however, imposes greater costs on states than does commandeering in certain circumstances. Preemption can impose significant costs on the states if they must meet burdensome federal standards in pursuing their activities in areas where these activities are also performed by private individuals. Examples might include operating cars or running a utility. Imagine two possibilities: (1) Congress requires the states to decrease pollution by X amount; or (2) Congress imposes standards for pollution control that require the most expensive abatement technology, standards that are far more costly than states would be allowed to choose under (1). Even when states are not market participants, moreover, preemption can impose significant

This is an important empirical question, the answer to which likely depends on the circumstances.<sup>106</sup> Yet it is a striking feature of the contemporary anticommandeering doctrine that the Court does not pause to consider these dimensions of the problem. Indeed, the the Court's ban on commandeering is so broad,<sup>107</sup> so context insensitive, that it applies not just in the face of a compelling government interest (for example, commandeering of state and local officials in the wake of a terrorist attack or devastating hurricane).<sup>108</sup> The ban also applies when accountability concerns are minimal (perhaps because Congress, the states, and the media have taken steps to clarify the extent to which the federal government is in charge), and when preemption would impose huge costs on the states relative to commandeering, both financially and in terms of lost regulatory control. This does not seem a sensible outcome to the extent that the animating purpose of anticommandeering doctrine is (or should be) the federalist enterprise of protecting state autonomy.

#### D. Conditional Federal Spending

Unlike preemption or commandeering, Congress's use of its conditional spending power—conditioning federal funds on the agreement of the states to be commandeered—does not constitute a

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costs on them. Imagine that after *New York*, Congress enacted super-strict waste storage requirements, and no private business could afford to comply with them. States with such businesses in their jurisdictions would then have to spend money to subsidize them, or else would risk losing them and all of the associated tax revenue, jobs, and other economic benefits—either because the businesses would leave for another jurisdiction or would have to shut down.

106. It is one thing to call a question “empirical” and another to resolve it with empirical evidence. It is difficult, if not impossible, to investigate rigorously the extent to which anticommandeering doctrine advances or thwarts the vindication of federalism values in various circumstances. The chief obstacles lie in calculating the relevant probabilities and in deriving a common metric according to which the various costs can be compared. Financial costs are by definition measured in monetary terms, but the problem of monetizing accountability and regulatory-control costs seems intractable as a general matter. The analyst cannot ask states how much they would be willing to pay to avoid accountability or to retain regulatory control. Nor are the preferences of state officers the relevant concern. *See infra* Part IV.B. The most that can be hoped for empirically in light of the inevitable lack of knowledge is the context-sensitive, rough balancing of incommensurable values that is typical of doctrinal analysis in constitutional law. Regardless, anticommandeering doctrine would be improved if the Court took all of the relevant costs into account, not just political accountability. In cases in which the record is particularly clear, moreover, empirical problems will not pose a serious difficulty to sound constitutional analysis of the relevant considerations. *See infra* Part III (discussing *New York*).

107. For a discussion of “breadth” and “depth” as characteristics of judicial decision making, see generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Neil S. Siegel, *A Theory In Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005) (analyzing Sunstein's theory of judicial minimalism).

108. *See infra* Part V.

mandatory form of federal regulation. States, in other words, may avoid being commandeered by turning down the money. As noted above,<sup>109</sup> Justice O'Connor stressed for the *New York* Court that Congress may place strings on federal grants in the commandeering context.

Although Justice O'Connor distinguished conditional spending from commandeering on grounds of coercion and thus accountability,<sup>110</sup> commentators have debated vigorously whether many forms of conditional federal spending are actually mandatory in practice because the Rehnquist Court declined to put teeth into *Dole's* non-coercion requirement.<sup>111</sup> To the extent one believes that particular uses of the conditional spending power are non-coercive, so that states have a reasonable choice in deciding whether to accept or to turn down federal dollars, it may not seem apparent how putting strings on federal money might compromise accountability values as much as commandeering. While commandeering leaves states with no choice, a state can turn down a conditional grant and thereby avoid being commandeered.

One response to this point regarding accountability is to reject the premise and to maintain that state officials have no reasonable choice but to accept large quantities of federal money in many situations, so that Justice O'Connor's opinion in *New York* draws distinctions often without a relevant real-world difference. For example, no state realistically could afford to give up highway money from the government in *Dole*.<sup>112</sup> Certain conditions can be quite coercive; it is extraordinarily difficult to draw a line beyond which a condition becomes coercive, and thus conditional spending can be as coercive as commandeering or preemption.

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109. See *supra* note 51 and accompanying text.

110. Coercion and accountability are related in that state officials are appropriately held accountable for accepting conditional federal grants if and only if they had a choice in the matter—that is, they were not coerced into accepting the conditions in order to get the money. If coercion exists, conditional spending may give the false impression of a choice. What it means for state officials to “have a choice in the matter” is a nettlesome question. Must the choice be merely possible or must it also be rational, reasonable, or something more demanding?

111. See generally Siegel, *supra* note 3 (collecting exemplary sources that take different positions on this issue); see also *supra* note 51 (stating the non-coercion requirement).

112. See Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147, 160-61 (2001) (“As a practical matter, states will not reject large sums of money offered by Congress unless the conditions are unduly repressive. . . . South Dakota, Nevada, and Virginia sued to invalidate conditions attached to the receipt of federal highway trust funds. However, upon losing their suits, the states promptly complied with the conditions. Federal funds trumped state principles.” (footnotes omitted)); *supra* note 51 (discussing *Dole*).

From a federalism perspective, however, a potentially crucial difference exists between conditional federal spending on the one hand and commandeering or preemption on the other. This difference concerns relative financial and opportunity costs.<sup>113</sup> With conditional federal spending, states “get paid” in exchange for their agreement to be commandeered. To the extent that conditional spending pays the costs of federal regulation, it avoids the problem of displacing state and local budget choices underscored by the Court in *National League of Cities*.<sup>114</sup> With commandeering or preemption, by contrast, states may face an unfunded mandate and may thus have to forgo other regulatory priorities.<sup>115</sup>

There does not seem to be much difference between conditional spending and commandeering in terms of regulatory control. This is because under conditional spending the federal government gives the money in exchange for the states’ agreement to be commandeered. A difference exists only to the extent one views state choices between the money and the commandeering as itself an exercise of regulatory control. Moving beyond the commandeering context and considering conditional grants in general, the degree of state regulatory control depends on the specificity with which Congress sets the conditions. Conditions can be general and leave great flexibility (for example, “set a reasonable speed limit”), or they can be specific (for example, “set a 55 mph speed limit”). The amount of regulatory control retained by states depends on the type of condition established.

Overall, the relative impact of conditional spending from a federalism perspective depends on context, and it would be perilous to attempt a rank ordering of different forms of federal regulation according to their impact on federalism values. Based on the foregoing analysis of the conditional spending power, the most that can be said in general is that the Court has shown too much concern about accountability in the commandeering context and arguably too little concern about accountability when federal regulation takes the form of conditional spending. In addition, the Court has undermined federalism values by paying essentially no attention to the relative impact of different forms of federal regulation on state budgets and decision making capabilities. Thus, the Court’s general categories distinguishing permissible from impermissible kinds of federal legislation do not withstand a functional analysis grounded in the values typically associated with federalism.

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113. See *supra* notes 65-66 and accompanying text.

114. See *supra* note 94 and accompanying text.

115. See *supra* notes 66, 105 and accompanying text.

*E. A Transnational Comparison*

The federalism consequences of reduced regulatory control at the state level are borne out by the European experience. The general view of member states of the European Union on commandeering is the opposite of the U.S. Supreme Court's position:<sup>116</sup> member states tend to prefer directives to regulations. Directives "command a Member State to regulate in a particular area and thus require further Member State legislative action to become fully effective within that state," while regulations "have immediate legal force for individuals within a Member State."<sup>117</sup> The European judgment is that directives leave member states with more regulatory power.<sup>118</sup> In a relatively rare instance of comparative analysis on the U.S. Supreme Court, Justice Breyer flagged this perceived virtue of commandeering across the Atlantic:

At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body. . . . They do so in part because they believe that such a system interferes less, not more, with the independent authority of the "state," member nation, or other subsidiary government, and helps to safeguard individual liberty as well.<sup>119</sup>

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116. See, e.g., Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 800, 801 (2004) (arguing that the Tenth Amendment decisions "stand in striking contrast to the analogous doctrines of the European Court of Justice," and exploring some of the "reasons for welcoming 'commandeering' in the European Union but not in the United States").

117. Halberstam, *supra* note 14, at 214-15 ("In the European Union, by contrast [to the United States], the subject of concern is not Union action that 'commandeers' Member State legislative or administrative bodies, but EU legislative activity that has direct effect in the legal systems of the Member States. Member States tend not to welcome Community regulations, which have immediate legal force for individuals within a Member State, and instead prefer that the Community pass directives, which command a Member State to regulate in a particular area and thus require further Member State legislative action to become fully effective within that state. So, too, 'commandeering' is a basic feature of German federalism . . ." (footnote omitted)). See also COOTER, *supra* note 90, at 236 (discussing the difference between directives and regulations in the law of the European Union).

118. Technically, both directives and regulations qualify as forms of "commandeering" under *Printz* because most regulations in the European Union must be enforced by member state institutions. See, e.g., Halberstam, *supra* note 14, at 213. Note, moreover, that even if one were to dispute Professor Halberstam's empirical judgment about member-state preferences, the key point would remain that both directives and regulations are legal in the European Union.

119. *Printz v. United States*, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting).

Writing for the majority, Justice Scalia declined Justice Breyer's invitation to look abroad, deeming "such comparative analysis inappropriate to the task of interpreting a constitution."<sup>120</sup>

Of course, dabbling in comparative law by contrasting legal regimes briefly and at a high level of abstraction does not definitively clarify the wisdom of current Tenth Amendment doctrine. Justice Breyer rightly recognized that "we are interpreting our own Constitution, and not those of other nations, and there may be relevant political and structural differences between their systems and our own."<sup>121</sup> Indeed, Daniel Halberstam's analysis of institutional dynamics in the United States and the European Union helps to account for their opposite approaches to commandeering:

The US anti-commandeering rule exists in the context of a federal system marked by independently constituted, independently competent levels of governance that coexist . . . with a powerful federal government whose sphere of influence has proven difficult to contain by other means. Here, the anti-commandeering rule may be viewed as a consensus-forcing device by separating independent tiers of governance and requiring federal and State decision makers to reach agreement before working together.<sup>122</sup>

According to Professor Halberstam, the legal and political culture in Europe is different:

[T]he EU and Germany have both preserved . . . limitations on central government expansion and mechanisms of component State control over central government norms. Constitutional provisions and practical realities in both the EU and Germany make the central governing structure in both systems dependent on the component States for administrative services. And in both systems, component States are represented in their corporate capacities in the central governing institutions. Thus, in the EU and in Germany, commandeering is embedded within a system of consensus-forcing governance with structural limitations on the expansion of the central government. . . . [C]ommandeering may be viewed as a further mechanism to maintain the dependence of the central government on the component States and to preserve a sphere for additional component State input while carrying out central commands.<sup>123</sup>

The political safeguards of federalism are more present in Europe than they are here.<sup>124</sup>

Moreover, the directive in European Union law (1) refers only to commandeered legislation, not to executive action, as was at issue

120. *Id.* at 921 n.11.

