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MATTHEW D. ADLER
AND SETH F. KREIMER

THE NEW ETIQUETTE OF
FEDERALISM: NEW YORK, PRINTZ,
AND YESKEY

A majority of the Supreme Court once more believes that state autonomy is a fundamental, constitutional value and has set out to develop that proposition from case to case. As a result, the Tenth Amendment and its penumbrae have recently generated a series of intricate, judicially declared limitations on federal power. The jurisprudence of federalism has been bedecked with formalistic distinctions that provide law professors rich opportunity to chase law students down a series of hypotheticals and into contradictions. While this may be good fun for professors, and occasionally for students, one suspects that the new federalism doctrines quickly will drive political actors, judges, and practicing lawyers to distraction. The area lacks a fabric of constitutional law sufficiently coherent and well-justified to last.

This article focuses on the proposition that the federal government may not “commandeer” state officials, and the attendant doctrines announced by the Court. The anticommandeering doctrines are of interest not only because they have impelled the

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Court to invalidate two federal statutes in the last seven years, but because they are both unspecified and potentially explosive.¹ If developed expansively, they threaten to undermine the supremacy of federal law.

The doctrines, as announced by the Court in *Printz v United States*² and *New York v United States*,³ and reaffirmed last Term in *Pennsylvania Department of Corrections v Yeskey*,⁴ create a regime of dichotomous boundaries. Like the federalism jurisprudence set forth, a generation ago, in *National League of Cities v Usery*,⁵ the new jurisprudence of commandeering purports to define an area of total state (and local) immunity from federal intervention.⁶ Neither the magnitude of the federal interest nor the degree of interference with state prerogatives is relevant. Rather, the doctrinal boundaries constitute what Justice Kennedy calls "the etiquette of federalism," and a federal trespass across those boundaries is per se invalid.⁷

¹ As Professor Tushnet has observed, "[O]ne can use the word 'commandeer' to refer to almost anything that affects a state's ability to pursue the substantive policies it prefers." Mark Tushnet, *Keeping Your Eye on the Ball: The Significance of the Revival of Constitutional Federalism*, 13 Ga St U L Rev 1065, 1067 (1997). For examples of the potential reach of the anticommandeering principle, see *Condon v Reno*, 155 F3d 453 (4th Cir 1998) (invalidating Driver's Privacy Protection Act, which prohibited dissemination of information contained in state motor vehicle records, as a commandeering); *West v Anne Arundel County*, 137 F3d 752, 760 (4th Cir 1998) (entertaining claim that application of the Fair Labor Standards Act to state subdivision was a commandeering; rejecting only as a matter of stare decisis); *Burbank-Glendale-Pasadena Airport Auth. v City of Burbank*, 136 F3d 1360, 1364-65 (9th Cir 1998) (Kozinski concurring) (arguing that empowering state officials to bring a preemption claim in federal court might be commandeering). The anticommandeering doctrines have already attracted considerable scholarly attention. See, in particular, Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 Supreme Court Review 199; Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?* 95 Colum L Rev 1001 (1995); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 Mich L Rev 813 (1998); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?* 111 Harv L Rev 2180 (1998).

² 117 S Ct 2365 (1997).

³ 505 US 144 (1992).

⁴ 118 S Ct 1952 (1998).

⁵ 426 US 833 (1976), overruled, *Garcia v San Antonio Metropolitan Transit Auth.*, 469 US 528 (1985).

⁶ Although the Tenth Amendment refers simply to "States," not localities, and although the parallel reference to "State[s]" in the Eleventh Amendment has been read by the Court solely to immunize states, not localities, from suit, the anticommandeering doctrines protect both state and local governments. See *Printz*, 117 S Ct at 2382 n 15. For the remainder of this article, we generally use "state" to mean "state or local."

