

IMPROPER COMMANDEERING

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ABSTRACT

New York v. United States, Printz v. United States, and Murphy v. NCAA each involved federal laws that told a state to do, or not do something. And, in each case, the Supreme Court found that the federal laws were unconstitutional because they violated the so-called “anticommandeering” doctrine. However, the Court did not hold that any of these laws violated the Tenth Amendment, standing by itself. Rather, in each case, the federal laws were unconstitutional because they exceeded the scope of Congress’s enumerated powers. Most recently, Murphy acknowledged the issue, but ultimately tiptoed around the doctrine of enumerated powers.

Soon enough, the Supreme Court can restore doctrinal clarity in the percolating litigation over sanctuary cities. To date, several courts have held that 8 U.S.C. § 1373(a) is unconstitutional on its face. This law requires states and their subdivisions to share information about unlawful aliens in their custody. Or more precisely, states cannot enact laws that prevent their subdivisions from sharing that information with the federal government.

Regrettably, these courts have based their rulings solely on the Tenth Amendment, without discussing the scope of Congress’s enumerated powers. Section 1373(a) is arguably a “necessary” means to carry into execution Congress’s powers to establish a uniform system of naturalization laws. However, it cannot be “proper” for Congress to accomplish that end by instructing states how to manage their law enforcement agencies. On appeal, the Supreme Court should provide this textual explanation for why Section 1373(a) violates the anticommandeering doctrine.

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INTRODUCTION

Pop quiz!

Which of the following federal laws did the Supreme Court find to violate the Tenth Amendment?

- A. The “Take Title” provision in *New York v. United States*
- B. The background-check mandate in *Printz v. United States*
- C. The prohibition on state gambling laws in *Murphy v. NCAA*
- D. All of the above
- E. None of the above

The correct answer is *E*, but you will be forgiven for thinking it was *D*. Judges, attorneys, law students, and even law professors routinely make this common mistake. A federal law can no more *violate* the Tenth Amendment than a state law can violate the Supremacy Clause. Rather, both clauses “simply provide[] ‘a rule of decision.’”¹

The Tenth Amendment tells us 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.”² This clause, added two years after the ratification of the Constitution, contains three premises. First, we ask if a power is delegated to Congress. For example, is that power enumerated in Section 8 of Article I, in Section 5 of the Fourteenth Amendment, or elsewhere? If the answer is *yes*, then the federal law is a proper exercise of federal power. In addition, by virtue of the Supremacy

¹ See *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018) (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015)).

² U.S. CONST. amend. X.

Clause, courts can “not give effect to [a] state law[] that conflict[s] with [this] federal law[].”³

Second, if the answer is *no*, we ask if the Constitution prohibits the state from exercising that power. For example, are the states prohibited from taking such an action because of a limitation in Section 10 of Article I, in Section 1 of the Fourteenth Amendment, or elsewhere? If the answer to the second question is *no*, then we move onto the third premise: Congress lacks this power, and the Constitution does not bar the states from exercising this power. Therefore, the states—and only the states—can exercise that power.

Justice O’Connor articulated a similar logic in *New York v. United States*: “If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”⁴ Both questions center around whether Congress or the states have the power to do, or not do something. “It is in this sense,” Justice O’Connor observed, “that the Tenth Amendment ‘states but a truism that all is retained which has not been surrendered.’”⁵

Now that we’ve had a chance to articulate first principles, let’s review our pop quiz. *New York v. United States*,⁶ *Printz v. United States*,⁷ and *Murphy v. NCAA*⁸ each involved federal laws that told a state to do, or not do something. And, in each case, the Court found that the federal laws were unconstitutional because they violated the so-called “anti-commandeering” doctrine. However, the Court did not hold that any of these laws violated the Tenth Amendment, standing by itself. Rather, in each case, the federal laws were unconstitutional because they exceeded the scope of Congress’s enumerated powers.

First, in *New York*, Congress lacked the power to force the states to enact legislation and take title of radioactive waste. Second, in *Printz*, Congress lacked the power to mandate that state officials must perform firearm background checks. Third, in *Murphy*, Congress lacked the power to tell states not to authorize gambling. Generally, Congress can regulate each of these areas—radioactive waste, firearms, and gambling—through its powers under the Commerce and Necessary and Proper Clauses. However, in each

³ *Armstrong*, 135 S. Ct. at 1383 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824)).

⁴ *New York v. United States*, 505 U.S. 144, 156 (1992).

⁵ *Id.* (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

⁶ *New York*, 505 U.S. at 156.

⁷ *Printz v. United States*, 521 U.S. 898 (1997).

⁸ *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

case, Congress ran afoul of the anticommandeering doctrine because these laws were not “proper” exercises of federal power. *New York* made this point implicitly. *Printz*,⁹ as well as *National Federation of Independent Business (“NFIB”) v. Sebelius*,¹⁰ made the point explicitly. Most recently, *Murphy* acknowledged the issue,¹¹ but ultimately tiptoed around the doctrine of enumerated powers.

Soon enough, the Supreme Court can restore doctrinal clarity in the percolating litigation over sanctuary cities. 8 U.S.C. § 1373(a) provides that a “State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”¹² The Trump Administration relied on Section 1373 to withhold federal funding from so-called “sanctuary cities.”¹³ In response, those jurisdictions have challenged those executive actions. To date, several district courts have held that Section 1373 is unconstitutional on its face.¹⁴ Regrettably, these courts have based their rulings solely on the Tenth Amendment, without discussing the scope of Congress’s enumerated powers. On appeal, the Supreme Court should provide a *textual* explanation for why Section 1373 violates the anticommandeering doctrine.

Part I traces the history of the anticommandeering doctrine from the First Bank of the United States to *McCulloch v. Maryland* to *Prigg v. Pennsylvania* to *New York v. United States* to *Printz v. United States* to *NFIB v. Sebelius* to *Murphy v. NCAA*. Part II concludes that Section 1373(a) is arguably a “necessary” means to carry into execution Congress’s powers to establish a uniform system of immigration laws. However, it cannot be “proper” for Congress to accomplish that end by instructing states how to manage their law enforcement agencies.

⁹ *Printz*, 521 U.S. at 923–24.

¹⁰ *NFIB v. Sebelius*, 567 U.S. 519 (2012).

¹¹ *Murphy*, 138 S. Ct. at 1475–76.

¹² 8 U.S.C. § 1373(a) (2012).

¹³ *Immigration 101: What Is a Sanctuary City?*, AMERICA’S VOICE (Apr. 25, 2017), <https://americasvoice.org/blog/what-is-a-sanctuary-city/> (last updated Oct. 9, 2018).

¹⁴ *See, e.g.*, *New York v. U.S. Dep’t of Justice*, 343 F. Supp. 3d 213, 237 (S.D.N.Y. 2018) (“Accordingly, the Court holds that 8 U.S.C. § 1373(a)–(b), insofar as it applies to states and localities, is facially unconstitutional under the anticommandeering doctrine of the Tenth Amendment.”); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018) (“In sum, Section 1373 impermissibly directs the functioning of local government in contravention of Tenth Amendment principles”); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 331 (E.D. Pa. 2018) (“Section 1373 violates the Tenth Amendment of the Constitution”).

I. COMMANDEERING IS NOT A “PROPER” EXERCISE OF FEDERAL POWER

In recent years, the anticommandeering doctrine has “come to be associated primarily with the Tenth Amendment.”¹⁵ This association is not accurate. Rather, the anti-commandeering doctrine is best understood to reflect the limited scope of Congress’s enumerated powers: laws that command states to do, or not do something, may be “necessary” to accomplish certain legitimate ends, but cannot be deemed “proper” exercises of federal power. To understand *New York v. United States* and *Printz v. United States*, we have to revisit the basis of the First Bank of the United States, *McCulloch v. Maryland*, and *Prigg v. Pennsylvania*. In addition, *NFIB v. Sebelius*, and more recently, *Murphy v. NCAA* shed some, but not enough light on the foundation of commandeering. The Supreme Court has failed to precisely articulate the *textual* basis of this principle. Part I takes up this mantle.

A. *The First Bank of the United States and McCulloch v. Maryland*

Following the ratification of the Constitution, our young Republic faced serious financial problems. In 1790, Alexander Hamilton, the Secretary of the Treasury proposed, the creation of a national bank to address these issues.¹⁶ The bank would operate branches throughout the United States, which could establish credit, accept deposits, and loan money to the new national government.¹⁷ The power to incorporate a bank cannot be found in the first seventeen clauses of Article I, Section 8. The bill to establish the bank does not directly collect taxes. So that power is out. Nor does the bill borrow money or regulate commerce. All of the other express powers are likewise out. Only the eighteenth clause, the Necessary and Proper Clause, could possibly support the power to incorporate the bank. It provides: Congress shall have the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁸

¹⁵ Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U.J.L. & LIBERTY 581, 623 (2010).