121. *Id.* at 977 (Breyer, J., dissenting).

122. Halberstam, *supra* note 14, at 249.

123. *Id.* at 249-50 (footnote omitted).

124. See Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 ST. LOUIS U. L.J. 671, 677 (2005) (recharacterizing Professor Halberstam's findings in terms of "the political safeguards of federalism" and suggesting that "Justice Breyer's comments on German federalism [in *Printz*] can be used to enter a note of caution about relying on bottom-line results without paying attention to the larger institutional surrounding").

in *Printz*; (2) is specifically provided for in the European Union Treaty; (3) is the only available instrument in some areas; and (4) is partly justified by the very different doctrinal structures that characterize the legal regimes of member states. Directives enable them to realize given policy goals in a variety of legal systems, a concern less relevant in the United States because differences among state laws are more substantive and less doctrinal (perhaps excepting Louisiana).<sup>125</sup>

Accordingly, there exists a stronger textual basis for legislative commandeering in the European Union than in the United States and a greater need for state-level flexibility. Such wrinkles, however, do not detract from Justice Breyer's suggestion that the European "experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem."<sup>126</sup> Professor Halberstam's examination of commandeering in Europe verifies that commandeering affords states greater regulatory control than does preemption.<sup>127</sup>

### III. REVISITING *NEW YORK* AND *PRINTZ*

It is instructive to analyze *New York* and *Printz* according to the foregoing analysis of anticommandeering doctrine. The key question is whether the Court's holdings make sense from a federalism perspective when assessed according to their impact on the probability of federal regulation, state regulatory control, political accountability, and financial costs.

Based upon these criteria, the Court in *New York* was myopic in its focus on accountability and it decided the case incorrectly even on accountability grounds. Of course, *New York* is a familiar case by now. But Justice White's dissent warrants attention, even at this late date, because familiarity may tend to facilitate forgetfulness. Justice White reported that the legislation at issue "resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal preemption or intervention, but

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125. See, e.g., Halberstam, *supra* note 14, at 213-14, 230-31.

126. *Printz*, 521 U.S. at 977 (Breyer, J., dissenting).

127. See, e.g., Halberstam, *supra* note 14, at 247-48 ("[P]roviding the central government with the legal tools and practical powers to take independent action might . . . introduce a bias in favour of centralization. Central-component system relations might atrophy and the central government might come to rely increasingly on its own resources. . . . [T]he anti-commandeering rule might have perverse effects, by prodding the central government to develop the bureaucracy necessary to implement its policy without involving the component States. Where the central government has the capacity to do this and expands central functions, the central infrastructure might short-circuit what would have otherwise become a productive cooperative relationship with component States." (footnote omitted)).



rather congressional sanction of interstate compromises they had reached.” The National Governors’ Association (“NGA”) “recognized that the Federal Government could assert its preeminence in achieving a solution to this problem, but requested instead that Congress oversee state-developed regional solutions.”<sup>128</sup> Justice White noted that the Senate had considered “a ‘federal’ solution” in July 1980.

The 1980 legislation, however, did not dispose of the matter (so to speak) because of continuing interstate disputes:

[A]ttempts by states to enter into compacts and to gain congressional approval sparked a new round of political squabbling between elected officials from unsited States, who generally opposed ratification of the compacts that were being formed, and their counterparts from the [still only three] sited States, who insisted that the promises made in the 1980 Act be honored. . . . [T]he [NGA] organized more than a dozen meetings to achieve a state consensus.

. . . A movement thus arose to achieve a compromise between the sited and the unsited States, in which the sited States agreed to continue accepting waste in exchange for the imposition of stronger measures to guarantee compliance with the unsited States’ assurances that they would develop alternative disposal facilities. . . . In sum, the 1985 Act was very much the product of cooperative federalism, in which the States bargained among themselves to achieve compromises for Congress to sanction.<sup>129</sup>

As Justice White discussed, New York was an unsited state that exported large amounts of low-level radioactive waste to sited states. It took various actions that signified its approval of the interstate negotiations and that allowed it to reap substantial benefits from the ensuing bargain.<sup>130</sup>

Despite the empirical problems that impede a cost-benefit inquiry in this area of constitutional law,<sup>131</sup> the facts of *New York* mitigate these problems. The probability of federal regulation was not sensitive to the issue of commandeering versus preemption or some other regulatory alternative. The problem was pressing, and Congress was going to act one way or the other. Indeed, the states had to persuade Congress not to engage in preemption and instead to impose

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128. *New York v. United States*, 505 U.S. 144, 189-92 (White, J., dissenting) (internal citations omitted).

129. *Id.* at 192-94 (internal citations omitted). See Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 541-42 (1997) (“In *New York* . . . , the record of state participation in resolving an ongoing problem at a national level through legislation to which states as such significantly contributed is clear. There can be little doubt that the ‘safeguards of the federal structure’ were in play there, if they ever can be said to be in play.” (footnotes omitted)).

130. *New York*, 505 U.S. at 196-99 (White, J., dissenting) (documenting various statements and actions by New York officials signifying the state’s agreement with the efforts of the NGA and the federal legislation that resulted).

131. See *supra* note 106.

a commandeering sanction in the 1985 Act (among other measures) as a way of disciplining unsited states, which had not lived up to their promises.<sup>132</sup> Although New York stopped supporting the commandeering approach when its strategic situation changed ex post, New York had approved it ex ante.<sup>133</sup>

Turning from the probability of federal regulation to the various costs imposed on the states by federal regulation, two points are apparent. First, while the commandeering at issue imposed substantial liabilities on the states, the commandeering arrangement reflected the states' desire to retain regulatory control, which was why they repeatedly asked Congress to stay its (concededly constitutional) preemptive hand. Absent a threat of federal preemption (the worst possible outcome from the states' perspective), the states apparently believed that a commandeering lever was needed to ensure compliance with any interstate agreement, and thus to secure an agreement. Second, there was little prospect of public confusion or the imposition of undeserved accountability on the states because the states approved the agreement formalized by Congress.

One could insist that the views of most state officials in the interstate interactions leading up to *New York* are irrelevant because Tenth Amendment doctrine does not exist for the sake of state officials or even states; rather, federalism values serve the long-term liberty and self-government interests of our nation's citizens.<sup>134</sup> On this view, it does not matter that state officials may not care about accountability, and indeed may try to evade accountability.<sup>135</sup>

But this generalization is far removed from the realities on the ground in *New York*. The states wanted regulatory control, and they were not trying to evade the political accountability that ought to come with it. It seems a difficult task to construct a federalism argument that removing the states from the regulatory scene through preemption would have been preferable. A citizen of New York who observed that her state was building a waste facility or taking title to

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132. It is, of course, possible that Congress would not have passed preemptive legislation in the event that a state-proposed solution failed to be enacted. Congress might not have acted on a preemption threat for any number of reasons. See *supra* note 104 and accompanying text. But the threat of preemption in *New York* does appear to have been real. See *supra* note 128 and accompanying text.

133. See *supra* note 130 and accompanying text.

134. See *supra* notes 35, 88 and accompanying text. See also *New York*, 505 U.S. at 181 ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.").

135. See *infra* Part IV.B.

low-level radioactive waste would not be wrongly inferring that the state was responsible for the regulatory action. New York was author of this regulatory action in the real sense that New York had sought, approved, and reaped the benefits of the interstate negotiation process that resulted in the commandeering.<sup>136</sup> This is why Justice White thought “[t]he State should be estopped from asserting the unconstitutionality of a provision that seeks merely to ensure that, after deriving substantial advantages from the 1985 Act, New York in fact must live up to its bargain by establishing an in-state low-level radioactive waste facility or assuming liability for its failure to act.”<sup>137</sup>

Writing for the majority, Justice O’Connor argued that accountability concerns cut decisively in the opposite direction.<sup>138</sup> As explained immediately above, the level of abstraction at which she cast her accountability analysis renders her conclusion vulnerable. More problematic, however, was her failure to recognize the other considerations relevant to the Tenth Amendment inquiry: the ex ante probability of federal regulation, the federalism costs of forgone state regulatory control, and the financial costs imposed by federal regulation. The Court did not recognize, let alone adequately defend, the apparent constitutional lesson of *New York*: accountability concerns (as the Court sees them) are so important that they trump not only the states’ ex ante desire for accountability, but also the other determinants of whether a commandeering ban advances or undermines the values of federalism.

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136. One might respond that New York’s executive had helped to broker the deal, but New York’s legislature would have born the electoral consequences of compliance because it was required to identify and authorize a site within the state on which to build a waste facility. This point, however, does seem a distinction without a decisive difference. New York, through its duly elected representative, brokered an interstate deal and agreed to a certain way of dealing with certain nuclear wastes. There is no reason to assume that only the state legislature could give this consent. Such a requirement, moreover, would be unrealistic. The kind of interstate negotiation and solution at issue in *New York* required the actions of state executives. Finally, there is no indication that the New York legislature thought differently about the issue at the time that the state executive acted. And if the legislature did in fact have a different view of the matter, it could have voiced its disapproval publicly and told the electorate as much.

137. *New York*, 505 U.S. at 198-99 (White, J., dissenting). By contrast, Professor Jackson argues that, “[i]n view of the length of time between enactment and imposition of the most severe penalties, the scheme [in *New York*] created a significant risk that federal officials would receive credit for solving a problem while passing the politically unpleasant decisions on to the states.” Jackson, *supra* note 12, at 2203. Professor Jackson’s description, like Justice O’Connor’s, proceeds from the assumption that the states, including New York, bore no responsibility for the federal legislation. As discussed above, however, the states in *New York* were as responsible for the law as was the federal government. It is therefore not clear wherein the accountability problem lay.