⁷ *United States v Lopez*, 514 US 549, 583 (1995) (Kennedy concurring) (citing *New York* as a case "where the etiquette of federalism has been violated by a formal command from

In such a regime, a great deal hinges on the exact contours of the area protected from federal infringement. If they are to be consistent with precedent, the doctrinal boundaries that define this area must map onto the outcomes of prior cases. If they are to be workable, the boundaries must be intelligible and coherent. And if they are to be at all intellectually persuasive, the boundaries cannot be simple result-oriented gerrymanders. Unfortunately, the anticommandeering doctrines seem headed for trouble in all three dimensions. In this article we seek to clarify as sympathetically as possible the doctrinal boundaries between permissible federal regulation and impermissible commandeering, to assess those boundaries in light of the justifications for judicially enforced federalism, and to explore the possibility of an expressive justification for the boundaries that cannot be otherwise justified.⁸

Part I lays out our understanding of the basic pieces of the puzzle: the explicit lines of demarcation that the Court has drawn in *Printz*, *New York*, and *Yeskey*, and the values that constitutional federalism might be understood to realize. Part II argues that behind the explicit lines must lie a more basic distinction, alluded to by the Court in *Printz*, between impermissible commandeering and the permissible federal preemption of state law. We flesh out the preemption/commandeering distinction, but conclude that the distinction is only poorly justified by the values of constitutional federalism.

Parts III and IV engage in the same exercise for the lines of demarcation explicitly set forth by the case law. Part III addresses the three distinctions adopted in *New York* and *Printz*: between commandeering and conditional funding or preemption, between generally applicable and targeted federal statutes, and between commandeering of state officials exercising the judicial function and commandeering of other officials. In each case, the boundaries in question seem to us both normatively insupportable and practically unworkable. Part IV goes to the issue addressed in the most recent commandeering case, *Yeskey*—whether an anticommandeering

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the National Government directing the state to enact a certain policy . . . or to organize its governmental functions in a certain way").

⁸ *Printz* also sketched out a unitary executive argument for the anticommandeering doctrine. See 117 S. Ct. at 2378. We have nothing to add to Professor Caminker's persuasive criticism of that argument, see 1997 Supreme Court Review at 223–33 (cited in note 1), and thus focus here on the federalism argument.

prohibition should include an exemption for federal legislation adopted to enforce the Reconstruction Amendments. We conclude that the answer should be “yes,” both as a matter of the case law and as a matter of federalism values, but also suggest that the task of delineating a clear and workable exemption will be a difficult one.

Finally, in Part V we explore, with skepticism, the possibility of an expressive justification for the anticommandeering doctrines here described.

I. FIVE LINES OF DEMARCATION IN SEARCH OF A RATIONALE

A. DOCTRINE: LINES OF DEMARCATION

In dissenting from the Court’s 1985 decision to cease enforcing state sovereignty constraints on the national government, Justices O’Connor and Rehnquist each announced a hope and expectation that the Court would return to the fray.⁹ In fact, federalism doctrine was reinvigorated six years later when *Gregory v Ashcroft* introduced a “plain statement rule”¹⁰ for congressional action that interferes with “the authority of the people of the States to determine the qualifications of their most important government officials.”¹¹ But it was not until the next year, in *New York v United States*, that the Court actually held a federal statute unconstitutional on federalism grounds.

In *New York*, the majority invalidated one part of a federal scheme seeking to induce states to make provision for the disposal of low-level nuclear waste, and sustained two others. The Court drew a line of demarcation between legitimate conditional exercises of the federal spending or preemption power, on the one hand, and illegitimate “commandeer[ing],” on the other.¹² The de-

⁹ See *Garcia v San Antonio Metropolitan Transit Auth.*, 469 US 528, 580 (1985) (Rehnquist dissenting); id at 589 (O’Connor dissenting).

¹⁰ 501 US 452, 461 (1991).