¹⁶ *Historical Highlights: The First Bank of the United States*, OFFICE OF THE HISTORIAN [hereinafter *Historical Insights*], https://history.house.gov/Historical-Highlights/1700s/1791_First_Bank/ (last visited Apr. 1, 2019).

¹⁷ *Id.*

¹⁸ U.S. CONST. art. I, § 8, cl. 18.

The debate in Congress and in the Executive Branch centered around an important question: in order to execute the powers to collect taxes, borrow money, or regulate commerce, is it “necessary and proper” for Congress to charter a bank? Representative James Madison objected to the bank’s constitutionality in a speech to Congress. He argued that the power to incorporate a bank was not incidental to any of the enumerated powers. Therefore, this “great and important power” needed to be enumerated in the Constitution.¹⁹ In addition, Madison contended that it was not *necessary* to incorporate a bank in order to collect taxes, borrow money, or regulate commerce.²⁰ He concluded that Congress lacked the power to incorporate the bank.²¹

Despite Madison’s opposition, Congress approved the Bank.²² President Washington asked members of his cabinet for their opinions on the Bank’s constitutionality. Thomas Jefferson, the Secretary of State, took an even more stringent view of “necessary” than did Madison. Jefferson contended that when “the constitution restrained [Congress] to the *necessary* means” of executing its powers, Congress’s authority was limited to “those means without which the grant of the power would be nugatory.”²³ Because its goals could be accomplished in other ways, it was not “necessary” to charter the bank.

Secretary of the Treasury Alexander Hamilton, who first proposed the idea of the national bank, strongly rejected Jefferson’s strict reading of “necessary.” Instead he defined “necessary” as “needful, requisite, incidental, useful, or conducive.”²⁴ In other words, if it is “useful” for Congress to charter a bank in order to collect taxes or borrow money, then Congress has the power to do so.

Hamilton rejected any test of constitutionality that rested on the “degree in which a measure is necessary,” or “the more or less of necessity or utility” of a measure.²⁵ However, he did not go so far as to say that Congress had the discretion to adopt *any means* that, in its sole judgment, would be

¹⁹ James Madison, The Bank Bill (Feb. 2, 1791), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_18s9.html.

²⁰ *Id.*

²¹ *Id.*

²² *Historical Highlights*, *supra* note 16.

²³ Letter from Thomas Jefferson, U.S. Sec’y of State, to George Washington, U.S. President, (Feb. 15, 1791), *available at* <https://founders.archives.gov/documents/Washington/05-07-02-0207>.

²⁴ *Hamilton’s Opinion as to the Constitutionality of the Bank of the United States*, in *THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES* 659 (Paul Leicester Ford ed., 1898).

²⁵ *Id.* at 659–60.

convenient to carry into execution other enumerated powers. Instead, Hamilton offered the following test: “The relation between the measure and the end; between the nature of the mean employed toward the execution of a power, and the object of that power must be the criterion of constitutionality.”²⁶ Today, we would describe this approach as “means-ends” scrutiny. President Washington may have agreed with Hamilton’s opinion on the Bank’s constitutionality. Or he may have agreed with Jefferson that, because the decision was a close one, he should defer to Congress. In either event, in 1791, President Washington signed the bill into law, and chartered the First Bank of the United States.²⁷ It would remain in business for two decades.

In 1816, Congress chartered a second bank of the United States.²⁸ President James Madison signed the bill into law. Did he change his opinion from two decades earlier about the meaning of the Necessary and Proper Clause? In private correspondence, Madison defended the consistency of his approach. He contended that it was proper to defer to the judgment of several Congresses on the question of whether a bank was truly *necessary* to execute its powers, especially given what he said was the bank’s “almost necessity.”²⁹

However, soon the bank became very unpopular.³⁰ In 1818, the Maryland General Assembly imposed a tax on the branch of the Bank of the United States in Baltimore.³¹ The bank’s cashier, James William McCulloch, refused to pay the tax. Maryland sued McCulloch to recover the money.³² The Maryland Court of Appeals ruled for the state.³³ McCulloch then appealed the case to the Supreme Court. He argued that the state could not tax the federal institution.³⁴ However, before the Court could decide if the state tax was constitutional, it had to first decide if Congress had the power to charter the federal bank. The debate from two decades earlier between Jefferson and Madison on one side, and Hamilton on the other, would now

²⁶ *Id.* at 660.

²⁷ *Historical Highlights*, *supra* note 16.

²⁸ Letter from Andrew Jackson, U.S. President, to John Coffee (Feb. 19, 1832), *available at* https://www.archives.gov/exhibits/treasures_of_congress/text/page9_text.html.

²⁹ Letter from James Madison, U.S. President, to Charles Jared Ingersoll (June 25, 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 185 (William C. Rives & Philip R. Fendall eds., 1867).

³⁰ Letter from Andrew Jackson, U.S. President, to John Coffee (Feb. 19, 1832), *available at* https://www.archives.gov/exhibits/treasures_of_congress/text/page9_text.html.

³¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 317–18 (1819).

³² *Id.* at 318–19.

³³ *Id.* at 437.

³⁴ *Id.* at 318–19.

be resolved by the Supreme Court in *McCulloch v. Maryland*.

Chief Justice Marshall wrote the majority opinion. He rejected Maryland's very narrow reading of "necessary." Though Marshall did not cite Hamilton, the Chief Justice copied several portions of the Treasury Secretary's opinion on the bank almost verbatim. Hamilton defined "necessary" as "needful," "requisite," "useful," and "conducive."³⁵ Marshall used the same four adjectives, but added the word "Convenient" at several junctures in his opinion³⁶—a term that Hamilton did not use as a synonym for "necessary." Marshall can be read as saying that Congress could do whatever is "convenient" in order to execute its other enumerated powers.

Indeed, Marshall described the creation of a bank as "a convenient, a useful, and essential instrument in the prosecution of its fiscal operations" and "an appropriate mode of executing the powers of government."³⁷ He rejected the notion that the federal bank must be an "absolute physical necessity."³⁸ Marshall puts forward the following test, which, to this day, is relied upon by the Supreme Court to determine the scope of Congress's implied powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."³⁹

McCulloch held that the Necessary and Proper Clause gave Congress a power sufficient to incorporate the bank. As a result, Maryland could not tax the federal bank, because "the power to tax involves the power to destroy."⁴⁰ Marshall rejected the objection that the Constitution did not specify a power to create a bank, on the ground that such specificity "would partake of the prolixity of a legal code."⁴¹ Instead, he declared, "we must never forget that it is a *constitution* we are expounding."⁴² He added: our Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."⁴³ In other words, to avoid soon growing outdated, the Constitution speaks in more general terms.

³⁵ *Hamilton's Opinion as to the Constitutionality of the Bank of the United States*, *supra* note 24, at 659.

³⁶ *McCulloch*, 17 U.S. at 333, 354, 365, 367, 371, 409, 413.

³⁷ *Id.* at 422.

³⁸ *Id.* at 413.

³⁹ *Id.* at 421.

⁴⁰ *Id.* at 431.

⁴¹ *Id.* at 407.

⁴² *Id.*

⁴³ *Id.* at 415.

Much of Chief Justice Marshall's decision focused on the construction of the phrase "necessary." Though, the Court offered a separate test to determine if a law is *also* "proper." Specifically, the Constitution "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated."⁴⁴ Chief Justice Marshall did not provide much guidance on how this test should be applied—that is, when does a mere *incidental* power become a "great substantive and independent power." The Rehnquist and Roberts Courts would revisit this question nearly two centuries later. Several decades later, the Court would expand on the scope of "necessary" in the context of the Fugitive Slave Act.

B. *The Fugitive Slave Act and Prigg v. Pennsylvania*

In 1793, Congress enacted the Fugitive Slave Act, which authorized slave catchers to travel across state lines and arrest runaway slaves.⁴⁵ This federal law was very unpopular. Several northern states that opposed slavery, including Pennsylvania, enacted so-called "Personal Liberty Law."⁴⁶ These statutes prevented a person's removal from the state without a full judicial proceeding—including a jury trial—to determine whether or not that person was in fact a fugitive slave. These state laws conflicted with the federal act, that included only the most minimal procedural protections.

Congress can only enact laws pursuant to one of its delegated powers. What provision of the Constitution gave Congress the power to enact the Fugitive Slave Act? One possible candidate is the Fugitive Slave Clause, which appears in Article IV, Section 2. It provides: "No Person held to Service or Labour in one State . . . escaping into another . . . shall be delivered up on Claim of the Party to whom such Service or Labour may be due."⁴⁷ The text does not actually give Congress any new power to enact that Fugitive Slave Act. Rather, the Clause merely governs the relations between the states.

In *Prigg v. Pennsylvania*, the Supreme Court rejected the argument that Congress lacked the enumerated powers to enact the Fugitive Slave Act.⁴⁸ Justice Story wrote the majority opinion. He held that the Fugitive Slave Act was constitutional because it was intended to prevent free states from "intermeddling with, or obstructing, or abolishing the rights of the owners of

⁴⁴ NFIB v. Sebelius, 567 U.S. 519, 559 (2012) (quoting *McCulloch*, 17 U.S. at 411).