138. See *supra* text accompanying note 7.

*New York* provides another analytical lesson, which Justice White implicitly identified:

[T]he practical effect of New York's position is that because it is unwilling to honor its obligations to provide in-state storage facilities for its low-level radioactive waste, *other* States with such plants *must accept* New York's waste, whether they wish to or not. Otherwise, the many economically and socially beneficial producers of such waste in the State would have to cease their operations. The Court's refusal to force New York to accept responsibility for its own problem inevitably means that some other State's sovereignty will be impinged by its being forced, for public health reasons, to accept New York's low-level radioactive waste. I do not understand the principle of federalism to impede the National Government from acting as referee among the States to prohibit one from bullying another.<sup>139</sup>

Justice White over claimed, because the implication of the majority's position was not that other states had to accept New York's waste. The other remedies, including federally sanctioned border closings, remained in place. But the larger point remains: it can be oversimplified to conceive constitutional federalism questions as involving a power struggle between the federal government and "the states." Likewise, it can be oversimplified to ask whether anticommandeering doctrine makes "the states" better or worse off in various situations. In *New York*, the unsited states were the immediate beneficiaries of the Court's decision, while the three sited states and Congress were the short-term losers. Yet over the long run, it is difficult to see how "the states" were made better off by the decision in *New York*, which likely rendered them less able to make credible commitments to one another in the face of collective action problems, and which may have left Congress less willing to stay its regulatory hand in the future by forgoing preemption.<sup>140</sup>

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139. *New York*, 505 U.S. at 199 (White, J., dissenting). As of October 2006, New York remained one of only six states (plus the District of Columbia and Puerto Rico) that had not entered into a regional compact. See U.S. NUCLEAR REGULATORY COMMISSION, LOW-LEVEL WASTE COMPACTS, <http://www.nrc.gov/waste/llw-disposal/compacts.html> (last visited Oct. 12, 2006).

140. *Accord* Caminker, *supra* note 14, at 1013 (In *New York*, "[e]ach state preferred to wait and hope that its neighbor built a disposal site on which it could 'free ride.' To transcend this prisoners' dilemma, the states proposed a cooperative solution and sought congressional enforcement to preclude defections. The congressional mandate of state action thus sought merely to empower states to achieve self-generated objectives." (footnote omitted)); Young, *supra* note 72, at 113 ("The federal law at issue in *New York* . . . reinforced state-level policy efforts to agree on shared responsibilities for radioactive waste disposal by providing a federal enforcement mechanism. In this sense, federal action reduced constraints on state autonomy by removing collective action impediments to state-level policymaking. . . . Recognition of the anticommandeering rule in *New York* thwarted a national effort, supported by most states, to help solve the difficult collective action problem of nuclear waste disposal. . . . [N]ational action can sometimes empower state governments, and federalism doctrine needs to be sufficiently flexible to address that possibility." (footnote omitted)).

Justice White's exclamation to the effect that "this is madness; the states wanted this!" misses a more fundamental objection to the outcome in *New York*: regardless of what the states wanted, commandeering was more protective of federalism values than was the regulatory alternative in play—preemption.<sup>141</sup> A persuasive accountability argument in favor of the Court's holding in *New York* must explain why accountability problems potentially associated with commandeering are so weighty that they trump the core federalist priority of preserving state regulatory autonomy. Without state retention of significant regulatory control, federalism cannot realize its goals of preventing federal tyranny, promoting political participation, encouraging responsiveness and accountability, allowing expressions of value pluralism, providing state laboratories of experimentation, and facilitating the efficient delivery of local public goods.<sup>142</sup>

*New York* is arguably a stronger kind of Tenth Amendment case than *Printz* from the standpoint of symbolic federalism and political accountability values, at least if one abstracts away from the particular facts of *New York*. Commandeering state legislatures and forcing them to enact laws may constitute more of an intrusion and infringement on state sovereign "dignity" than asking state law enforcement personnel merely to enforce a federal law on an interim basis.<sup>143</sup> In the *New York* scenario, moreover, the inquiring citizen would need to determine not only which sovereign was seeking to control her behavior, but also whether one sovereign was forcing the other sovereign to control her behavior through legislation. No such informational complications exist in the *Printz* situation, where it would be clear upon inquiry that the governing law is federal.<sup>144</sup> These differences may explain why many constitutional lawyers seem to

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141. See *supra* text accompanying note 129 (discussing Congress' consideration of a preemptive solution to the interstate waste problem).

142. See *supra* notes 88-95 and accompanying text.

143. See *infra* Conclusion for a discussion of the role played by symbolism in the Court's federalism jurisprudence.

144. The two kinds of cases are more difficult to distinguish on financial grounds, because compelling states to enforce federal laws can also require states to expend scarce and potentially significant state resources. On the other hand, state courts are required to hear federal claims, and state executive officers must enforce state-court decisions vindicating federal rights. See *New York*, 505 U.S. at 178-79 ("[T]his sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."); *Testa v. Katt*, 330 U.S. 386 (1947). Both of these requirements are costly, yet are allowed under the Court's anticommandeering doctrine.

agree that *New York* involved the stronger Tenth Amendment challenge.<sup>145</sup>

From the standpoint of state regulatory control, however, *Printz* is on firmer constitutional ground. As noted in Part II, anticommandeering doctrine will not impede the realization of federalism values when preemption is not reasonably available, because the federal government will be just as unable to preempt as to commandeer. The way preemption would work in *New York* is straightforward: Congress could use its commerce power to dictate to public and private owners of the waste how to dispose of the waste. These congressional rules would preempt any other rules or regulations. Then, if a waste storage crisis ensued because of insufficient facilities around the country, states wanting businesses that generated the waste to operate within their jurisdictions would have to build storage facilities for waste that could not be moved out of state. Otherwise, the businesses would have to move elsewhere or stop operating.<sup>146</sup>

But Congress would have to do more than trump local laws regarding background checks for preemption to succeed in *Printz*. Because the absence of an instantly available computer database made it impossible for Congress to require licensed gun dealers to abide by the federal regulation directly, the federal government would immediately have had to establish a large bureaucracy in order to

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145. When *Printz* was pending before the Supreme Court, for example, Acting Solicitor General Walter Dellinger argued that the decisive Tenth Amendment objections to the federal law in *New York* had no relevance to the Brady Act:

The Brady Act provisions at issue here stand in marked contrast to those struck down in *New York*. The law invalidated in *New York* was a “command [to] state government to enact state regulation” (either by legislation or administrative initiative) to deal with the problems of radioactive waste. 505 U.S. at 178 (emphasis in original). In distinction, the Brady Act represents a clearly articulated congressional solution to the problems posed by handgun violence, especially insufficiently effective regulation of handgun transfers between private parties. The Brady Act does not require [Chief Law Enforcement Officers] to make policy; rather, . . . the Act only requires state officials to assist in the application of federal law to private parties in the course of their ordinary duties. The Brady Act is therefore not an impermissible command to the States to promulgate laws or regulations, but an unobjectionable requirement that officials assist in “congressional regulation of individuals.” *New York*, 505 U.S. at 178.

Brief for the United States at 22, *Printz v. United States*, 521 U.S. 923 (1997) (Nos. 95-1478, 95-1503), 1996 WL 595005. This history suggests that *ex ante*, the Government viewed *New York* as expressing a smaller principle than did *Printz* as eventually handed down by the Court.

146. *Cf. supra* note 105 (discussing related issues).

conduct the checks. This costly prospect would have substantially reduced the probability of mandatory federal regulation.<sup>147</sup>

*Printz* is thus more defensible than *New York* from the perspective of state regulatory control. In his opinion for the Court in *Printz*, Justice Scalia recognizes this point, and he appears unwittingly to concede the independent importance of regulatory control when he distinguishes *New York*:

Even assuming, moreover, that the Brady Act leaves no “policymaking” discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty. Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than . . . by “reduc[ing] [them] to puppets of a ventriloquist Congress.” It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.<sup>148</sup>

In light of the disciplined formalism that otherwise pervades his opinion for the Court, this implicitly functional judgment is noteworthy.

The foregoing assessment of *Printz* is a relative one. The suggestion is not that *Printz* was decided correctly. Rather, the argument is that, on grounds of relative regulatory control, *Printz* is more defensible than *New York* from a federalism perspective if one accepts anticommandeering, at least in some instances, as sound constitutional doctrine. Whether *Printz* adequately accounts for the interests of the national government is a distinct question. It is also unclear in *Printz* how accountability costs trade off with the other federalism costs imposed by federal regulation: loss of regulatory control and financial costs. On the one hand, preemption does not seem to have been a feasible possibility in the short run,<sup>149</sup> and the statute allowed states to exercise no real measure of regulatory control. On the other hand, the expense borne by the states in carrying out the federal mandate seemed modest.<sup>150</sup> But the upshot of

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147. Use of the conditional federal spending power would have remained an option. See *supra* notes 3, 51 and accompanying text; *supra* Part II.D (analyzing the conditional spending power from a federalism perspective).

148. *Printz v. United States*, 521 U.S. 923, 928 (1997) (internal citation omitted).

149. See *supra* note 83 and accompanying text; see also *supra* text accompanying note 147 (discussing the costliness of performing background checks).

150. In *Printz*, the Solicitor General underscored the minimal nature of the burden that the Brady Act imposed on the states:

The text of the Brady Act requires only that CLEOs [Chief Law Enforcement Officers] make a “reasonable effort” to conduct the record check, and the Act affords CLEOs broad discretion to determine the scope of that “reasonable effort,” in light of their own resources and law enforcement priorities. The Bureau of Alcohol, Tobacco and Firearms, which administers the Brady Act, has made clear in its guidance interpreting the Act that it is generally “reasonable” for CLEOs to choose to fulfill their duties by consulting readily accessible criminal records. Thus, in light of their

the balancing analysis depends on how much one values accountability as a constitutional concern in this setting, and the extent to which one believes that the Brady Act compromised political accountability, even though local law enforcement officers could have simply informed would-be firearms purchasers that the federal government was requiring them to conduct the background checks.<sup>151</sup> Regardless, the Court should have addressed all of the relevant considerations discussed above before imposing a broad and deep anticommandeering rule in the name of the Constitution's commitment to federalism.<sup>152</sup>

#### IV. ANTICIPATING OBJECTIONS

This Part addresses various potential objections to the argument advanced in this Article. First, an unsympathetic commentator could argue that the foregoing "functional" analysis sounds in politics or public policy, not constitutional law. Second, a critic might submit that if the foregoing analysis is correct, there would be no Tenth Amendment litigation because the states would perform the cost-benefit tradeoff themselves and they would have no interest in rendering themselves worse off. Third, a federalist could object that the real problem here is not anticommandeering doctrine, but the Supreme Court's failure to limit preemption as an alternative to commandeering. Fourth, one might insist that the Court has gotten the doctrine exactly right from a federalism perspective because Congress may give states the choice between commandeering and preemption, and this option is clearly preferable to allowing commandeering as well. Fifth, a critic might suggest that conditional federal spending or another cooperative arrangement is more likely to result than is preemption when Congress would like to commandeer

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limited resources and competing obligations, CLEOs can and do meet their obligations by having clerical personnel perform checks of criminal records to the extent possible given the circumstances. The other requirements imposed on CLEOs under the Act are even more clearly *de minimis*.