¹¹ Id at 463. The scope of the plain statement rule has proved elusive. Compare *City of Edmonds v Oxford House, Inc.*, 514 US 725, 732 n 5 (1995) (land use regulation was not “a decision of the most fundamental sort for a sovereign entity”) (quoting *Gregory v Ashcroft*, 501 US at 460) with *BFP v Resolution Trust Corp.*, 511 US 531, 544 n 8 (1994) (“essential sovereign interest in the security and stability of title to land” triggered plain statement rule). The Court’s opinion in *Yeskey*, discussed below, does not clarify matters.

¹² 505 US at 161 (“Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program”)

gree of justification or public necessity was held to be irrelevant; commandeering was an irredeemable constitutional violation, while conditional spending or preemption was per se consistent with constitutional constraints. The *New York* Court drew a second line of demarcation by affirming prior cases upholding the imposition of federal duties upon state judges; the Court reasoned that, as a matter of the text of the Supremacy Clause, judicial officials were peculiarly subject to federal demands.¹³ Finally, the Court suggested that the prohibition on federal commandeering would not cover "generally applicable" statutes.¹⁴

Two Terms ago, in *Printz*, the Court went one step further. It applied the prohibition on commandeering not only to federal statutes which mandated policy-making by legislative officials, but to the Brady Act, a federal statute that merely imposed on state law enforcement officials the obligation to "make a reasonable effort"¹⁵ to determine whether certain pending firearm purchases would be illegal. *Printz* reiterated the suggestion that statutes of general applicability fell outside the coverage of the anticommandeering principle.¹⁶ The Court reaffirmed that this principle did not apply to statutes imposing federal duties on state judges, and clarified that any state official performing judicial functions was also subject to commandeering.¹⁷ And the majority in *Printz* did not take issue with the proposition, articulated by the dissent,¹⁸ that Congress could induce action by state officials through conditional federal spending or preemption.¹⁹

(internal quotation omitted); see *id.* at 161–69 (distinguishing between commandeering and conditional spending or preemption).

¹³ See *id.* at 178–79.

¹⁴ *Id.* at 177–78.

¹⁵ 117 S. Ct. at 2369 (quoting Brady Act).

¹⁶ See *id.* at 2383.

¹⁷ See *id.* at 2371, 2381 and n. 14. It probably would be unwarranted to conclude that every directive to state judges and state officials exercising a judicial function, otherwise within Congress's Article I powers, is constitutionally permissible. See, for example, *Howlett v. Rose*, 496 U.S. 356, 372 (1990) ("The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented"). However, *Printz* and *New York* clearly exempt judges and state officials exercising a judicial function from the generic prohibition on commandeering.

¹⁸ See *id.* at 2396–97 (Stevens dissenting).

¹⁹ The majority opinion itself seems explicitly to acknowledge the constitutional legitimacy of cooperative federalism programs in the course of its unitary executive discussion. See *id.* at 2378 n. 12.

Pennsylvania Dept of Corrections v Yeskey offered the opportunity to clarify matters. The Court reviewed the applicability of the Americans with Disabilities Act (ADA) to the operation of a state prison system. The *Yeskey* petitioners and amici argued before the Court not only that the ADA failed the "plain statement" requirement of *Ashcroft*, but that application of the statute to prisons would be at odds with *Printz*, since the statute imposed duties of "reasonable accommodation" which could be far more intrusive than the Brady Act.²⁰ A unanimous Court, however, saw no need to reach the constitutional question.

Justice Scalia's opinion took the position that even if a "plain statement rule" applied, it was "amply met" by the terms of the ADA.²¹ The opinion went on to avoid the question whether the ADA was barred by *Printz*, on the ground that the question had not been raised before the lower courts.²² *Yeskey* was, however, illuminating in one way. The opinion suggested more directly what had been implicit in *New York* and *Printz*: the limits imposed by those cases do not apply to congressional enactments rooted in Section 5 of the Fourteenth Amendment.²³

Thus, by the end of last Term, the Court had erected an enclave of state sovereignty explicitly bounded by four lines of demarcation. In addition, as we will argue below, these four demarcations presuppose a fifth, implicit distinction between federal preemption and commandeering. A federal requirement will be judged per se unconstitutional if:

- 1) the requirement commandeers state officials, rather than merely preempting state law; and
- 2) it does so directly rather than as a condition for federal spending, or for nonpreemption of state law; and
- 3) the requirement is targeted at state officials, rather than being generally applicable to state officials and private persons alike; and
- 4) the officials commandeered are exercising legislative or executive rather than judicial functions; and
- 5) the requirement is grounded in the Commerce Clause or

²⁰ See Brief for the Petitioners 23–25; Brief Amicus Curiae of the Criminal Justice Legal Foundation 23–24.