⁴⁵ Fugitive Slave Act of 1793, 1 Stat. 302 (amended 1850) (repealed 1864).

⁴⁶ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 550 (1842).

⁴⁷ U.S. CONST. art. IV, § 2.

⁴⁸ *Prigg*, 41 U.S. at 625–26.

slaves.”⁴⁹ He doubted that the Union could have even been formed if the Fugitive Slave Clause had not been added to the Constitution.

But what about the argument that Article IV, Section 2 does not grant Congress the power to enforce the Clause? Justice Story responded that the Necessary and Proper Clause provides the necessary authority. He wrote: “The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end.”⁵⁰ This construction by Justice Story in *Prigg* extends well beyond Chief Justice Marshall’s opinion in *McCulloch*. It remains one of the most expansive readings of the Necessary and Proper Clause ever adopted by the Supreme Court. In sum, because Justice Story found that that the Fugitive Slave Act was made “in pursuance of” the Fugitive Slave Clause, and in conjunction with the Necessary and Proper Clause, that act was “supreme” and preempted the Pennsylvania Personal Liberty Law.⁵¹ Prigg’s conviction was therefore reversed.⁵²

Justice Story also maintained that the states cannot be “compelled to enforce” the Fugitive Slave Act.⁵³ He added, “it might well be deemed an unconstitutional exercise of the power of interpretation, to insist, that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the constitution.”⁵⁴ Rather, it is for the national government to carry into effect its own policies.⁵⁵ Specifically, in the context of the Fugitive Slave Act, “where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person.”⁵⁶ In other words, the Constitution authorizes Congress to mandate action by private parties, pursuant to the Fugitive Slave Clause. However, that provision does not allow Congress to *commandeer* state executive-branch officials.

Justice Story also opined on another aspect of the anticommandeering doctrine: The Fugitive Slave Act required state judges to enforce the law.⁵⁷ In an oft-forgotten portion of the opinion, Story found that state courts could

⁴⁹ *Id.* at 611.

⁵⁰ *Id.* at 619.

⁵¹ *Id.* at 561.

⁵² *Id.* at 626.

⁵³ *Id.* at 615.

⁵⁴ *Id.* at 615–16.

⁵⁵ *Id.*

⁵⁶ *Id.* at 616.

⁵⁷ See Josh Blackman, *State Judicial Sovereignty*, 2016 U. ILL. L. REV. 2033, 2056–57.

be exempted from enforcing the Fugitive Slave Act if state legislatures deprived them of jurisdiction to hear such cases.⁵⁸ After all, courts without jurisdiction can do nothing. Justice Story found the Fugitive Slave Act “to be clearly constitutional, in all its leading provisions, and, indeed, *with the exception of that part which confers authority upon state magistrates.*”⁵⁹ He continued:

[With respect to the] authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still, on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this court, that state magistrates may, if they choose, exercise that authority, *unless prohibited by state legislation.*⁶⁰

In the normal course, state courts of general jurisdiction were obligated to enforce federal law.⁶¹

However, the states were under no obligation to confer such jurisdiction on their own courts. Justice Story does not even entertain the notion that Congress could confer jurisdiction on a state court to entertain certain claims. Nor could Congress compel a state legislature to confer such jurisdiction on their state courts to carry out the Fugitive Slave Act. In this regard, *Prigg* foreshadowed the question presented in *New York v. United States*.⁶² Justice Thomas’s dissent in *Haywood v. Drown* noted this facet of *Prigg*: state courts could not “be compelled to enforce” the 1793 Fugitive Slave Act.⁶³ Justice Stevens’s majority opinion in *Haywood*, alas, disregarded *Prigg*.⁶⁴

In the aftermath of *Prigg*, many states deprived their state judges of subject matter jurisdiction concerning the Fugitive Slave Act.⁶⁵ As a result, federal agents were unable to enforce the law without the benefit of state courts. Congress obviated this problem with the Fugitive Slave Act of 1850.⁶⁶ This far-more draconian law established federal commissioners in every county

⁵⁸ *Prigg*, 41 U.S. at 622.

⁵⁹ *Id.* (emphasis added).

⁶⁰ *Id.* (emphasis added).

⁶¹ Cf. Paul Finkelman, *The Roots of Printz: Proslavery Constitutionalism, National Law Enforcement, Federalism, and Local Cooperation*, 69 BROOK. L. REV. 1399, 1410 (2004) (“In the years after *Prigg* a number of northern judges simply refused to enforce the Fugitive Slave Law of 1793, even though under *Prigg* they were legally free to do so, and in Story’s eyes had a constitutional or even moral obligation to do so.”).

⁶² *New York v. United States*, 505 U.S. 144 (1992).

⁶³ *Haywood v. Drown*, 556 U.S. 729, 764 n.8 (2009) (Thomas, J., dissenting) (citing *Prigg*, 41 U.S. at 615).

⁶⁴ Blackman, *supra* note 57, at 2059.

⁶⁵ Finkelman, *supra* note 61, at 1411 (“A number of states followed Story’s ‘hint’—if that is what it can be called—and prohibited their judges from hearing cases under the federal Fugitive Slave Law of 1793.”).

⁶⁶ The Fugitive Slave Act of 1850, 9 Stat. 462 (repealed 1864).

who could decide and enforce fugitive slave cases.⁶⁷ As a result, federal agents would no longer have to rely on state courts. This approach, in a way, promoted federal aims while respecting federalism.⁶⁸

What was the basis for Justice Story's ruling? *Prigg* teaches that Congress cannot mandate, or commandeer, state executive- and legislative-branch officials to take certain actions. But why are courts different? The answer may be derived from Article VI of the Constitution. Pursuant to the Supremacy Clause, the "judges in every state shall be bound" by the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof."⁶⁹ In contrast, pursuant to the Oaths Clause, "Members of the several State Legislatures, and all executive and judicial officers . . . of the several States" are "bound by Oath or Affirmation, to support this Constitution."⁷⁰ State judges are bound by the former clause. State executive, legislative, and judicial officers are bound by the latter clause. The Constitution is silent about the precise distinction between being *bound* by the Constitution and being *bound to support* the Constitution. But there is a textual difference between the two provisions—a textual difference that is reinforced by Justice Story's *Prigg* dichotomy between the executive and legislative, and judicial branches.

To this day, *McCulloch* remains the definitive account of the Necessary and Proper Clause. *Prigg*, perhaps due to its odious subject matter, is seldom cited in discussions about commandeering.⁷¹ Over a century later, commandeering cases decided by the Rehnquist and Roberts Court would harken back to Chief Justice Marshall, but not to Justice Story.

C. *Commandeering State Legislatures to Enact Legislation and New York v. United States*

In 1985, only three states had facilities that disposed of low-level radioactive waste.⁷² In response, Congress enacted a law that created incentives for states to provide for waste generated within their border.⁷³ The

⁶⁷ Finkelman, *supra* note 61, at 1413.

⁶⁸ See *Printz v. United States*, 521 U.S. 898, 961–62 (1997) (Stevens, J., dissenting) ("As a general matter, Congress has followed the sound policy of authorizing federal agencies and federal agents to administer federal programs.").

⁶⁹ U.S. CONST. art. VI.

⁷⁰ *Id.*

⁷¹ Finkelman, *supra* note 61, at 1400 ("Oddly, none of the opinions in [*Printz*] mentioned the first Supreme Court case to deal with these issues, *Prigg v. Pennsylvania*.").

⁷² *New York v. United States*, 505 U.S. 144, 151 (1992).

⁷³ *Id.*

most severe incentive was the so-called “Take Title” provision.⁷⁴ If a state could not provide a disposal facility, the state must take title, or ownership, of waste generated by private parties within the state.⁷⁵ Furthermore, the state would be liable for all damages that results from the waste.⁷⁶ New York challenged the constitutionality of this law.⁷⁷ The state acknowledged that the federal government could regulate the interstate waste market, but Congress could not force the state to take ownership of private radioactive waste.⁷⁸

Justice O’Connor wrote the majority opinion. She agreed with New York: “Congress may not simply ‘commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”⁷⁹ In other words, Congress lacked the power to force the state legislature to enact new laws that assume title and liability for the radioactive waste. Congress had other means to encourage the states to take title of radioactive waste. For example, it could provide money to the states with strings attached, like in *South Dakota v. Dole*.⁸⁰ Or Congress could preempt waste disposal and impose a uniform federal standard nationwide. But it could not force the state legislatures to enact such laws itself. (Justice Story’s opinion in *Prigg* supported this holding, but Justice O’Connor did not mention it.) Justice O’Connor recognized the importance of federalism in our system of government. “The Constitution divides authority between federal and state governments,” she wrote, “for the protection of individuals.”⁸¹

The commandeering cases, including *New York*, are often described as Tenth Amendment cases. However, Justice O’Connor said the Tenth Amendment was not relevant to her analysis, not directly at least. “The Tenth Amendment likewise restrains the power of Congress,” she wrote, “but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology.”⁸²

Let’s revisit this concept using the three premises identified in the Introduction. First, we ask if a power is delegated to Congress? For example, can Congress require New York to take title of the radioactive waste pursuant

⁷⁴ *Id.* at 153–54.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 154.