Brief for the United States at 12, *Printz v. United States*, 521 U.S. 923 (1997) (Nos. 95-1478, 95-1503), 1996 WL 595005. Yet the federal government would have been on stronger ground if it had paid for the background checks of potential firearms purchasers. *See supra* note 66 and accompanying text (arguing that an unfunded mandate compromises federalism values to a greater extent than a funded mandate).

151. To alleviate accountability concerns, Congress might have required the transmission of such information to potential purchasers and perhaps also mandated the posting of visible signs in gun stores indicating that background checks were mandated by federal statute, not state or local law.

152. *See supra* note 107 (referencing discussions of "breadth" and "depth" as characteristics of judicial decision making); Siegel, *supra* note 107, at 1966 (characterizing *New York* and *Printz* as "relatively broad and deep").



the states but the Court prohibits it from doing so. Sixth, a defender of anticommandeering doctrine could argue that accountability concerns, by themselves, are sufficient to render commandeering unconstitutional. Seventh and finally, a proponent of the Court's anticommandeering doctrine might submit that this investigation ignores the tradeoff between rules and standards, assuming that the commandeering issue should be settled by a standard but neglecting the clarity of rules, particularly in federalist systems, which sometimes lack extensive state involvement in the national legislative process.

The following sections address these criticisms in order. While some of the objections have more force than others, none of them ultimately undermines this inquiry's claim that anticommandeering doctrine indefensibly ignores the doctrine's impact on state regulatory control.

#### A. *Law or Politics?*

This functional analysis of anticommandeering doctrine will mean different things to different people, depending on their views concerning foundational questions of constitutional interpretation and the sources of constitutional law. For some, the level of state regulatory control encouraged by Supreme Court decisions qualifies as a jurisprudential argument.<sup>153</sup> For others, however, it is merely a policy position the relevance of which is limited to the legislative process or to issues of constitutional design or amendment. The same could be said of the Court's accountability concerns and the present inquiry's consideration of financial burdens.

To be clear, the presumption underlying this inquiry is *not* that issues of regulatory control, political accountability, and financial costs necessarily provide the relevant normative criteria by which to judge the constitutionality of federal legislation. In a given case, arguments grounded in these considerations could conflict with arguments based on the constitutional text, constitutional structure, Supreme Court precedent, the original understanding of the Constitution, American historical tradition, or an evolving national consensus on constitutional values. Rather, this investigation takes as a given the values that *the Court's various federalism opinions* have identified as relevant to the practice of constitutional adjudication. Rather than imposing constitutional values, in other words, this

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153. See, e.g., BREYER, *supra* note 95, at 63 ("Why not at least consider the practical effects on local democratic self-government of decisions interpreting the Constitution's principles of federalism—principles that themselves seek to further that very kind of government?").

analysis assesses the extent to which anticommandeering doctrine tends to promote or to impede realization of the Court's own stated values. Accordingly, this inquiry bears no burden of establishing the constitutional moment of the federalism values that it examines.<sup>154</sup>

That said, a few observations on the status of state regulatory control as a value of constitutional moment are warranted to further defend the jurisprudential relevance of this analysis. This inquiry's focus on regulatory autonomy is grounded in several sources of authority in American constitutional law. The Tenth Amendment speaks of "powers . . . reserved to the States," which is a way of referencing the constitutional significance of state retention of regulatory authority. The text of the Tenth Amendment, moreover, articulates what other parts of the Constitution and the vertical constitutional structure presuppose and rely upon—that the federal government created by the Constitution will execute its responsibilities against the backdrop of states that generally may use their police powers to regulate public and private entities.<sup>155</sup> Several key parts of the constitutional text and structure appear to express an underlying purpose to preserve and encourage state regulatory participation in the government of the nation.<sup>156</sup> Similarly, many Supreme Court opinions and founding materials underscore the

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154. As the vigorous debates between the majority and the dissent in *New York* and *Printz* suggest, arguments sounding in constitutional text, structure, precedent, originalism, and tradition have not decisively favored one side or the other in the Court's Tenth Amendment cases. Under these circumstances, it is unsurprising that the Justices would underscore underlying federalism values.

155. For example, Article I, Section 8, Clause 16 authorizes Congress "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States," but "reserve[es] to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." Similarly, Article I, Section 10 lists numerous activities in which states may not engage, such as "enter into any Treaty, Alliance, or Confederation," "coin Money," or "emit Bills of Credit." The implication is that the states would possess the authority to do these things in the absence of the textual prohibition. *See, e.g.,* *Gonzales v. Oregon*, 126 S. Ct. 904, 922-923 (2006) ("[The federal Controlled Substances Act (CSA)] manifests no intent to regulate the practice of medicine generally. The silence is understandable given the structure and limitations of federalism . . . . The structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers.").

156. *Cf. BREYER, supra* note 95, at 115 ("Throughout, I have urged attention to purpose and consequences. My discussion sees individual constitutional provisions as embodying certain basic purposes, often expressed in highly general terms. It sees the Constitution itself as a single document designed to further certain basic general purposes as a whole. It argues that an understanding of, and a focus upon, those general purposes will help a judge better to understand and to apply specific provisions. And it identifies consequences as an important yardstick to measure a given interpretation's faithfulness to these democratic purposes.").

fundamental importance of state regulatory power to our constitutional system.<sup>157</sup>

Finally, although intense disagreements have erupted at different points in American history over whether particular issues should be decided by the states or by the federal government (for example, racial issues), Americans have always almost universally accepted states as legitimate centers of significant regulatory power across a broad range of other issues (for example, the family, education, criminal law enforcement, and local land use in the absence of environmental harms).<sup>158</sup> Accordingly, there is good reason to believe that the value of state regulatory autonomy is of constitutional significance and thus that anticommandeering doctrine's impact on state autonomy is no mere "policy" concern better directed at Congress.

### *B. Why the Litigation?*

The next objection seems straightforward: if this inquiry is correct, the Court fails to advance the interests of the states when it holds that commandeering violates the Tenth Amendment. But to the extent anticommandeering doctrine makes the states worse off, they should be able to figure out these perverse consequences on their own, and rational states would not press the Court to take the commandeering power away from the federal government.

This objection, however, overlooks the distinction between the values of federalism and the political self-interest of state officials at a particular time. This analysis has been concerned with the former, not the latter. State officials may have an interest in challenging a particular instance of commandeering if they do not (or no longer) want to be bound by a federal regulation. They may have such an interest regardless of the long-run federalism costs or costs to other states,<sup>159</sup> and despite their own expressed preferences before the

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157. See, e.g., *supra* notes 88, 148 and accompanying text (quoting THE FEDERALIST PAPERS and various Supreme Court opinions).

158. This last statement refers not only to the constitutional authority of history and tradition, but also to the authority of the Constitution as ethos – as an evolving instantiation of American collective identity. See ROBERT C. POST, *Theories of Constitutional Interpretation*, in CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 23-50 (1995) (arguing that constitutional interpretation is ineluctably responsive to contemporary conceptions of value).

159. Notably, some states sided with the federal government in *Printz* and *New York*. See Brief of the States of Maryland et al. as Amici Curiae in Support of Respondent, *Printz v. United States*, 521 U.S. 923 (1997) (Nos. 95-1478, 95-1503), 1996 WL 5950921; Brief of Respondents, *States of Washington, Nevada and South Carolina, New York v. United States*, 505 U.S. 144 (1992) (Nos. 91-543, 91-558, and 90-563), 1992 WL 526133.

federal regulation went into effect. This, of course, is what happened in *New York*.<sup>160</sup> The petitioner state internalized more of the benefits of its successful constitutional challenge than it did the costs. Under these circumstances, it is no surprise that New York brought suit.

This distinction between the values of federalism and the political self-interest of state officials at a particular time is critical and warrants further consideration. The foregoing analysis has argued that federalism values are compromised when states lose regulatory control, regardless of whether state officials are eager to cede regulatory authority to the federal government. The fact that state officials sometimes seek to relinquish regulatory power<sup>161</sup> is largely beside the point within the context of this inquiry. The relevant normative question, rather, is what the constitutionally grounded values of federalism identify as the appropriate level of state regulatory control. Normatively, as opposed to descriptively, it would be odd for a federalism that values states as guardians against federal tyranny to countenance local avoidance of political responsibility as a benefit indirectly conferred by anticommandeering doctrine through an increase in preemption.

From a constitutional perspective that values federalism, the optimal extent and form of federal regulation is ultimately a normative question of constitutional law, not a descriptive issue that turns on the political preferences of state officeholders. Constitutional law and economics, unlike other kinds of economic analysis, cannot take all preferences as given. Rather, a normative theory of value—here, one supplied by federalism theory and doctrine—is necessary to determine which costs and benefits are admissible in a theoretical analysis of state autonomy.<sup>162</sup>

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160. See *supra* Parts I and III.

161. See, e.g., Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 797 (1995) (“[Federalism] is not always of value to state and local officials. To begin with, it is sometimes in the interest of state and local officials for *them* to pass the buck on the hardest problems of government by deferring to the folks in Washington, D.C.” (emphasis added)); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 941 (2005) (“[T]here is no logical relationship between the policy interests of state citizens and the amount of regulation flowing from the federal government or left to the states. Federal regulation and spending obviously can, and often does, benefit state-level constituencies. Consequently, state officials who are primarily interested in maximizing political support will have no reliable interest in decreasing federal power (or, the equivalent, in increasing state power).” (footnotes omitted)).

162. The preferences of state officials may be relevant, however, regarding questions of political accountability. See *supra* Part III (discussing *New York*).

*C. Isn't Preemption the Problem, Not Commandeering?*

This inquiry focuses on the choice between commandeering and its alternatives, particularly preemption, from a federalism perspective. The central claim is that anticommandeering doctrine does not serve federalism values when the Court's application of the rule ultimately results in a greater number of preemptive responses, because preemption generally causes a greater compromise of federalism values than does commandeering. Relevant to this argument is the reality that the Rehnquist Court left preemption wide open as an alternative to commandeering. But what if that Court had not, or what if the Roberts Court changes course? One might respond to this inquiry by suggesting that the Court should strictly limit preemption in addition to maintaining anticommandeering doctrine in its current form.