²¹ 118 S Ct at 1954.

²² See *id.* at 1956.

²³ See *id.* See Part IV for a discussion of the Section 5 exception.

Congress's other Article I powers, rather than in the grants of power to Congress in the Reconstruction Amendments.

A great deal turns on the placement of these boundaries. We will suggest that they are both unclear and (with the exception of the last) unjustified by the values of federalism that the Court has invoked. We begin with a brief review of those values.

B. THE RATIONALES: THE VALUES OF FEDERALISM

What are the arguable values of constitutional federalism? More robustly, why might there be good reason to constitutionalize federalism guarantees and have these guarantees enforced by the Supreme Court,²⁴ as in such recent cases as *United States v Lopez*,²⁵ *Seminole Tribe of Florida v Florida*,²⁶ *City of Boerne v Flores*,²⁷ and the cases of most interest for us, *New York* and *Printz*? In this Part, we briefly summarize the values or functions that enforceable constitutional federalism might be understood to serve, with specific reference to the Court's own defense of this feature of our constitutional system. This summary should not be taken as an endorsement. Rather, our claim is conditional: on the assumption that constitutional federalism does serve important values, those values are poorly tracked by the anticommandeering doctrines set forth in *New York* and further developed by *Printz*. The critique of *New York* and *Printz* advanced here is an internal critique, which assumes without endorsing the basic normative presuppositions upon which those cases rest.²⁸

What, then, are the presuppositions of the Court's federalism cases and, more generally, of constitutional federalism? To begin,

²⁴ For discussion of the values that constitutional federalism, and federalism doctrine, arguably serve, see Barry Friedman, *Valuing Federalism*, 82 Minn L Rev 317, 386-405 (1997); Jackson, 111 Harv L Rev at 2213-28 (cited in note 1); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum L Rev 1, 3-10 (1988); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U Chi L Rev 1484, 1491-1511 (1987); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 Supreme Court Review 341, 380-414; David L. Shapiro, *Federalism: A Dialogue* 75-106 (Northwestern U Press, 1995). A critical survey is provided by Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L Rev 903 (1994).

²⁵ 514 US 549 (1995).

²⁶ 517 US 44 (1996).

²⁷ 117 S Ct 2157 (1997).

²⁸ For an external critique, see Rubin and Feeley, 41 UCLA L Rev at 903-52.

federalism might be justified in light of the geographic diversity of one or more variable V_i to which policy is appropriately responsive:²⁹ the geographic diversity of citizen preferences, needs, or interests; or, alternatively, of physical, social, or economic conditions; or even, perhaps, of the ethical norms and goals that undergird governmental policy. The simplest, static version of the argument says this: the values of some V_i are in fact different in different geographic regions; these variations are significant, that is, large enough to make different policies optimal for different regions; therefore a governmental regime that permits policy to vary by region, rather than requiring a single national policy, is optimal. As the Court crisply stated in *Gregory v Ashcroft*, federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society."³⁰ The geographic diversity argument can also be put, more elaborately, in dynamic rather than static form: if separate governments defined by geographic region exist, then citizens will migrate to different regions depending on, say, their needs, interests, or ethical views, such that over time geographic regions characterized by different values of some V_i will emerge. The dynamic version of the geographic diversity argument is, in effect, the argument famously advanced some forty years ago by Charles Tiebout, and since developed at great length in the economics literature on federalism.³¹

A different argument for federalism stresses governmental innovation rather than geographic diversity.³² As with the diversity argument, the innovation argument can be formulated either statically or dynamically. The static formulation is that proposed by Justice Brandeis in his oft-quoted dissent to *New State Ice Co. v Liebmann*: "To stay experimentation in things social and economic is a grave responsibility. . . . 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

²⁹ See, for example, Friedman, 82 Minn L Rev at 401–02; Merritt, 88 Colum L Rev at 8–9; McConnell, 54 U Chi L Rev at 1493–94.