⁷⁸ *Id.* at 159–60.

⁷⁹ *Id.* at 161 (alteration in original).

⁸⁰ *Id.* at 167.

⁸¹ *Id.* at 181.

⁸² *Id.* at 156–57.

to its powers under the Commerce and Necessary and Proper Clause clauses? If the answer is yes, then Congress can exercise that power. However, the *New York* Court answered that question *no*. It is certainly necessary—that is “conducive”—for Congress to require states to deal with the nationwide problem of radioactive waste disposal. However, it is not a “proper” exercise of federal power to require the state legislature to enact laws that take title of the waste.

Second, we ask if the Constitution prohibits the state from taking that action. The Constitution of 1789 listed several prohibitions in Article I, Section 10.⁸³ For example, states cannot enact bills of attainder or ex post facto laws.⁸⁴ Subsequently, the Thirteenth, Fourteenth, and Fifteenth Amendments placed additional restrictions on the states. However, the Constitution says nothing about how New York can or can’t deal with radioactive waste.

Therefore, third, the decision of how to handle the waste is reserved to the state. Congress lacks the power to tell the state how to exercise that power. The Tenth Amendment, standing by itself, adds nothing to the Court’s analysis.⁸⁵ If Congress lacks the power to force states to pass a statute, then the states retain the power to deal, or not deal, with the waste.

New York implicitly stands for an important proposition: while the “Take Title” provision may be a “necessary” means to regulate the interstate waste market, requiring a state to legislate is an intrusion into state sovereignty, and is therefore not a “proper” exercise of federal power. That this anticommandeering principle rests on the meaning of “proper” in the Necessary and Proper Clause: would not become explicit until *Printz v. United States*.⁸⁶ This 1997 decision considered whether Congress could commandeer state executive branch officials.⁸⁷

⁸³ *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018) (“The Constitution limits state sovereignty in several ways. It directly prohibits the States from exercising some attributes of sovereignty.” (citing U.S. CONST. art I, § 10)).

⁸⁴ U.S. CONST. art. I, § 10, cl. 1.

⁸⁵ *Printz v. United States*, 521 U.S. 898, 923 n.13 (1997) (“This argument also falsely presumes that the Tenth Amendment is the exclusive textual source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions [. . .] and not only those, like the Tenth Amendment, that speak to the point explicitly.”).

⁸⁶ *Id.* at 898.

⁸⁷ *Id.*

D. Commandeering State Executive-Branch Officials and Printz v. United States

The Brady Handgun Violence Prevention Act imposed a wide range of new gun control laws.⁸⁸ One provision required the attorney general to establish a new national database.⁸⁹ This system would allow federal firearm dealers to instantly check the background of prospective handgun purchasers.⁹⁰ Developing that electronic system would take some time. During the interim, the federal law “command[ed] state and local law enforcement officers”—CLEOs—“to conduct background checks on prospective handgun purchasers.”⁹¹ The law was challenged by several sheriffs, including Jay Printz of Ravalli County, Montana, and Richard Mack of Graham County, Arizona.⁹² The CLEOs argued that the federal government could not force them to perform background checks, and delay people in their communities from purchasing firearms.⁹³

The Court split 5-4 in favor of the Sheriffs. Justice Scalia wrote the majority opinion. He extended *New York’s* rubric, and found that Congress also lacked the power to commandeer state executive-branch officials.⁹⁴ The majority disagreed with Justice Stevens’s dissent, which—according to the majority—contended that the Brady Act was valid “because the Tenth Amendment imposes no limitations on the exercise of *delegated* powers.”⁹⁵ The dissent also stated that the Necessary and Proper Clause was an “affirmative delegation of power in Article I” that “provides ample authority for the congressional enactment.”⁹⁶

Justice Scalia responded that the Necessary and Proper Clause was “the last, best hope of those who defend ultra vires congressional action.”⁹⁷ He stated explicitly what Justice O’Connor had implied in *New York v. United States*: to ascertain if a federal law falls within the scope of Congress’s powers under the Necessary and Proper Clause, courts must separately ask whether a law is both “necessary” and “proper.” Justice Scalia stated the rule succinctly: “When a ‘La[w] . . . for carrying into Execution’ the Commerce Clause *violates the principle of state sovereignty* . . . it is not a ‘La[w] . . . proper for

88 *Id.* at 902.

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.* at 904.

93 *Id.* at 905.

94 *Id.* at 935.

95 *Id.* at 923.

96 *Id.* at 941 (Stevens, J., dissenting).

97 *Id.* at 923 (majority opinion).

carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely [an] ac[t] of usurpation’ which ‘deserve[s] to be treated as such.’”⁹⁸

The Brady Act provision very well may have been a “necessary”—that is *conducive*—means to regulate the interstate firearms market. However, forcing Sheriffs to perform background checks was not a “proper” exercise of federal power. Such a law violated the principle of state sovereignty reflected in the Tenth Amendment and other structural provisions of our Constitution. The Tenth Amendment, standing by itself, did not provide the rule of decision. Rather, the Tenth Amendment merely informed the Necessary and Proper Clause analysis.

The *Printz* Court explained that its decision five years earlier in *New York v. United States* reflected the same principle: federal laws that commanded states to regulate interstate commerce may be deemed necessary, but are not a *proper* exercise of federal power.⁹⁹ In both *Printz* and *New York*, the federal laws were not proper because they intruded on the principles of state sovereignty. Therefore, these laws were beyond the scope of Congress’s express *and* implied enumerated powers. Justice Scalia would return to this theme in his concurrence in *Bond v. United States*.¹⁰⁰ He explained that “[n]o law that flattens the principle of state sovereignty, whether or not ‘necessary,’ can be said to be ‘proper.’”¹⁰¹ This *proper* framework turned on a due respect for state sovereignty.

Against this backdrop Justice Scalia cited several early statutes “enacted by the first Congresses [that] required state courts” to take action concerning matters of naturalization.¹⁰² The first Naturalization Act of 1790, for example, provided that an alien “may be admitted to become a citizen thereof, on application to any common law Court of record, in any one of the states.”¹⁰³ The law further provided that the state court “*shall* administer” the oath, accept “proof” that “he is a person of good character,” and the

⁹⁸ *Id.* at 923–24 (quoting THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added)).

⁹⁹ *Id.* at 924 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992) (“[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . [T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”)).

¹⁰⁰ *Bond v. United States*, 134 S. Ct. 2077, 2101 (2014) (Scalia, J., concurring).

¹⁰¹ *Id.*

¹⁰² *Printz*, 521 U.S. at 905–06.

¹⁰³ United States Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795).

“Clerk of such Court *shall* record such application.”¹⁰⁴ The provision with the mandatory “shall,” Scalia suggested, imposed an affirmative obligation on the state judges.¹⁰⁵

A subsequent Naturalization Act passed in 1798 directed the “clerk, or other recording officer of the [state] court before whom a declaration has been, or shall be made, by any alien, of his intention to become a citizen of the United States, to certify and transmit to the office of the Secretary of State of the United States.”¹⁰⁶ Justice Scalia explains that intrusions on state courts’ jurisdiction were limited to judicial matters: “the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters *appropriate for the judicial power*.”¹⁰⁷

Paradoxically, Justice Scalia does not cite *Prigg* in *Printz*.¹⁰⁸ *Prigg* expressly held that Congress could compel state courts of competent jurisdiction to enforce federal laws.¹⁰⁹ *Printz sub silentio* reaffirmed Justice Story’s dichotomy. That is, Congress can commandeer state courts, but not state executive or legislative branch officials. And textually, this rule can be derived from the text of “the Supremacy Clause, Art. VI, cl. 2, [which] announced that ‘the Laws of the United States . . . shall be the supreme Law of the Land; and the *Judges in every State* shall be bound thereby.’”¹¹⁰ Justice Scalia explained that judges, unlike legislatures or executives, “applied the law of other sovereigns all the time.”¹¹¹ In “so-called ‘transitory’ causes of action . . . laws which operated elsewhere created obligations in justice that courts of the forum State would enforce.”¹¹² This principle is also implicit in the Full Faith and

¹⁰⁴ See *id.* § 1 (emphasis added).

¹⁰⁵ Cf. Nora Rotter Tillman & Seth Barrett Tillman, *A Fragment on Shall and May*, 50 AM. J. LEGAL HIST. 453, 454 (2008) (“For example, legal discussions frequently focus on the alleged distinction between the use of (the mandatory) *shall* and (the permissive) *may* in the Constitution of 1787. But this distinction may very well be a victim of presentism.”).

¹⁰⁶ Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567.

¹⁰⁷ *Printz*, 521 U.S. at 907 (second emphasis added).