There is some force to this argument, but less than might at first appear. If preemption is "taken off the table," so to speak, then so is much of the foregoing analysis of anticommandeering doctrine. But it is not clear how the Court could remove preemption as a constitutional alternative in many instances without radically transforming the constitutional regime in which we live. For example, the scope of the commerce power would have to be greatly restricted, or the Supremacy Clause would have to be fundamentally reinterpreted, to compel the conclusion that the *New York* Court erred in noting that preemption remained available to combat an interstate nuclear waste problem generated by commercial activity.<sup>163</sup>

Granted, the Roberts Court could hold state and local laws preempted less often than the Rehnquist Court did. The Rehnquist Court's apparent lack of concern for the impact of broad federal preemption on state regulatory control in the commandeering context is hardly *sui generis*. It is one of the puzzles of that Court's legacy that the same Justices who wrote passionately about the virtues of federalism seemed somewhat tone deaf to the implications of broad federal preemption for the vindication of a substantive vision of state autonomy. The five Justices in the majority in critical cases involving the scope of congressional power under the Commerce Clause<sup>164</sup> or

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163. See *supra* text accompanying note 7.

164. See *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacked authority under either the Commerce Clause or § 5 of the Fourteenth Amendment to enact a provision of the Violence Against Women Act of 1994 creating a private civil remedy for victims of gender-motivated violence); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating, for the first time since the New Deal, a federal statute regulating private conduct—the Gun Free School Zones Act of 1990—as beyond the commerce power). *But see* *Gonzales v. Raich*, 545 U.S. 1 (2005)

Section Five of the Fourteenth Amendment<sup>165</sup> were often the most likely to hold state laws preempted.<sup>166</sup> Professor Ernest Young has made this point repeatedly,<sup>167</sup> as have other commentators of diverse

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(holding that the Commerce Clause authorizes Congress to prohibit the local cultivation and use of marijuana in states allowing such activity).

165. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Title I of the Americans with Disabilities Act of 1990 (ADA), which prohibits employment discrimination against the disabled, is beyond the scope of Section 5); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act of 1967 is beyond the scope of Section 5); *Morrison*, 529 U.S. at 598; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (holding that Congress could not lawfully abrogate state sovereign immunity from patent infringement suits because the provisions of the Patent and Plant Variety Protection Remedy Clarification Act of 1992 are beyond the scope of Section 5); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act of 1993 is beyond the scope of Section 5). *But see* *United States v. Georgia*, 126 S.Ct. 877 (2006) (holding unanimously that insofar as Title II of the ADA creates a private damages action against states for conduct that violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity); *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding that, as it applies to the class of cases implicating the fundamental right of access to the courts, Title II of the ADA constitutes a valid exercise of Congress' Section 5 power); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding the family-care leave provision of the Family and Medical Leave Act of 1993 as a valid exercise of Congress' Section 5 power to combat unconstitutional sex discrimination).

166. See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 462 (2002) (observing that the Rehnquist Court held in favor of federal preemption in almost two-thirds of the then thirty-five preemption cases decided since Justice Thomas joined the Court); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 369-70 (studying the Rehnquist Court's voting alignments in eight non-unanimous preemption cases decided during the October 1999-2001 Terms; noting that "Justice Scalia voted to preempt in all eight, the Chief Justice and Justices O'Connor and Kennedy in seven each, and Justice Thomas in six"; and further observing that "in those same eight cases, Justices Souter, Ginsburg, and Breyer each voted to preempt only twice and Justice Stevens never voted to preempt").

167. See, e.g., Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1377-84 (2001) (observing that the Rehnquist Court's allegedly state-rights majority often votes against the states in preemption cases); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 39-40 (contending that the Court's preemption decisions are significantly more important for state autonomy than are the rulings articulating a robust conception of state sovereign immunity).

ideological commitments.<sup>168</sup> The Justices, however, apparently do not perceive any tension.<sup>169</sup>

The suggestion that the Court should hold state law preempted less frequently, however, implicates questions of statutory construction, not constitutional law.<sup>170</sup> When Congress makes clear its intent to preempt certain state and local laws, and when such preemptive action would otherwise fall within the commerce power, removing preemption as an option would be too bitter a pill to swallow even for most federalist Justices.<sup>171</sup> It would also be difficult to justify disabling Congress from regulating interstate commercial matters,<sup>172</sup> particularly when the states are individually incompetent in light of collective action problems.<sup>173</sup>

#### D. What about Conditional Non-Preemption?

Another objection seizes upon the potentially attenuated nature of the link between the application of anticommandeering doctrine in a particular case and future instances of preemption. This

168. See, e.g., Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004) (critiquing the Rehnquist Court's preemption decisions for broadly interpreting federal law in favor of commercial interests and at the expense of progressive state regulatory measures); Fallon, *supra* note 166, at 471-72; Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 508 (2002) ("Given the broad range of issues over which Congress has undoubted power to regulate, the failure of the Court to apply preemption doctrine sparingly, and with real attention both to Congress's intent and the values of federalism, will in the long run prove disastrous to perpetuation of the very real values underlying the diffusion of power inherent in federalism."); Meltzer, *supra* note 166, at 362-78.

169. *But see* Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 46 (2006) (questioning "the widespread impression of a sharp discontinuity between the Rehnquist Court's 'pro-state' federalism decisions and its 'nationalist' preemption decisions").

170. See *supra* note 17.

171. On the other hand, if one accepts the view that the Tenth Amendment imposes independent limits on congressional power (akin to other parts of the Bill of Rights), then certain hard-to-specify constitutional limits on preemption would seem to follow, at least when preemption imposes an extreme burden on the states. See *supra* notes 25-29, 36, 94 and accompanying text (discussing *National League of Cities* and *Garcia*). See also *supra* note 105 and accompanying text (discussing the potentially onerous burden that federal preemption imposes on states).

172. See, e.g., *New York v. United States*, 505 U.S. 144, 159-60 ("Space in radioactive waste disposal sites is frequently sold by residents of one State to residents of another. Regulation of the resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause. . . . Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, preempt state radioactive waste regulation.")

173. See *supra* notes 67, 140 and accompanying text (discussing the collective action problem implicated in *New York*); see also COOTER, *supra* note 90, at 103-07 (analyzing public goods and spillovers).

criticism argues that if the Court's holding in *New York* raises concerns because of possible preemption going forward, then current doctrine is exactly right because the Court has banned commandeering while allowing Congress to offer states a choice between commandeering and preemption.<sup>174</sup> This scheme can be denoted "conditional non-preemption" because Congress is conditioning its decision not to preempt state and local laws in a certain area upon the agreement of the states to be commandeered, which Congress lacks the power to do directly.<sup>175</sup> With conditional non-preemption, preemption is certain to occur if commandeering does not.

For example, statutes such as the Clean Air Act ("CAA")<sup>176</sup> avoid the commandeering problem because they give states a choice. If states want to administer the clean air program in their states, they can prepare state implementation plans ("SIPs") that meet federal minimum criteria. But if they do not, then the Act empowers the Environmental Protection Agency ("EPA") to write a federal implementation plan ("FIP") for such states.<sup>177</sup> EPA has written several FIPs over the years, but few have gone into effect because the states ultimately have preferred to retain control over the implementation of the national standards.<sup>178</sup>

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174. See, e.g., *New York*, 505 U.S. at 167 ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. This arrangement, which has been termed 'a program of cooperative federalism,' is replicated in numerous federal statutory schemes." (internal citations omitted)). For a description of this "cooperative federalism" model, see Adler, *supra* note 15, at 384-87.

175. Conditional non-preemption is structurally analogous to conditional federal expenditures under the Spending Clause, Article I, Section 8, Clause 1. See *supra* notes 3, 51 and accompanying text; *supra* Part II.D (analyzing the conditional spending power from a federalism perspective).

176. 42 U.S.C. §§ 7401-7431 (2006).

177. For an able discussion of the "federal-state partnership" structure of the CAA, see *Virginia v. EPA*, 108 F.3d 1397, 1406-11 (D.C. Cir. 1997). See also Adler, *supra* note 15, at 447-48.

178. An interesting facet of the strategic posturing, however, is that EPA may be reluctant to impose FIPs because of the local anger generated when Washington, D.C. dictates such behavior as one's personal driving and cooking habits. A FIP for ozone can govern such matters as local transportation and barbecue emissions. Personal Communication with Professor Jonathan Wiener, Duke University School of Law, in Durham, N.C. (January 24, 2006). This dimension of the problem suggests that the preemption alternative to SIPs is not truly automatic; EPA might hesitate before imposing a FIP. Yet perhaps a non-governmental organization ("NGO") could eventually sue EPA to force it to adopt a FIP. In the longer term, after witnessing the angry feedback in response to the FIP, Congress might amend the CAA to remove or to dilute the FIP threat, thereby weakening the incentive of states to adopt SIPs. Thus, one could model this series of interactions as a multiperiod strategic game among several actors—the states, EPA, the NGO, and Congress. But this is a game for another day.



Thus, instead of allowing commandeering because of possible preemption later on if commandeering were prohibited, the Court has permitted commandeering only after Congress commits to preemptive action if the states decline to be commandeered. When the Court bans commandeering, preemption is merely possible. When the Court allows conditional non-preemption, preemption is assured if commandeering does not take place. The challenge for this inquiry is to explain why, from a federalism perspective, a regime allowing conditional non-preemption but not commandeering is less preferable than one that allows both. In any situation in which Congress is willing to regulate directly if it cannot commandeer because of an anticommandeering rule, it should also be willing to pass a conditionally non-preemptive statute. In any other situation, an anticommandeering rule cannot cause a greater amount of direct federal regulation going forward.

From a federalism perspective, however, the choice that conditional non-preemption provides may not be preferable to the lack of choice that commandeering entails. In order to make a credible threat of preemption if the states refuse to be commandeered, Congress often must commit to putting federal “boots on the ground.” For example, the CAA’s conditional non-preemption provisions are effective only because EPA is able to step in if states refuse to enforce federal requirements.<sup>179</sup> The existence of a federal administrative structure changes the federal-state balance in the relevant field for many of the same reasons that direct federal regulation does: federal administrators are present and making federal policy to some extent. And with the federal regime in place, more invasive federal regulations may be forthcoming.<sup>180</sup> Accordingly, it may not be plausible to hypothesize a situation in which Congress credibly threatens preemption without imposing at least some direct regulation or agency oversight of states that has an impact similar to direct regulation. Commandeering is preferable to this type of oversight insofar as it affords states more flexibility to make policy choices.<sup>181</sup>

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179. See *supra* notes 176-78 and accompanying text.