³⁰ 501 US at 458.

³¹ See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J Pol Econ 416 (1956); Rubin and Feeley, 41 UCLA L Rev at 918 n 62 (citing literature).

³² See, for example, *Ashcroft*, 501 US at 458; Friedman, 82 Minn L Rev at 397–400; Merritt, 88 Colum L Rev at 9; McConnell, 54 U Chi L Rev at 1498–99; Shapiro, *Federalism* at 138–39.

experiments without risk to the rest of the country.”³³ The notion here is that the efficacy of novel governmental policies is uncertain, and thus that, quite apart from the geographic diversity of needs, interests, and so on, it makes sense to create a mechanism by which to test novel policies on a subnational scale. That way, policy testing occurs more quickly, and the harmful effects of poor policies are confined to particular regions rather than spread nationwide. One objection here is that state governments have an incentive to underinvest in policy innovation, as compared with the federal government, since each state realizes within its boundaries only a portion of the benefits from successful innovation, but bears all the costs of failure.³⁴ A partial response to this objection holds that successful states will induce immigration (with concomitant benefits, such as tax dollars) by the residents or firms of less successful states. Thus is delineated a dynamic version of the innovation argument for federalism which, like the different kind of dynamic argument proposed by Tiebout, has been popular among economists.³⁵

Yet a third value arguably served by federalism is one that might be termed “tyranny prevention.”³⁶ It is this value that has figured most prominently in the recent case law. As the majority in *New York* explained:

[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. 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.³⁷

³³ 285 US 262, 311 (1932) (Brandeis dissenting).

³⁴ See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?* 9 J Legal Stud 593 (1980) (questioning, on various grounds, incentive of states to innovate).

³⁵ See Rubin and Feeley, 41 UCLA L Rev at 920–21 nn 68–69 (citing sources for and against the thesis that interstate competition is beneficial).

³⁶ Rapaczinski argues at length that federalism serves a “tyranny prevention” function. See 1985 Supreme Court Review at 380–95. For other scholarly accounts that, in name or substance, defend a tyranny-prevention view, see Friedman, 82 Minn L Rev at 402–04; Jackson, 111 Harv L Rev at 2218–20; Merritt, 88 Colum L Rev at 3–7; McConnell, 54 U Chi L Rev at 1500–07.

³⁷ 505 US at 181 (internal quotations and citations omitted).

Printz heartily seconded this line of argument: "This separation of the two spheres [state and federal] is one of the Constitution's structural protections of liberty."³⁸ The claim, very roughly, is that the amount of tyranny in a unitary regime (that is, the total tyranny at the level of the national government) is greater than the amount of tyranny in a federal regime (that is, the total tyranny at the level of the national government plus the total tyranny at the level of the state governments). Place to one side, for the moment, the interesting problem of how to make commensurate different kinds of tyranny, or tyranny at different levels of government. (For example, if the move from a unitary regime to a federal regime weakens the hold of powerful interest groups on the national government, but creates compact states, each with its government dominated by a homogenous majority of in-state citizens, has overall tyranny decreased or increased?) The more basic question is what one means by "tyranny." Broadly speaking, we suggest, "tyranny" can be understood as the unjustified responsiveness of governmental policies, or actions, or decisions, to particular groups or persons.³⁹

There are plausible arguments that constitutional federalism helps to mitigate tyranny so defined. In particular, we will take as true the claim that constitutional federalism serves to reduce the interest-group dominance that would obtain in a unitary regime, because the collective-action problems that hinder political activity

³⁸ 117 S Ct at 2378.