¹⁰⁸ Finkelman, *supra* note 61, at 1409–10 (“Oddly, Justice Scalia did not cite *Prigg* to bolster his contention that the law at issue in *Printz* was unconstitutional, even though he could have mustered the intellectual support of Justice Story. Perhaps Justice Scalia did not do so because he would have been citing a case that otherwise supported slavery and was indeed, next to *Dred Scott*, the most important judicial support for slavery in our constitutional jurisprudence.”).

¹⁰⁹ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625–26 (1842).

¹¹⁰ *Printz*, 521 U.S. at 907 (emphasis added).

¹¹¹ *Id.*

¹¹² *Id.* (citing *McKenna v. Fisk*, 42 U.S. (1 How.) 241, 247–249 (1843) (“And it also appears from the authorities which have been cited, that in a transitory action of trespass, it is only necessary to lay a venue for a place of trial, and that such venue is good without stating where the trespass was in fact committed, with a *scilicet* of the county in which the action is brought.”)).

Credit Clause, which “generally required such enforcement with respect to obligations arising in other States.”¹¹³ Thus, it is “understandable why courts should have been viewed distinctively in this regard.”¹¹⁴

In dissent, Justice Stevens vigorously disagreed with the “suggestion that . . . the reference to judges in the Supremacy Clause . . . implied *expressio unius* . . . that the Framers . . . did *not* intend to permit the enlistment of other state officials.”¹¹⁵ Following his retirement, Justice Stevens proposed a constitutional amendment to rebut the *expressio unius* implication of the Supremacy Clause, and “to eliminate the rule” in *Printz*.¹¹⁶ As amended, Article VI would now read as follows, with the alterations emphasized:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges *and other public officials* in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.¹¹⁷

Stevens explained that by “[a]dding just four words—‘and other public officials’—immediately after the word ‘Judges’ in the Supremacy Clause would, under the Court’s reasoning, expressly confirm the power of Congress to impose mandatory duties on public officials in every state.”¹¹⁸ Justice Stevens’s proposed amendment reaffirms the textual distinction that Justice Scalia drew in *Printz*, and Justice Story recognized in *Prigg*.

The distinction between “necessary” and “proper” makes its next appearance in the Affordable Care Act case, *NFIB v. Sebelius*.

E. Commandeering the People and NFIB v. Sebelius

Chief Justice Roberts’s controlling opinion in *NFIB v. Sebelius* provided the most authoritative, and significant application of the *proper* test. He concluded that the Affordable Care Act’s “individual mandate [to purchase health insurance] cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms.”¹¹⁹ Unlike past exercises of implied power that were upheld, Chief Justice Roberts observed that the mandate’s “authority” is “in no way . . . ‘narrow in scope.’”¹²⁰ Nor

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 969 (Stevens, J., dissenting).

¹¹⁶ JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 29 (2014).

¹¹⁷ *Id.* at 29–31.

¹¹⁸ *Id.*

¹¹⁹ *NFIB v. Sebelius*, 567 U.S. 519, 560 (2012).

¹²⁰ *Id.* (quoting *United States v. Comstock*, 560 U.S. 126, 148 (2010)).

was the individual mandate merely “‘incidental’ to the exercise of the commerce power.”¹²¹ Rather, the individual mandate “work[ed] a substantial expansion of federal authority.”¹²² Why? Because under “such a conception” of federal power, “Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it.”¹²³ In other words, Congress would be able to regulate people it otherwise could not regulate. Such a law is unconstitutional, because—invoking Chief Justice Marshall’s framework from *McCulloch*—it “involve[s] the exercise of a[] ‘great substantive and independent power.’”¹²⁴ Therefore, Chief Justice Roberts observed, “[e]ven if the individual mandate is ‘necessary’ to the Act’s insurance reforms, such an expansion of federal power is not a ‘proper’ means for making those reforms effective.”¹²⁵

The joint opinion of Justices Scalia, Kennedy, Thomas, and Alito elaborated on this framework—somewhat. They explained that a federal law is improper “not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.”¹²⁶ For example, Congress’s efforts to regulate guns in school zones,¹²⁷ and domestic violence,¹²⁸ ran afoul of that “background principle.”

The Chief Justice’s framework left much to be desired. In dissent, Justice Ginsburg posed the critical questions left unanswered: “How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an ‘independent power,’ or merely a ‘derivative’ one? Whether the power used is ‘substantive,’ or just ‘incidental?’”¹²⁹ At bottom, she observed, the lower courts are offered little guidance: “You will know it when you see it.”¹³⁰ I don’t disagree with Justice Ginsburg’s admonitions.

Yet, *NFIB* added a new layer to the anticommandeering doctrine. *New York* held that Congress lacks the enumerated powers to compel state legislatures to enact legislation.¹³¹ *Printz* held that Congress lacks the

¹²¹ *Id.* (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819)).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 561 (quoting *McCulloch*, 17 U.S. at 411).

¹²⁵ *Id.* at 560 (emphasis added).

¹²⁶ *Id.* at 653 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

¹²⁷ *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 559–63 (1995)).

¹²⁸ *Id.* (citing *United States v. Morrison*, 529 U.S. 598, 609–19 (2000)).

¹²⁹ *Id.* at 621 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹³⁰ *Id.*

¹³¹ See discussion *supra* Section I.C.

enumerated power to compel state executive branch officials to enforce federal legislation.¹³² And *NFIB* held that Congress lacks the enumerated power to compel the people to engage in commercial transactions.¹³³ Such an authority would force the people to “bring themselves within the sphere of federal regulation.”¹³⁴ That is, *all* Americans could be commandeered by the federal power—whether they entered the stream of commerce, or not.¹³⁵ In each of these three cases, the mandates may have been “necessary”—that is conducive—to implement a legitimate end. However, the mandates on the legislatures, the executive branch, and the people themselves, were not proper exercises of federal power. In particular, the Affordable Care Act’s individual mandate was not proper because of its unprecedented reach into private conduct. The Tenth Amendment informs this inquiry, for it speaks of the powers “reserved to the States respectively, or to the people.”¹³⁶ But the mandates at issue in *New York*, *Printz*, and *NFIB* do not violate the Tenth Amendment standing by itself. The next case, *Murphy v. NCAA*, expanded the scope of *New York v. United States*.

F. *Commandeering States Not to Enact Legislation* and *Murphy v. NCAA*

The Professional and Amateur Sports Protection Act (“PASPA”) “generally makes it unlawful for a State to ‘authorize’ sports gambling schemes.”¹³⁷ While the “Take Title” provision in *New York* commanded states to enact specific legislation, PASPA did just the opposite: it commanded states *not* to enact specific legislation. New Jersey wanted “to legalize sports gambling at casinos and horseracing tracks.”¹³⁸ However, doing so would have violated the federal law. Therefore, the Garden State challenged the constitutionality of this provision of PASPA.

In *Murphy v. NCAA*, six Justices held that the law ran afoul of the anticommandeering doctrine.¹³⁹ Three Justices, in dissent, “assum[ed] *arguendo*” that the challenged part of PASPA was unconstitutional, but found that other provisions of the law should be severed.¹⁴⁰ Two of the dissenters—

¹³² See discussion *supra* Section I.D.

¹³³ See discussion *supra* Section I.E.

¹³⁴ *NFIB*, 567 U.S. at 560.

¹³⁵ See generally Barnett, *supra* note 15 (discussing why the Supreme Court could find the Affordable Care Act unconstitutional).

¹³⁶ U.S. CONST. amend. X.

¹³⁷ *Murphy v. NCAA*, 138 S. Ct. 1461, 1468 (2018) (citing 28 U.S.C. § 3702(1) (2012)).

¹³⁸ *Murphy*, 138 S. Ct. at 1468.

¹³⁹ *Id.* at 1475.

¹⁴⁰ *Id.* at 1488–89 (Ginsburg, J., dissenting).

Justices Ginsburg and Breyer—joined the *Printz* dissent two decades earlier. Yet, they now accepted—or at least declined to reject—a doctrine that Justice Stevens concluded had no basis in the text or history of the Constitution.¹⁴¹ Justice Kagan joined *Murphy* without reservation.

Justice Alito’s majority opinion conceded that “[t]he anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution.”¹⁴² He maintained that these principles “did not emerge in our cases until relatively recently, when Congress attempted in a few isolated instances to extend its authority in *unprecedented ways*.”¹⁴³ (Justice Alito, like Justice Scalia before him, did not identify the application of the anticommandeering doctrine in *Prigg v. Pennsylvania*.) In several contexts, the Constitution “indirectly restricts the States by granting certain legislative powers to Congress, see Art. I, § 8.”¹⁴⁴ Under the Supremacy Clause, he continued, “when federal and state law conflict, federal law prevails and state law is preempted.”¹⁴⁵

Yet, the scope of this preemptive force is limited. Why? Though “sizable, [the legislative powers granted to Congress] are not unlimited.”¹⁴⁶ Beyond the “certain enumerated powers” that the Constitution delegates to Congress, “all other legislative power is reserved for the States, as the Tenth Amendment *confirms*.”¹⁴⁷ Here, the key word is *confirms*. The Tenth Amendment does not allocate power between the federal government and the states. Rather, the Tenth Amendment merely recognizes the structure that is implicit in the Constitution. A law that runs afoul of this allocation does not violate the Tenth Amendment.