180. See *Printz v. United States*, 521 U.S. 923, 959 (1997) (Stevens, J., dissenting) (“In the name of States’ rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies.”); *supra* note 127 and accompanying text.

181. The CAA experience strengthens the point that *Printz* is actually—and perhaps counter intuitively—a stronger case than *New York* from an anticommandeering perspective. See *supra* Part III. When the federal government is merely trying to get the states to do the leg work, a rule against commandeering might advance federalism values. By contrast, when a significant amount of discretion exists in executing a regulatory action (as there generally is under the

*E. Is the Likelihood of Preemption High?*

The next objection is related to, but distinct from, the last one. This inquiry presents a story of counterintuitive results and perverse consequences only to the extent that the Court's commandeering ban causes Congress to preempt state and local law more often than it otherwise would, thereby compromising federalism values to a greater extent than would commandeering. Skeptics might suggest that this story is possible but improbable because preemption of the kind that compromises federalism values is unlikely to result when the Court removes commandeering as a regulatory option. This may be so for at least two reasons.

First, the distinction between commandeering and preemption from the standpoint of state autonomy is sometimes not clear-cut because not all types of preemption have the same impact on federalism values. It is one thing for Congress to preempt a field or to set a specific rule with which all regulated actors must comply. It is another for Congress to set a regulatory floor, above which states can regulate further if they choose. The latter type of preemption, like many instances of commandeering, allows states to retain some measure of regulatory control.<sup>182</sup>

Second, if Congress would prefer to commandeer but cannot, then Congress's second choice might not be preemption. Rather, its next-best alternative might entail regulating in a way conceptually and operationally more analogous to commandeering – such as using the conditional spending power or conditional non-preemption. If this is right, then anticommandeering doctrine does not significantly increase the probability of preemption going forward. For example, commandeering is often attractive when states possess an administrative capacity or infrastructure that the federal government lacks. Preemption, however, can be infeasible, at least in the short run, in regulatory situations involving large, fixed start-up costs. Moreover, heavy-handed federal preemption can be politically unpopular locally. It also requires a “boots on the ground” or “nation building” commitment from the federal government that may be lacking. The preemption “threat,” in other words, may not be credible. Members of Congress tend to talk about preempting state and local law more often than they do it.

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CAA), federalism values are often better secured through commandeering than through preemption.

182. *See supra* note 17.

Regarding the first point, it is true that preemption, like commandeering, can leave states a significant degree of regulatory control. But it is difficult to see how a given instance of preemption can offer states more regulatory control than a corresponding use of commandeering. With preemption, Congress wills not only the end but also the means. With commandeering, Congress wills just the end. If only one means is available to achieve the end, then commandeering and preemption affect state regulatory control to the same extent. Logically, however, it is not evident how preemption could offer states more regulatory control. In other words, it might happen that a particular use of commandeering leaves states with no more choices than would preemption, such as when both command the same behavior. But many situations exist when commandeering leaves states with more choices than would preemption, as in *New York*, while it is difficult to identify situations when preemption would allow states more choices than would commandeering.

Regarding the second point, there were scores of preemption statutes in the United States Code, many more than there were instances of commandeering even before 1992, when *New York* was decided.<sup>183</sup> In addition, preemption is not typically unpopular, nor is the federal will to preempt a rare political phenomenon.<sup>184</sup> While the absence of a federal regulatory infrastructure may sometimes deter immediate preemptive action, this will not always be the case, and a commandeering ban gives Congress a greater incentive to put “boots on the ground” by building such an infrastructure.<sup>185</sup> Moreover, states may not always agree to the conditions attached to federal funds, and conditional non-preemption also requires Congress to express the will to preempt. Finally, none of the above counterarguments suggest—let alone compel—the conclusion that the likelihood of preemption will usually be so trivial if Congress cannot commandeer that the Court has been justified in ignoring the question of state regulatory control.

It is ultimately a context-sensitive empirical question whether applying the commandeering ban in a particular setting would cause the federal government to respond by engaging in preemption, using

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183. Rather than 1992, the relevant time period may be the 1970s, when several (though not all) federal courts of appeals rejected commandeering imposed by EPA, and the federal government stopped the practice before the Supreme Court could decide the constitutional question. See Adler, *supra* note 15, at 423-24.

184. For example, after the Ninth Circuit invalidated the commandeering statute at issue in *Board of Natural Resources v. Brown*, see *supra* note 62, Congress responded with preemption. See Adler, *supra* note 15, at 425 (“Following the Ninth Circuit’s decision, Congress amended the [law] to require the Secretary of Commerce to issue federal regulations directly limiting the export of unprocessed logs.”).

185. See *supra* notes 127, 180 and accompanying text.

the conditional spending power or conditional non-preemption, or simply giving up and issuing no federal regulation. Sometimes preemption will be more likely, and sometimes it will be less likely for a variety of legal and political reasons.

There are various ways one could try to investigate this issue both empirically and theoretically. Empirically, one could examine the universe of commandeering statutes and ask whether a preemption alternative would have been feasible, and if so, whether preemption would have been more effective than other regulatory approaches in light of the congressional priorities articulated in the statute and the legislative history. One could do the same for the much larger universe of preemption statutes in the United States Code—that is, ask whether there were feasible and comparatively effective commandeering alternatives available to Congress. Such an inquiry would require many contestable judgment calls regarding issues of feasibility and efficacy.

Theoretically, one could inquire why Congress would ever want to commandeer. The answer to this question has important implications for the regulatory outcome that is most likely to occur if Congress cannot commandeer. To be sure, sometimes Congress will commandeer because only the states have the necessary people on the ground to carry out the federal mandate. At other times, however, the federal government commandeers instead of preempting because the states prefer commandeering and they impact the federal legislative process. At still other times, Congress may get “lazy” and choose one regulatory approach without thinking through the alternatives.

Ultimately, however, this debate over the likelihood of preemption when commandeering is prohibited misses the intended contribution of this inquiry, which is primarily to advance a conceptual claim, not an empirical one. Because there often will exist a non-trivial chance that Congress will engage in preemption when it cannot commandeer, and because it is impossible for the Court to know at the time of judicial decision where a given case fits along the continuum of preemption probabilities, federalism doctrine requires a strategically sophisticated conceptual system, one that accounts for all of the regulatory possibilities before Congress. The basic error the Court has made, in other words, is that it has examined the accountability effects of commandeering without comparing commandeering to its alternatives and their effects on federalism values, which include but transcend accountability. If the Court made such a comparison, it would not insist upon a federalism doctrine in which commandeering is categorically barred, federal statutes are routinely construed to have broad preemptive effect, and Congress can

condition federal funding on state agreements to be commandeered even when the amount of money involved leaves the states no reasonable choice.

Indeed, the “preemption is unlikely” objection to this critique of anticommandeering doctrine implicitly (if unwittingly) acknowledges that the Court’s defense of its doctrine is inadequate. The most persuasive argument in favor of *New York* and *Printz* is not that accountability concerns trump all other considerations.<sup>186</sup> Rather, the argument is that commandeering raises serious accountability problems and imposes potentially significant financial costs on the states, and that a commandeering ban does not generate considerable, countervailing concerns about state retention of regulatory control (and accountability as well). For the reasons stated, this inquiry disagrees with this view. But the most important point is that the debate should center on a more complicated constitutional calculus than the accountability story told by the Court.

#### *F. Why Shouldn’t Accountability Trump?*

Those who find the Court’s accountability concerns compelling—perhaps even a constitutional “trump”—may be inclined to dismiss the foregoing analysis on the ground that accountability values are sufficient by themselves to render commandeering unconstitutional. This conclusion would be shortsighted for at least two reasons.

First, as discussed in the Introduction and extensively by other commentators,<sup>187</sup> it is not clear that political accountability is a constitutional value that the Justices are supposed to police in the service of federalism. The Tenth Amendment does not so instruct.<sup>188</sup> Nor is it apparent generally that commandeering generates insurmountable accountability concerns, or that preemption, conditional non-preemption, and conditional federal spending avoid similar accountability problems.<sup>189</sup>

Second, no one value should be regarded as absolute in an area of constitutional law implicating inherent value pluralism. If a

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186. Even when federalism values are reduced to accountability concerns, a ban on commandeering may be self-undermining. To the extent that anticommandeering doctrine results in greater use of the conditional spending power, for example, the doctrine generates potentially serious accountability problems. Unlike commandeering or preemption, conditional spending statutes can present state voters with the false impression of a free choice to regulate in exchange for federal dollars. *See supra* note 14; Part II.D.

187. *See supra* notes 9-12 and accompanying text.

188. *See supra* note 4 and accompanying text.

189. *See supra* notes 12-15, 186 and accompanying text.

particular federalism doctrine makes states worse off in terms of regulatory power forgone, the question arises whether the game is worth the candle. Federalists, in other words, have an interest in considering whether the accountability benefits alleged to be generated by current Tenth Amendment doctrine are cost-justified by exceeding the expected damage to state regulatory control caused by preemption. Federalists should also consider the relative financial costs imposed on the states by commandeering and its alternatives.

The answer to this cost-benefit question is ultimately context-sensitive, largely empirical, relatively unexamined, and therefore uncertain. Still, it is the most relevant inquiry to make if one is committed to more than a judicially administrable but largely symbolic gesture in the direction of federalism.<sup>190</sup> That is, the cost-benefit issue is the question to pose if one wants to determine the value of anticommandeering doctrine to the project of constitutional federalism.<sup>191</sup> And lest this objection to the doctrine be deemed uncharitable or overstated, recall Justice Scalia's chilling rigidity on

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190. See, e.g., Caminker, *supra* note 14, at 1007 (“[*New York*] is symbolism, nothing more; a line drawn in the sand for the sake of drawing a line.”); *id.* at 1088-89 (“The Court’s anti-commandeering rule [is] best understood as a symbolic gesture—waving the banner of state sovereignty whether victory was here deserved or not.”); Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 200 (noting that “while [*Printz*] represents a decisive symbolic victory for state sovereignty, some would characterize its immediate practical impact as relatively minor”). Anticommandeering doctrine is relatively broad and deep, but its real-world effects have been quite modest in part because the federal government engaged in little commandeering even before 1992. See *supra* note 103; see also Caminker, *supra*, at 200, n.6 (noting that “there are only a handful of other recent commandeering statutes that clearly fall within the [*Printz*] decision’s ambit”); *id.* at 243 (concluding that “*Printz* does not appear to curtail prior nationalist assertions of power in a significant manner”).