³⁹ A narrower definition of tyranny would require unjustified governmental responsiveness to governmental officials. Classically, of course, the "tyrant" was someone who held formal office—indeed, was the head of state—rather than simply being a powerful person. But the narrower definition entails that talk of the "tyranny of the majority," or of "interest group tyranny," is confused. We see no confusion here. These kinds of governmental pathologies, like classic tyranny, or "legislative tyranny" (the responsiveness of government to the interests of legislators, such as their interest in entrenching themselves in office), or "bureaucratic tyranny," are all instances of the same general phenomenon, namely, the unwarranted control of government by powerful groups or individuals—whether those persons hold formal office or not.

Tyranny is, at a minimum, unjustified responsiveness to particular groups or persons, not mere responsiveness; if, for example, it truly is the case that governments justifiably give greater weight to the interests of citizens as opposed to noncitizens, that hardly counts as "tyranny." We will not pursue the issue whether further qualifiers are needed, e.g., "oppressive" or "liberty-infringing" unjustified responsiveness, because we do not think it plausible that such qualifiers materially change our argument. See, for example, Part II.C. (considering whether tyranny, as here defined, is more problematic when it ensues in governmental action rather than inaction).

by diffuse, unorganized groups at the national level are less difficult to overcome in the smaller world of state politics.⁴⁰ We will also accept, for purposes of our internal critique, the standard view that constitutional federalism undermines tyranny in the narrower and more traditional sense of “tyranny by national officials,” whether legislators, bureaucrats, judges, or the President.⁴¹ We do find it quite implausible that constitutional federalism reduces tyranny along *all* dimensions. For example, the claim that (1) the national government is more likely than state governments to be dominated by a majority of the citizenry, to the detriment of the minority, is in obvious tension with the claim that (2) the national government is more likely than state governments to be dominated by well-organized interest groups, to the detriment of the majority. This returns us to the problem, alluded to above, of how to make commensurate different kinds of tyranny. Rather than take a stance on that problem, we will generally advance a critique of *Printz* and *New York* that is robust across different methods of commensuration, and across the different types of tyranny (interest-group tyranny, official tyranny, and others) that constitutional federalism might possibly mitigate.⁴²

The final value arguably served by constitutional federalism is one that we shall term “political community.”⁴³ It is a shibboleth of the literature endorsing federalism that states facilitate a kind or degree of political participation by citizens that does not occur at the national level.⁴⁴ We will assume that (a) democratic politics (including citizen involvement) has *intrinsic* value or importance,⁴⁵ and (b) the realm of state politics, if and only if adequately protected by the right sort of constitutionalized federalism guarantees,

⁴⁰ See Rapaczynski, 1985 Supreme Court Review at 386–88.

⁴¹ See *id.* at 388–91.

⁴² But see Part III.C.

⁴³ The Court did not rely upon the value of political community in *Printz* and *New York*, but it did do so in another case that figures importantly in current federalism jurisprudence, *Gregory v. Ashcroft*. See *Ashcroft*, 501 US at 460–64.

⁴⁴ See, for example, Friedman, 82 Minn L Rev at 389–94; Jackson, 111 Harv L Rev at 2221; Merritt, 88 Colum L Rev at 7–8; McConnell, 54 U Chi L Rev at 1507–11; Rapaczynski, 1985 Supreme Court Review at 395–408; Shapiro, *Federalism* at 139; S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 BU L Rev 685, 701–14 (1991).