Does Article I, Section 8 authorize Congress “to issue direct orders to the governments of the States”?¹⁴⁸ Justice Alito answered no.¹⁴⁹ Such a power is “conspicuously absent” from the Constitution.¹⁵⁰ That power cannot be found in Commerce Clause. Nor can it be found in “the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause.”¹⁵¹ The Framers chose “to withhold from Congress the power to

¹⁴¹ *Id.*

¹⁴² *Id.* at 1475 (majority opinion).

¹⁴³ *Id.* at 1476 (emphasis added).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (emphasis added).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Printz v. United States*, 521 U.S. 898, 923 (1997).

issue orders directly to the States,” which “retained ‘a residuary and inviolable sovereignty.’”¹⁵² Justice Alito added, “[t]he anticommandeering doctrine simply represents the recognition of this limit on congressional authority.”¹⁵³

Justice Alito identified three “significant” “reasons” to “explain[] why adherence to the anticommandeering principle is important.”¹⁵⁴ First, he found that this doctrine “serves as ‘one of the Constitution’s structural protections of liberty.’”¹⁵⁵ Second, he continued, “the anticommandeering rule promotes political accountability.”¹⁵⁶ Third, he concluded, “the anticommandeering principle prevents Congress from shifting the costs of regulation to the States.”¹⁵⁷

Given this framework, PASPA “violates the anticommandeering rule” because it “unequivocally dictates what a state legislature may and may not do.”¹⁵⁸ Through PASPA, Congress sought to put “state legislatures . . . under the direct control of Congress.”¹⁵⁹ PASPA presumes that “federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals.”¹⁶⁰ Justice Alito concluded, “[a] more direct affront to state sovereignty is not easy to imagine.”¹⁶¹

The result in *Murphy* flows from *New York* and *Printz*. Justice Alito’s majority opinion attempted to synthesize the doctrines from those cases. However, in the process, he erased the necessary-but-not-proper analysis. Indeed, the majority opinion failed to anchor its analysis in the text of the Constitution.

Justice Thomas, in his concurring opinion, concisely articulated this doctrine, like Justice Scalia did two decades earlier. He found that Congress

¹⁵² *Murphy*, 138 S. Ct. at 1475 (quoting THE FEDERALIST NO. 39, *supra* note 98, at 245 (James Madison). *But cf.* *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (“To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves ‘SOVEREIGN’ people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.” (emphases omitted)).

¹⁵³ *Murphy*, 138 S. Ct. at 1476.

¹⁵⁴ *Id.* at 1477.

¹⁵⁵ *Id.* (quoting *Printz*, 521 U.S. at 921).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1478.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

lacks the enumerated power to commandeer the states: PASPA “exceeds Congress’ Article I authority to the extent it prohibits New Jersey from ‘authoriz[ing]’ or ‘licens[ing]’ sports gambling.”¹⁶² To reach this conclusion, Justice Thomas ruled out the two most common grants of authority in Article I, Section 8. First, the Commerce Clause “does not authorize Congress to regulate state governments’ regulation of interstate commerce.”¹⁶³ Second, “[t]he Necessary and Proper Clause does not give Congress this power either.”¹⁶⁴ Here, Justice Thomas articulated the *textual* reason why commandeering is unconstitutional: “a law is not ‘proper’ if it ‘subvert[s] basic principles of federalism and dual sovereignty.’”¹⁶⁵ PASPA, which commandeers the states, “subverts those principles.”¹⁶⁶ Justice Thomas got *Printz* exactly right. The majority got it wrong.

There is a downside to Justice Alito’s majority opinion: lower court judges will be able to disregard the text of the Constitution, with ease. Instead, courts will—as they are wont to do—weigh the majority’s three *principles* as a balancing test to determine if a given law runs afoul of the anticommandeering doctrine. Imagine the colloquy: *Well, this law frustrates political accountability, but doesn’t shift that many costs to the state, and has only a minimal infringement on individual liberty, so the law passes muster.* This trend will mask the doctrinal underpinnings of *New York* and *Printz*: federal laws that are not “proper” exercises of federal power.

More importantly, *Murphy* fails to shine any light on other types of improper federal laws that do not commandeer. To date, the Supreme Court has only used this framework to declare unconstitutional laws that impose mandates on states or the people. However, other laws that fall short of commandeering may still not be proper exercises of federal power.¹⁶⁷ As a result, *Murphy* allows the lower courts to disregard the “proper” framework, and treat commandeering laws as an isolated subset of constitutional law that has no bearing on other elements of the scope of Congress’s powers. This

¹⁶² *Id.* at 1485 (Thomas, J., concurring) (citing 28 U.S.C. § 3702(1) (2012)).

¹⁶³ *Id.* (internal quotation marks omitted) (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (quoting *Gonzales v. Raich*, 545 U.S. 1, 65 (2005) (Thomas, J., dissenting)).

¹⁶⁶ *Id.* (citing *Printz v. United States*, 521 U.S. 898, 923–24 (1997)).

¹⁶⁷ See Brief for Cato Institute & Professors of Constitutional Law as Amici Curiae Supporting Plaintiff-Appellee at 30, *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017) (Nos. 14-4151 & 14-4165) (“Any construction of the Necessary and Proper Clause that upholds the ‘take’ regulation of the Utah prairie dog necessarily upholds a broad, unenumerated power to regulate the ecology of each individual state. This regulation is both unnecessary and improper.”).

outcome is unfortunate. Fortunately, *Murphy*'s omission can be remedied in a future case concerning sanctuary cities.

II. SECTION 1373(A) IS FACIALLY UNCONSTITUTIONAL

8 U.S.C. § 1373(a) provides that a “State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service [“INS”] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”¹⁶⁸ (The Department of Homeland Security now performs this role in the place of the defunct-INS.) This law requires states and their subdivisions to share information about unlawful aliens in their custody. Or more precisely, states cannot enact laws that prevent their subdivisions from sharing that information with the federal government.

This two-decade-old law¹⁶⁹ has taken on a new salience as part of the Trump Administration's ongoing litigation concerning so-called “sanctuary cities.”¹⁷⁰ Specifically, the federal government argues that this law requires the states to tell the federal government *where* and *when* a given alien will be released from custody.¹⁷¹ That way, Immigration and Customer Enforcement (“ICE”) agents can safely arrest and detain the alien. However, as a threshold matter, this statute only applies to a specific category of information: “the citizenship or immigration status, lawful or unlawful, of any individual.”¹⁷² The law in no way requires the state to share information about an alien's release date or location. Therefore, the statute is largely unhelpful. The federal government already knows an alien's “citizenship or immigration status.”¹⁷³ ICE seeks custody of that alien, precisely because it already has such information in its possession. The statute is silent about the precise information the government needs—where and when the alien will be released. Ultimately, Congress enacted a statute that fails to serve the present-day needs of the executive branch.

¹⁶⁸ 8 U.S.C. § 1373(a) (2012).

¹⁶⁹ Section 1373 was signed into law on August 22, 1996. *Printz v. United States* was argued on December 3, 1996 and was decided six months later on June 27, 1997. Query if Congress anticipated *Printz* when the immigration law was enacted.

¹⁷⁰ See Ilya Shapiro & Josh Blackman, *Testing California's 'Sanctuary' Laws*, CATO INST. (Mar. 13, 2018), <https://www.cato.org/publications/commentary/testing-californias-sanctuary-laws> (discussing the constitutional implications of two California sanctuary laws challenged by the Trump Administration).

¹⁷¹ *Id.*

¹⁷² 8 U.S.C. § 1373(a).

¹⁷³ *Id.*

This Article, therefore, will not consider whether Section 1373 is unconstitutional as applied to the current sanctuary city litigation. Rather, I will focus on the broader question: whether the law is unconstitutional on its face. First, I will consider Section 1373 under *Murphy*'s approach. Second, I will turn to *Printz*'s necessary-but-not proper rubric. These analyses yield slightly different outcomes. This distinction at one demonstrates the pliability of Justice Alito's atextual commandeering analysis.

A. Section 1373 and Murphy

Let's start with the *Murphy*-three-step. First, does shielding states from the enforcement of Section 1373 "protect[] . . . liberty"?¹⁷⁴ The sanctuary cities would unquestionably contend that the federal law infringes the freedoms of immigrants in their communities. The so-called "sanctuary" laws are enacted precisely to protect aliens from federal immigration enforcement—much like the personal liberal laws were enacted two centuries earlier to protect runaway slaves from the Fugitive Slave Act.¹⁷⁵ The federal government would counter that Section 1373 prevents states from harboring criminals who seek to evade federal law enforcement officials. How can people be free, the argument goes, unless they are safe to live their lives? This question brings to mind Abraham Lincoln's famous parable about liberty: "The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same word we do not all mean the same thing."¹⁷⁶

Does liberty protect the right of aliens in sanctuary city to avoid ICE agents? Or does liberty ensure that criminal aliens in sanctuary cities are brought to justice to promote the general welfare?