Regarding *Printz* in particular, the Brady Act’s interim provisions for background checks on firearm purchasers were scheduled to be replaced by a federal computer database as soon as it was ready to go online. The database is operational. See Federal Bureau of Investigation, National Instant Criminal Background Check System (“NICS”), <http://foia.fbi.gov/nics552g.htm> (last visited Nov. 5, 2005) (“The purpose of NICS, which was established pursuant to the Brady Handgun Violence Prevention Act (Brady Act), is to provide a means of checking available information to determine whether a person is disqualified from possessing a firearm under federal or state law.”).

The present, however, is not necessarily prelude to the future. The Roberts Court could use anticommandeering doctrine to invalidate other federal laws or executive actions, including those imposing reporting requirements that do not now clearly fall within the scope of the ban. See Caminker, *supra* note 190, at 200 n.6 (collecting various federal laws that require state officials to gather and report information to federal authorities). The *Printz* Court stated that it was not deciding whether reporting requirements fall within the ban on commandeering. See *Printz v. United States*, 521 U.S. 923, 917-18 (1997); see also *id.* at 936 (O’Connor, J., concurring). In a post-9/11 world, moreover, it is uncertain what the future may bring in the realm of commandeering. See *infra* Part V.

191. Cf. Caminker, *supra* note 14, at 1007 (calling for the Court to “engage in a more serious and sophisticated inquiry into the role that federalism values ought to play in our polity today”).

behalf of the Court in *Printz*: “It is the very *principle* of separate state sovereignty that [commandeering] offends, and no comparative assessment of the various interests can overcome that fundamental defect.”<sup>192</sup> While it is black letter law that the Constitution allows facial distinctions on the basis of race if the state interest is sufficiently weighty,<sup>193</sup> the Rehnquist Court allowed no such balancing in the context of commandeering. Accountability concerns do not justify the Court’s categorical rule.

### G. Why Not Prefer Rules over Standards?

One might agree with the theoretical suggestion that the values animating anticommandeering doctrine need not have uniform bite in all contexts, yet nonetheless conclude as a practical matter that the Court’s categorical rule is sound. On this view, much of the difference between this inquiry’s balancing argument and the holding in *New York* concerns the distinction between a rule and a standard. In the particular circumstances of *New York*, perhaps federalism values would have been better served by allowing commandeering, yet this suggestion just assumes the conclusion that the question should be settled by a legal standard requiring case-by-case application. The choice between bright-line rules and flexible standards implicates a famously complicated jurisprudential and ideological controversy, one that is closely related to the debate in constitutional law between categorization and balancing.<sup>194</sup> In the commandeering context, the clarity of rules may be especially protective of federalism values when, in contrast to Europe, states tend to be less involved in the formulation of the federal law that would commandeer.<sup>195</sup>

Putting aside the questionable assumption that greater state involvement in the formulation of federal policy means greater

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192. *Printz*, 521 U.S. at 932. *See id.* at 935 (“[N]o case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”). *See also* Young, *supra* note 72, at 127 (“The anticommandeering doctrine is . . . the hardest of rules, apparently recognizing no exceptions for even the clearest of statements or the weightiest of federal interests.”); Caminker, *supra* note 190, at 200 (“The Court [in *Printz*] announced a categorical anti-commandeering rule, one not subject to any case-by-case balancing of interests or measurement of burden.”).

193. For the Court’s most recent pronouncement, see *Johnson v. California*, 543 U.S. 499, 505 (2005).

194. *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15–63 (1987); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1991). *Cf.* Neil S. Siegel, *A Prescription for Perilous Times*, 93 GEORGETOWN L.J. 1645, 1663–66 (2005) (discussing the rules-versus-standards debate in the context of wartime threats to civil liberties).

195. *See supra* Part II.E.

protection of federalism values,<sup>196</sup> the problem with this defense of anticommandeering doctrine is that the Court's rule is so over- and under- inclusive with respect to the purpose of safeguarding federalism values as to be vulnerable to the charge of arbitrariness. The anticommandeering ban is over-inclusive because one can readily imagine instances of commandeering that advance, rather than thwart, federalism values—for example, the facts of *New York*. At the same time, the rule is under-inclusive because it does not account for other regulatory alternatives, particularly preemption, that can impose truly awful consequences by stripping states of regulatory control and generating a complex picture of accountability. Conditional federal spending, moreover, can offer states no reasonable choice, raising both accountability and regulatory-control concerns.<sup>197</sup> One can persuasively argue for a rule over a standard in certain situations, but one cannot plausibly suggest that any rule will do. More aggressive use of preemption after *New York* would illustrate the general phenomenon that rules, which lack the chilling effect imposed by standards, may free strategic actors to pursue counter-purposive advantage right up to the line demarcated by the rule.<sup>198</sup>

Indeed, the Court's constitutionally decisive classification of a federal regulation as commandeering, preemption, conditional non-preemption, or conditional spending is normatively empty. In general, federal laws falling into any of these categories can safeguard or undermine federalism values. Sound legal doctrine requires a functional analysis of a federal law's impact on constitutionally relevant federalism values, not a bright-line distinction that judges all instances of commandeering out of bounds but interprets invasive federal regulations to have broad preemptive effect.

#### V. COMMANDEERING AFTER 9/11

An illustration other than *New York* and *Printz* is useful to show how the analysis defended in this inquiry is preferable to the Court's categorical approach to commandeering. The example, briefly referenced in the Introduction, will also serve to illuminate how the Court should handle the relevant issues going forward.

The Posse Comitatus Act of 1878 generally prohibits U.S. military personnel from directly participating in law enforcement activities within the United States—for example, interdictions,

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196. See *supra* Part IV.B.

197. See *supra* notes 12-14 and accompanying text.

198. See KELMAN, *supra* note 194, at 41; Kennedy, *supra* note 194, at 1773-74; Sullivan, *supra* note 194, at 63.



surveillance, searches, seizures, and arrests on behalf of civilian law enforcement authorities—except when expressly authorized by the Constitution or Congress.<sup>199</sup> Congress has provided for several exceptions to the Act.<sup>200</sup>

Presumably, Congress could amend the Posse Comitatus Act to specify that under defined conditions in the wake of a terrorist attack, the United States military would have exclusive authority to maintain law and order within the affected area.<sup>201</sup> There might need to be

199. 18 U.S.C. § 1385 (2006) (“Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”). The original 1878 Posse Comitatus Act (“PCA” or “Act”) referred only to the United States Army. The Air Force was added in 1956. The Act’s prohibitions were extended to all the services with the enactment of 10 U.S.C. § 375, which directed the Secretary of Defense to

prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

10 U.S.C. § 375 (2006). The Secretary of Defense issued Department of Defense Directive 5525.5. See United States Northern Command Fact Sheet, Posse Comitatus Act, <http://www.northcom.mil/index.cfm?fuseaction=news.factsheets&factsheet=5> (last visited Dec. 25, 2005). For background and analysis, see generally Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 MIL. L. REV. 86 (2003); Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POLY REV. 383 (2003); Matthew Carlton Hammond, Note, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L. Q. 953 (1997).

200. These include statutes that: (1) authorize U.S. military personnel to provide counterdrug assistance, 10 U.S.C. §§ 371-381 (2006); (2) allow the President to use U.S. military personnel at the request of a state legislature or governor to suppress insurrections, 10 U.S.C. §§ 331-335 (2006); (3) permit Department of Defense personnel to assist the Department of Justice in enforcing prohibitions regarding nuclear materials, when the Attorney General and the Secretary of Defense jointly determine that an “emergency situation” exists posing a serious threat to U.S. interests beyond the capability of civilian law enforcement agencies, 18 U.S.C. § 831 (2006); and (4) allow Department of Defense personnel to assist the Department of Justice in enforcing prohibitions regarding biological or chemical weapons of mass destruction, when the Attorney General and the Secretary of Defense jointly determine that an “emergency situation” exists posing a serious threat to U.S. interests beyond the capability of civilian law enforcement agencies, 10 U.S.C. § 382 (2006).

201. The President arguably possesses inherent Article II authority to use the military in such situations, as long as he acts in the absence of a congressional prohibition. Cf. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006) (“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”); Beth Nolan et al., *On NSA Spying: A Letter to Congress*, 53 N.Y. REV. BOOKS 42, 43 (Feb. 9, 2006) (“To say that the President has inherent authority does not mean that his authority is exclusive, or that his conduct is not subject to statutory regulations enacted . . . pursuant to Congress’s Article I powers.”). Even when Congress has not acted, there are limits to the President’s inherent authority. As held in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the

other limits (time, for example) to make the law clearly constitutional, but that is just fine tuning. So, what if Congress decides not to replace state and local law enforcement personnel with the military, but instead chooses to put state and local officers under federal command (with federal pay) for the duration of the emergency conditions?

If *New York* and *Printz* mean what they say, Congress would be prohibited from placing state and local officers under federal control; the authorizing legislation would fall within the Court's prohibition of commandeering.<sup>202</sup> Under current Tenth Amendment jurisprudence, however, and putting aside other constitutional considerations and the wisdom of the choice, there would be no constitutional impediment to Congress' authorizing the military to maintain law and order within the area targeted by the terrorist attack until the emergency had passed.<sup>203</sup>

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President may not substitute military courts for civilian courts in geographic areas of the country where civilian courts are functioning, unless Congress suspends the writ of habeas corpus.

202. See, e.g., Caminker, *supra* note 190, at 243 (citing *Printz v. United States*, 521 U.S. 923, 940 (1997) (Stevens, J., dissenting) ("Justice Stevens is surely correct to observe that a commandeering power might still be extremely important to protect national interests in an emergency."). Justice Stevens authored these "prescient" words, Althouse, *supra* note 76, at 1233, more than four years before September 11, 2001:

Indeed, since the ultimate issue is one of power, we must consider its implications in times of national emergency. Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond. If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment, "in historical understanding and practice, in the structure of the Constitution, [or] in the jurisprudence of this Court," ante, at 2370, that forbids the enlistment of state officers to make that response effective? More narrowly, what basis is there in any of those sources for concluding that it is the Members of this Court, rather than the elected representatives of the people, who should determine whether the Constitution contains the unwritten rule that the Court announces today?