⁴⁵ See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Counter-majoritarian Difficulty*, 145 U Pa L Rev 759, 796–806 (1997) (elaborating this idea).

can realize this intrinsic value in a manner, or to a degree, that a unitary regime cannot.⁴⁶

II. PREEMPTION VERSUS COMMANDEERING: THE BACKGROUND DEMARCATION

Printz and *New York* clearly adopt three lines of demarcation: (1) between coercive directives to state officials, on the one hand, and "cooperative federalism" statutes (conditional spending or preemption) on the other; (2) between coercive directives to state officials exercising a legislative or executive function, and coercive directives to state officials exercising a judicial function; and (3) between targeted coercive directives to state legislators or executives, and coercive directives that are generally applicable both to state officials and to private persons. In addition, the Supreme Court, in cases prior to *New York* and *Printz*, as well as in the *Yeskey* decision, has articulated a fourth demarcation line: (4) between coercive directives to state officials that are promulgated by Congress pursuant to its ordinary Article I powers, and coercive directives promulgated pursuant to Section 5 of the Fourteenth Amendment and the parallel enforcement provisions in the Thirteenth and Fifteenth Amendments.⁴⁷

Do these four demarcations together define the Court's new state sovereignty jurisprudence? We think not. The four lines of demarcation just described are, we believe, overlaid upon a fifth and much more basic one: the demarcation between *preemption* and *commandeering*. *Printz* and *New York* barely recognize this point. Nonetheless, we shall now claim, those decisions are best interpreted, in the context of wider case law, as standing for the proposition that the federal government may impose certain duties on state officials, even though the officials are nonjudicial, even though the duties are coercive and targeted in the strongest sense,

⁴⁶ The first assumption, (a), makes the concept of "political community" stronger than and distinct from the weaker view that democratic politics has merely instrumental importance in increasing the quality of governmental *outcomes*. We take it that the proponents of "political community" mean to endorse the stronger view. Indeed, if state politics is construed to have merely weak, instrumental significance, then the line between the political-community value of federalism and the others discussed above, particularly tyranny prevention, becomes quite blurred. Presumably, the main instrumental (outcome-enhancing) as opposed to intrinsic role of democratic involvement is to reduce certain kinds of tyranny: interest-group dominance as well as official entrenchment.

⁴⁷ See Parts III, IV (discussing these four demarcations).

and even though federal action is grounded merely upon the Commerce Clause or another Article I power rather than upon the Reconstruction Amendments.⁴⁸

In this Part, we defend this interpretive claim. Then we discuss how the preemption/commandeering distinction should be fleshed out. Our suggestion will be that the distinction is most plausibly and sympathetically construed as a distinction between inaction and action—between the negative duties that (albeit targeted, coercive, and directed to nonjudicial officials) are a permissible accompaniment of the federal power to preempt, and the affirmative duties that are not. Finally, we argue that the preemption/commandeering distinction, even when construed in this plausible and sympathetic way, is not strongly justified by the values of constitutional federalism.

A. IS THERE A PREEMPTION/COMMANDEERING DISTINCTION?

The federal government, where acting within the scope of its authority under the Commerce Clause and the other powers set forth in Article I, Section 8 of the Constitution, has the power to define the legal positions of private parties: to accord private parties federal rights, duties, liberties, powers, liabilities, and other legal positions, and to nullify the state-law rights, duties, etc. that physically or logically conflict⁴⁹ with the federal positions.⁵⁰ As the Court has explained:

⁴⁸ For a dramatic, recent failure to understand this point, see *Condon v Reno*, 155 F3d 453 (4th Cir 1998), where the Court invalidated the Driver's Privacy Protection Act—which merely required state motor vehicle departments to refrain from disclosing information in motor vehicle records—on the grounds that the Act was neither generally applicable nor an exercise of Congress's Section 5 power and was therefore unconstitutional under *New York and Printz*. By contrast, the courts in *Oklahoma v United States*, 161 F3d 1266 (10th Cir 1998) and *Travis v Reno*, 163 F3d 1000 (7th Cir 1998) upheld the Act against the claim that it impermissibly commandeered state governments.