Moreover, unlike the regulation of radioactive waste or firearms—areas where states have plenary authority—the federal government has, under modern doctrine¹⁷⁷ at least, exclusive jurisdiction over immigration. *New York*

¹⁷⁴ *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018) (quoting *Printz v. United States*, 521 U.S. 898, 921 (1997)).

¹⁷⁵ See discussion *supra* Section I.B.

¹⁷⁶ President Abraham Lincoln, Address at Sanitary Fair, Baltimore, Maryland (Apr. 18, 1864), in 7 COLLECTED WORKS OF ABRAHAM LINCOLN 1863–1864, at 301–03 (Roy P. Basler, ed., 1953) (emphasis omitted).

¹⁷⁷ See *Arizona v. United States*, 567 U.S. 387, 419 (2012) (Scalia, J., concurring in part and dissenting in part) ("In fact, the controversy surrounding the Alien and Sedition Acts involved a debate over whether, under the Constitution, the States had *exclusive* authority to enact such immigration laws.").

recognized that “the Constitution divides authority between federal and state governments for the protection of individuals.”¹⁷⁸ Did the Constitution settle this balance between federal and state power for the protection of liberty with respect to immigration? The first factor invariably turns on difficult value judgments about which regime more effectively promotes liberty.

Second, does Section 1373 “blur[]” political accountability?¹⁷⁹ The states will argue yes: local officials will be forced to comply with unpopular immigration policies, even against the wishes of their constituents. The federal government will counter that the federal government has plenary authority over immigration in all regards. Therefore, local voters who are unhappy with immigration laws can seek a change at the federal level. Here, the states have the stronger argument.

Third, does Section 1373 “shift[] the costs of regulation to the States”?¹⁸⁰ The cost here is likely minimal. States that already know a person’s immigration status can readily share that information with the federal government. Unlike with handling of radioactive waste, or performing of firearm background checks, Section 1373’s cost is de minimis.

At bottom, these three factors are somewhat inconclusive as applied to Section 1373. Were I to weigh these concerns, the scale would tip towards *unconstitutional*. But a credible argument can be made to the contrary. Does that then mean the question is open under *Murphy*? No. Justice Alito’s formalistic test decisively resolves the issue. Through Section 1373, Congress “unequivocally dictates what a state legislature may and *may not do*.”¹⁸¹ Specifically, the sanctuary states may not enact laws that protect information about the immigration status of aliens in their jurisdiction. Section 1373 places “state legislatures . . . under the direct control of Congress.”¹⁸² This federal law imposes a “direct affront to state sovereignty.”¹⁸³

Yet, this holding is somewhat unsatisfying. Why is this law such an “affront”?¹⁸⁴ The answer can be found through a careful study of Article I, Section 8, and the allocation of powers between Congress and the states.

¹⁷⁸ *Murphy*, 138 S. Ct. at 1477 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1478 (emphasis added).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *See id.*

B. Section 1373 Is Not a “Proper” Exercise of Federal Power

All exercises of federal power must be supported by a delegation of authority from the Constitution.¹⁸⁵ The regulations at issue in *New York, Printz*, and *Murphy* could be defended as exercises of Congress’s powers under the Commerce Clause and the Necessary and Proper Clause. The framework from these three cases, however, does not carry over to Section 1373. This federal regulation of sanctuary cities does not purport to regulate interstate commerce or intrastate economic activity.¹⁸⁶ Rather, the law mandates disclosure of information concerning an alien’s immigration status. Section 1373 cannot be supported by Congress’s powers under the Commerce Clause, the Naturalization Clause, and the Necessary and Proper Clause.

1. Section 1373 Cannot Be Supported by Congress’s Power over Interstate or Foreign Commerce

In *New York, Printz*, and *Murphy*, the Court did not question whether Congress could regulate *interstate* markets of radioactive waste, firearms, and gambling.¹⁸⁷ For example, Congress could preempt state laws concerning these three fields, and use federal agents to enforce those laws.¹⁸⁸ Nor did the Court in those cases doubt that Congress could regulate *intrastate* markets of radioactive waste, firearms, and gambling so long as those activities had a substantial effect on interstate commerce.¹⁸⁹ This latter analysis, premised on the Necessary and Proper Clause framework from *Wickard v. Filburn*,

¹⁸⁵ See U.S. CONST. art. I, § 1.

¹⁸⁶ See 8 U.S.C. § 1373(a) (2012).

¹⁸⁷ See, e.g., *New York v. United States*, 505 U.S. 144, 159–60 (1992) (“Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste. 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.”); cf. *Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring) (“But even assuming the Commerce Clause allows Congress to prohibit intrastate sports gambling ‘directly,’ it ‘does not authorize Congress to regulate state governments’ regulation of interstate commerce.” (quoting *New York*, 505 U.S. at 166)).

¹⁸⁸ Cf. *Murphy*, 138 S. Ct. at 1481 (“In sum, regardless of the language sometimes used by Congress and this Court, every form of preemption is based on a federal law that regulates the conduct of private actors, not the States. Once this is understood, it is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors.”).

¹⁸⁹ Cf. *Printz v. United States*, 521 U.S. 898, 937 (1997) (Thomas, J., concurring) (“Even if we construe Congress’ authority to regulate interstate commerce to encompass those intrastate transactions that ‘substantially affect’ interstate commerce, I question whether Congress can regulate the particular transactions at issue here.”).

serves as the basis for virtually all federal regulations: Congress can regulate intrastate economic activity that has a substantial effect on interstate commerce.¹⁹⁰ That is, Congress carries into execution its power to regulate interstate commerce by enacting laws that are necessary and proper to regulate intrastate economic activity.

However, the challenged laws at issue in *New York*, *Printz*, and *Murphy* did not merely regulate interstate and intrastate markets for radioactive waste, firearms, and gambling. Rather, the laws *mandated* states to regulate those areas.¹⁹¹ Under *McCulloch*, forcing states to take such actions is a necessary—that is “conductive”—means to police these three areas.¹⁹² If the states take such action, then the federal government does not need to assert itself. However, such regulations were not a proper way to achieve legitimate ends. Stated simply, it is not proper for Congress to mandate states to regulate intrastate economic activity.¹⁹³

This analysis does not provide the rule of decision for Section 1373. In *United States v. Lopez*, the Court held that Congress could not regulate noneconomic intrastate activity, even if that activity had a substantial effect on interstate commerce.¹⁹⁴ However, where intrastate “economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”¹⁹⁵ However narrow this test may seem, *Gonzales v. Raich* provided a capacious definition of “economics”: “the production, distribution, and consumption of commodities.”¹⁹⁶ Section 1373 regulates a

¹⁹⁰ *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (“Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.”).

¹⁹¹ See *New York*, 505 U.S. at 166 (“The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”).

¹⁹² See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819) (“[T]he power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. . . . It is a right incidental to the power, and conducive to its beneficial exercise.”).

¹⁹³ See, e.g., *Printz*, 521 U.S. at 923–24 (“When a ‘La[w] . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a ‘La[w] . . . proper for carrying into Execution the Commerce Clause,’ and is thus, in the words of *The Federalist*, ‘merely [an] ac[t] of usurpation’ which ‘deserve[s] to be treated as such.’” (quoting *THE FEDERALIST* NO. 33, *supra* note 98, at 204 (Alexander Hamilton))).

¹⁹⁴ *United States v. Lopez*, 514 U.S. 549, 560 (1995).

¹⁹⁵ *United States v. Morrison*, 529 U.S. 598, 610 (2000) (internal quotation marks omitted) (citing *Lopez*, 514 U.S. at 560).

¹⁹⁶ *Gonzales v. Raich*, 545 U.S. 1, 25–26 (2005) (internal quotation marks omitted) (quoting *Economics*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1966)).

single state sharing information. This activity is non-economic and cannot be aggregated under *Wickard*.

The Commerce Clause may be relevant in a different context. Article I, Section 8, Clause 3 provides: Congress has the power to “regulate Commerce with *foreign Nations*, and among the several States, and with the Indian Tribes.”¹⁹⁷ As understood in 1791, “commerce” was limited to some sort of “intercourse,” or perhaps “social interaction.”¹⁹⁸ Under modern doctrine, the movement of people can constitute “commerce.”¹⁹⁹ The federal government could potentially argue that Section 1373 is a necessary and proper means to regulate the movement of aliens between states, and to regulate aliens who travel from foreign nations into the states. For example, Congress may not know the identity of an alien who journeys across a border into a sanctuary state. Section 1373 would require the state to disclose to the federal government the immigration status of any new immigrants. With this understanding, Congress could link Section 1373 to its power to regulate foreign commerce: receiving such information makes federal immigration schemes more efficient. As a result, the mandate to provide the information would be a necessary, that is a *conducive* means to regulate foreign commerce. Ultimately, this argument fails for reasons discussed in the next part: even if these means are *necessary*, they are not *proper* exercises of federal power.