*Printz*, 521 U.S. at 940 (Stevens, J., dissenting). See Althouse, *supra* note 76, at 1235, 1266-68 (asking whether the needs of the federal government in fighting terrorism may cause the Court to articulate a national-security exception to anticommandeering doctrine, but arguing that the "doctrine should be preserved in its absolute form not only in spite of the war on terrorism, but precisely because it can protect individual rights that the exigencies of war may lead courts to narrowly construe").

203. Congress's power to enact legislation dealing with external threats to national security finds several textual justifications in Article I, Section 8 of the Constitution, which contains a number of military-related powers. They include the spending power in clause 1, which expressly refers to "the common Defence," and the necessary and proper power in clause 18, which grants Congress the authority to carry into effect the President's powers in this area as well. That said, the Constitution's independent limits apply generally to these congressional powers, although not necessarily in the same way. Accordingly, if *National League of Cities* were revived, see *supra* notes 24-29, 36, 94 and accompanying text, its holding might create problems for a preemption statute of the sort hypothesized in the text.

It is questionable whether this constitutional delineation of Congress's freedom of action is sound from a federalism perspective. According to the Rehnquist Court, criminal law enforcement is a traditional subject of state concern,<sup>204</sup> an area regarding which our federal system historically has preserved a significant degree of state regulatory control. Yet the impermissible commandeering option is the one that leaves room for state regulatory control if Congress allows deputized state officers to exercise discretion (which they inevitably would have to exercise in any event). By contrast, the permissible preemptive alternative allows no room for a state role in maintaining law and order.<sup>205</sup> Moreover, financial considerations do not weigh against the commandeering option because the legislation specifies that the mandate would be funded entirely by the federal government.<sup>206</sup> Finally, accountability concerns may be real when state officers act under federal command yet also exercise discretion, but *a priori* they do not seem sufficient to justify what would otherwise be a perverse situation from a federalism perspective. If anything can capture the attention of most Americans and impress upon them who is ultimately in charge, it is a national tragedy like the attacks of September 11, 2001. Moreover, government at every level and the news media could clarify to citizens on the ground when state and local law enforcement personnel were acting in a federal capacity.<sup>207</sup>

One could construct other examples to make the same point. Various federal responses to a natural disaster come to mind,

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204. See *supra* note 164 (discussing *Lopez* and *Morrison*). The *Morrison* Court stated that “the suppression of [violent crime] has always been the prime object of the States’ police power.” 529 U.S. at 615. The *Lopez* Court stressed that “[u]nder the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.” 514 U.S. at 564.

205. Cf. BREYER, *supra* note 95, at 60 (referencing Justice Stevens’ *Printz* dissent and asking rhetorically whether the “freedom to enlist state officials [would] not help to advance both the cause of national security and the cause of cooperative federalism”).

206. The commandeering might trigger some opportunity-cost concerns, however, if state and local law enforcement priorities were sacrificed during the time when the federal law placed the state and local officers under federal command. See *supra* note 66 and accompanying text.

207. This commandeering analysis is likely not affected by the constitutional provisions allowing Congress to call forth and govern the state militias, U.S. CONST. art. I, § 8, cl. 15-16. By firmly established historical understanding and legal practice, state and local law enforcement personnel are not included within the militia. See, e.g., 10 U.S.C. § 311 (2006); THE FEDERALIST NO. 29 (Alexander Hamilton); THE FEDERALIST NO. 46 (James Madison). Nor would Article IV, Section 4 appear to affect the constitutional inquiry. It provides that the United States “shall protect each [State] against Invasion.” This mandate would not allow otherwise prohibited commandeering when the federal government can use the United States Armed Forces to protect the states from invasion and thus need not commandeer local law enforcement officers.

particularly in light of the inadequate federal, state, and local reactions to Hurricane Katrina.<sup>208</sup> If constitutional doctrine is supposed to vindicate federalism values in reality and not just symbolically, then the Court should train its attention not only on political accountability, but also on state retention of regulatory control and the financial impact of different regulatory regimes on state budgets. A federalism jurisprudence that does so will deem the Rehnquist Court's categorical ban on commandeering seriously over and under inclusive with respect to the values of federalism. By reformulating the doctrine along the lines of an *ex ante* standard enforced through case-by-case balancing, the Court would be well positioned to conduct a functional analysis of different instances of commandeering, paying particular attention to the feasibility of preemption in various future situations were commandeering prohibited.

To reiterate, legal standards and balancing tests carry their own jurisprudential risks. They can be difficult to administer, and they can confer too much discretion upon lower courts and the Justices themselves in future cases. But as the foregoing analysis implicitly suggests, some relatively clear and administrable guidelines are available, even in the abstract. Instances of commandeering should carry a presumption of unconstitutionality when preemption is not a feasible alternative in the short run,<sup>209</sup> the federal mandate is unfunded and expensive, and the federal government makes little effective effort to alleviate reasonable accountability concerns. Only a substantial governmental interest should be sufficient to overcome this presumption.<sup>210</sup> By contrast, commandeering should be held constitutional as far as the Tenth Amendment is concerned when preemption is a feasible alternative in the short run and such

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208. See, e.g., Eric Lipton et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at A1 ("Federal Emergency Management Agency officials expected the state and city to direct their own efforts and ask for help as needed. Leaders in Louisiana and New Orleans, though, were so overwhelmed by the scale of the storm that they were not only unable to manage the crisis, but they were not always exactly sure what they needed. While local officials assumed that Washington would provide rapid and considerable aid, federal officials, weighing legalities and logistics, proceeded at a deliberate pace.").

209. Courts would have to make a judgment about how likely federal preemption is over what realistic period of time. Sometimes Congress would have an opportunity to preempt relatively quickly. Other times Congress would need a new federal regulatory infrastructure that would require a significant amount of time to establish. The longer it would take for Congress to act, the more speculative the action would become.

210. This article has examined the issue of commandeering from the standpoint of values commonly thought to be advanced by federalism. An optimal commandeering doctrine must also take into account the interests of the federal government. This part of the doctrinal test would require courts to assess the strength of the national interest in commandeering.

preemption would reduce state regulatory control relative to the commandeering at issue, the federal mandate is fully funded or inexpensive to carry out, and the federal government takes effective measures to maintain lines of accountability (or accountability is for some other reason not seriously threatened). More difficult situations arise when the above factors cut in opposite directions. The Court would need to address them through the inductive common law method that characterizes the practice of constitutional adjudication.<sup>211</sup> If the Court were to adopt this approach, Congress would be well-advised to legislate with the above considerations in mind so as to avoid confronting the Court with hard commandeering cases.

According to the above criteria, *New York* was decided incorrectly on balance. Although the federal mandate was expensive for the states to carry out, preemption was a plausible alternative that also would have imposed significant costs on states,<sup>212</sup> and accountability was not seriously threatened because the states should have been held accountable for the commandeering sanction they approved. Therefore, the Court should have permitted commandeering in *New York*. *Printz*, by contrast, is a closer case and is more defensible than *New York* from a federalism perspective. On the one hand, the federal mandate was inexpensive and local law enforcement officers could have explained to would-be firearms purchasers that federal law mandated background checks. On the other hand, the federal government made little effort to alleviate accountability concerns in enacting the law, and preemption was not a plausible alternative in the short run. In terms of the likely impact on federalism values, therefore, the Court's prohibition of commandeering in *Printz* was less problematic than it was in *New York*.

One might reiterate the objection that courts are not institutionally competent to implement such a multi-factored analysis, and that one benefit of the current doctrine is that it is clear, simple for courts to apply, and easy for the federal government to work around in developing federal policies. This criticism, however, proves too much. Flat prohibitions are the extraordinary exception in constitutional law, even though they are clearer, simpler, and easier to work with than rules or standards that tolerate exceptions and sensitivity to value conflict. The Tenth Amendment inquiry

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211. See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

212. See *supra* text following note 144.

recommended above seems less institutionally demanding and open-ended than many modes of analysis that govern distinct areas of constitutional doctrine, including federalism.<sup>213</sup>

### CONCLUSION

Anticommandeering doctrine is seriously over- and under-inclusive, whether considered in light of federalism values as a whole, or in light of the accountability concerns on which the Court has inappropriately fixated. As has been mentioned in passing throughout this inquiry,<sup>214</sup> such a disconnect between legal doctrine and animating values suggests that the Rehnquist Court's Tenth Amendment legacy has more to do with judicially manageable symbolism than with the substance of federalism.<sup>215</sup>

The legal universe is in flux, however, and the Rehnquist Court is no more. The Roberts Court will decide over the coming years and decades whether the Constitution is concerned primarily with the symbolism of federalism or with its substance.<sup>216</sup> The answer to this question will determine, among other things, whether the Court will insist on applying anticommandeering doctrine of *New York* and *Printz* no matter what—that is, even when there exists a serious

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213. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (Commerce Clause); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Section Five of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause); *South Dakota v. Dole*, 483 U.S. 203 (1987) (conditional Spending Clause); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (procedural due process).

214. See *supra* notes 19, 143, 190 and accompanying text.

215. The triumph of symbolism over substance is also evidenced by the Court's apparent lack of concern to limit or overrule *Garcia* and to rehabilitate *National League of Cities*. See *supra* Part I (discussing *National League of Cities* and *Garcia*). This triumph is further illustrated by the Court's invigoration of state sovereign immunity in the name of state sovereign "dignity." See *supra* notes 164-165 and accompanying text (citing the recent state sovereign immunity decisions). See also Adler, *supra* note 15, at 397 ("[T]he Court has invalidated federal actions that impede upon, or affront the 'dignity' of, states *qua* states. In particular, the Court has held that the federal government may neither command states to participate in or implement a federal regulatory program . . ."); Elizabeth Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L. REV. 1503, 1559 (2000) (suggesting that *New York* and *Printz* may be animated by concern that commandeering expresses disrespect for states).

216. The point is not that symbolism should not matter in law. See Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 62 (1965) (arguing that "symbols constitute an important element in any societal structure"); Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. (forthcoming 2007). The point, rather, is that a symbol should not routinely be wielded in a way that misapprehends the substance it is supposed to symbolize. This is what happens when states retain their "sovereign dignity" at the expense of their regulatory autonomy, even when accountability values are not significantly compromised and financial burdens are minimal.

threat to national security or other critical national interests are at stake; when Congress is determined to regulate one way or another; when our federal system has an abiding interest in maintaining state regulatory control; when there exists no reasonable possibility of voter confusion implicating accountability concerns; and when the financial costs to the states involved are trivial. If the Roberts Court applies anticommandeering doctrine even in these circumstances—which the Rehnquist Court insisted is the Constitution’s command—then defenders of state autonomy should join advocates of national power in dissent and emphatically reject the flattery.