2. Section 1373 Cannot Be Supported by Congress’s Power over Naturalization

Article I, Section 8, Clause 4 grants Congress the power “[t]o establish a uniform Rule of Naturalization.”²⁰⁰ This provision offers the strongest basis to support the constitutionality of Section 1373. Indeed, this Clause serves as the basis for modern immigration laws. (Though, as an original matter, the phrase “naturalization” is best understood to refer to grants of citizenship; not a plenary power to regulate immigration.²⁰¹) Moreover, several Supreme Court decisions have suggested that Congress has an *inherent* power over foreign and domestic immigration.²⁰² Even Justice Scalia—

¹⁹⁷ U.S. CONST. art. I, § 8, cl. 3.

¹⁹⁸ See Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 16 (2010); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 101 n.3 (2001).

¹⁹⁹ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255–56 (1964).

²⁰⁰ U.S. CONST. art. I, § 8, cl. 4.

²⁰¹ See Ilya Somin, *Does the Constitution Give the Federal Government Power Over Immigration?*, CATO UNBOUND (Sept. 12, 2018), <https://www.cato-unbound.org/2018/09/12/ilya-somin/does-constitution-give-federal-government-power-over-immigration>.

²⁰² See *e.g.*, *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“It is an accepted maxim of *international law* that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only

usually a stickler for the separation of powers—acquiesced to this doctrine. He admitted that “there was no need [for the Framers] to set forth control of immigration as one of the enumerated powers of Congress.”²⁰³ The notion of an unenumerated power over immigration stands in tension with our Constitution’s structural design. It is a bedrock principle that the federal government only has those powers that are enumerated in the Constitution.²⁰⁴

In any case, under modern doctrine, Congress has the power to regulate domestic immigration.²⁰⁵ And Congress can use this power to authorize federal officers to obtain the immigration status of aliens in all fifty states. Obtaining such information would—under modern doctrine—promote a “uniform Rule of Naturalization.” Can Congress accomplish this goal by requiring states to share such information with the federal government? This approach would certainly be a “necessary”—that is *conducive*—means to promote a uniform immigration scheme nationwide. After all, the system would be frustrated if the government had information about aliens in cooperative states, but no information about aliens in sanctuary states. Under the Court’s case law stretching from *McCulloch* to the present, such a regulation would be a *necessary* means to carry into execution an enumerated power. But is that approach also *proper*?

To answer this question, let’s consider how Section 1373 operates in practice. At the outset, someone in state government wants to share information with the federal government concerning a person’s “citizenship or immigration status.”²⁰⁶ Someone else, who ranks higher in state government, takes steps to “prohibit, or . . . restrict” the “sending” of such information.²⁰⁷ Generally, this sort of conflict is resolved internally: higher-

in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the constitution has committed the entire control of international relations, in peace as well as in war.” (emphasis added) (internal citation omitted).

²⁰³ *Arizona v. United States*, 567 U.S. 387, 422 (2012) (Scalia, J., dissenting) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893)).

²⁰⁴ *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“The Constitution creates a Federal Government of enumerated powers.”).

²⁰⁵ The basis of a federal power over *domestic* immigration law has largely been under-theorized, and ill-explained, by the Supreme Court. See Ilya Somin, *Immigration, Freedom, and the Constitution*, 40 HARV. J.L. & PUB. POL’Y 1 (2017) (arguing that Congress does not have the power to regulate immigration); Josh Blackman, *The Power to Exclude* (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265780 (arguing that Congress does not have plenary power over immigration, but does have the power to deny entry of aliens). But see John C. Eastman, *The Power to Control Immigration Is a Core Aspect of Sovereignty*, 40 HARV. J.L. & PUB. POL’Y 9 (2017) (discussing that Congress does have the power to regulate immigration).

²⁰⁶ 8 U.S.C. § 1373(a) (2012).

²⁰⁷ *Id.*

ranked state officials can instruct lower-ranked state officials how to act. This dynamic can play out in a mundane fashion: a sheriff tells a deputy not to coordinate with ICE. Or—as in the case of California—the state mandates that all entities within the state (such as cities, counties, prisons, etc.) must refuse to share the requisite information with the federal government. In our Republic, states are free from federal control. However, political subdivisions exist at the pleasure, and indeed absolute control, of the state. There is no internal equivalent of federalism for cities and states. In the absence of Section 1373, there would be no question that states could issue such edicts.

Section 1373 distorts that dynamic. Congress has instructed higher-ups in the states how they must manage their subordinates. That is, Congress has told sheriffs how to supervise their deputies, and has told state houses how to legislate over their subdivisions. Moreover, local officials are forbidden by federal law from implementing sanctuary policies favored by their constituents. Section 1373 is not a “proper” exercise of federal power: Congress cannot direct a state *how* to manage its workforce. In other words, the federal government cannot dictate how a state controls its own law enforcement agencies, pursuant to its police powers. Congress retains the authority to withhold federal subsidies from states that deviate from federal standards. Congress cannot, however, intercede in such internal affairs. For these reasons, Section 1373 cannot be a proper exercise of federal power.

CONCLUSION

Section 1373(a) is unconstitutional on its face. The courts can reach that result through a rote application of *Murphy v. NCAA*. Taking this approach, however, would pay insufficient attention to the constitutional foundation of the anticommandeering doctrine. Specifically, Section 1373(a), though perhaps a “necessary” means to establish a uniform naturalization scheme, is not a “proper” means to accomplish that goal. Are we merely quibbling over semantics? No. The distinction between these two outcomes transcends nomenclature.

For generations, students of *McCulloch* assumed that the Necessary and Proper Clause was a blank check for federal power. Congress could choose whatever means were *convenient* to carry into exaction one of its enumerated powers. Following *Wickard v. Filburn*, which embraced the substantial effects test, even *intrastate* economic activity supported federal regulation. In addition, this presumption was especially well-founded in the immigration context, where Congress has plenary, and perhaps even *inherent* power.

However, *Printz* and *NFIB* unsettled that presumption. These cases reaffirmed the principle that laws must be *both* “necessary” and “proper” to “carry[] into Execution the foregoing Powers” in Article I, Section 8—including the power to regulate interstate commerce and naturalization.²⁰⁸ It is not enough that a law makes it *convenient* for Congress to do its job. Courts must also carefully scrutinize whether the law does so in an *improper* fashion. That is, did Congress recognize the scope of its own authority, or did it intrude on the prerogatives of the states?

Judges following *Murphy* may be tempted to hide behind the veneer of the Tenth Amendment—a provision that has no teeth. This approach, alas, enables courts to sidestep a core aspect of the judicial role that many scholars thought was abandoned decades ago: the enforcement of the doctrine of enumerated powers. Judges that declare Section 1373 unconstitutional should embrace their decisions for what they are: furthering the project of the Rehnquist and Roberts Courts to chisel away at the New Deal settlement. This enterprise does not entail overturning well-entrenched precedents like *Wickard v. Filburn*. Rather, in the words of Randy Barnett, the Court has declared: *this far, but no farther*.²⁰⁹ Moreover, acknowledging the basis of their rulings would make it plain that other similar federal laws, that stop short of commandeering, are also in constitutional doubt.

There is, for some judges at least, a silver lining to the *Murphy* approach. A decision halting Section 1373 will simply be a one-off: a way to reject federal intrusions on the states in the sanctuary city context, without imposing any collateral damage on other species of federal invasions. Judges can rule against Section 1373—and the Trump Administration—and then continue to rubber-stamp all manner of federal laws that overstep proper bounds. Many fair-weather federalists would find this pathway attractive as a stopgap measure while an undesirable President resides in the White House.²¹⁰ However, full-time federalists—including those on the Supreme Court—should place the anticommandeering doctrine in its proper context, such that all improper laws now bear the constitutional bullseye they deserve.

²⁰⁸ U.S. CONST. art. I, § 8, cl. 18.

²⁰⁹ See Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331, 1348 (2013) (“This gestalt can be summarized as ‘this far and no further’— provided ‘no further’ is not taken as an absolute, but merely as establishing a baseline beyond which serious justification is needed.” (citation omitted)); see also Josh Blackman, *Originalism’s Gravitational Pull Towards Original Meaning*, JOSH BLACKMAN’S BLOG (Nov. 18, 2012), <http://joshblackman.com/blog/2012/11/18/originalisms-gravitational-pull-towards-original-meaning/>.

²¹⁰ See Josh Blackman, *How the States Can Help Trump Make Federalism Great Again*, NAT’L REV. (Jan. 18, 2017, 9:00 AM), <https://www.nationalreview.com/2017/01/federalism-state-attorneys-general-donald-trump-should-work-entrench-federalism/>.