⁴⁹ "Physical conflict" is meant to cover the case where it is physically impossible for persons to comply with both federal- and state-law positions, e.g., where federal law imposes a duty to perform action *A* and state law imposes a duty to refrain from action *A*. "Logical conflict" is meant to cover the case where having the federal position entails—as a matter of the logic of Hohfeldian positions—that the person not have the state law position, e.g., where federal law grants a liberty to perform *A*, and state law imposes a duty to refrain from *A*. Stephen Gardbaum, in a recent, revisionary piece on preemption, agrees that the federal government has the power to override state law in both cases of conflict, but would (in effect) place the case of physical conflict under the Supremacy Clause and the case of logical conflict under the Necessary and Proper Clause. See *The Nature of Preemption*, 79 Cornell L Rev 767 (1994).

⁵⁰ More precisely, it is unquestioned that the federal government has the power to define the federal positions of private persons, and to preempt conflicting state-law positions, just

A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law. Moreover, it is clear that the Commerce Clause empowers Congress to prohibit all—and not just inconsistent—state regulation of such activities. Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result.⁵¹

These propositions are explicitly endorsed by *Printz* and *New York*, and understandably so;⁵² to deny them would be to eviscerate the Supremacy Clause and two centuries of precedents.

Note, however, that the unquestioned power of the federal government to define the legal positions of private parties, and to pre-empt conflicting state-law positions, does not entail a federal power to define or change the legal positions (particularly the legal duties) of state legislators and enforcement officials. In theory, it is possible to imagine a regime of constitutional federalism in which the federal government has the power under the Commerce Clause (1) to define the legal positions of private parties, and (2) to impose a duty upon federal officials to respect, support, or enforce the rights, duties, etc. of private parties, as defined by the federal government, and also (3) to impose a duty upon state judges and adjudicators to respect, support, or enforce the rights, duties, etc. of private parties, as defined by the federal government,

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insofar as the federal positions of private persons do not entail duties by state officials. Obviously, it is *not* unquestioned that the federal government can give private persons a claim-right against state officials.

⁵¹ *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 US 264, 290 (1981) (citations omitted).

⁵² See *New York*, 505 US at 178 ("The Constitution . . . gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation"); *Printz*, 117 S Ct at 2374 (stating that "all state actions [obstructing federal law] are *ipso facto* invalid" and citing *Silkwood v. Kerr-McGee Corp.*, 464 US 238 (1984), for the proposition that federal law pre-empts conflicting state law). See also *FERC v. Mississippi*, 456 US 742, 766–67 (1982) (stressing federal power to define legal positions of private persons, and to preempt conflicting state law); *National League of Cities v. Usery*, 426 US 833, 840–45 (1976) (same, but also distinguishing between federal power over private persons and federal power over states themselves), overruled, *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 US 528 (1985); *Fry v. United States*, 421 US 542, 552 (1975) (Rehnquist dissenting) ("Congress may pre-empt state regulatory authority in areas where both bodies are otherwise competent to act. But this well-recognized principle of the Supremacy Clause is traditionally associated with federal regulation of persons or enterprises, rather than with federal regulation of the State itself. . . .").

but *not* the power to impose any duty at all⁵³ upon nonjudicial state officials. That is, it is in theory possible to imagine a constitutional regime in which, notwithstanding the federal power to define the legal position of private parties, state legislators and enforcement officials would remain free to act as if federal statutes had not been enacted, and the only governmental officials who would incur duties in virtue of a federal statute (under the Commerce Clause) would be federal officials and state judges and adjudicators. Indeed, a regime of constitutional federalism without federal power to impose duties upon state officials is precisely what an earlier Supreme Court endorsed in an 1861 decision, *Kentucky v Dennison*.⁵⁴ As the *Dennison* Court put it: “[W]e think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it.”⁵⁵

Should *Printz* and *New York* be read as reintroducing the *Dennison* doctrine into constitutional jurisprudence—more specifically, as reintroducing *Dennison* with respect to targeted federal statutes that are addressed to nonjudicial state officials, and that are grounded upon the Commerce Clause or Congress’s other Article I powers? We think not. Note, to begin, that the Court, in *FERC v Mississippi*—a state sovereignty case preceding *Printz* and *New York*—specifically disavowed *Dennison* as “not representative of the law today,” and stated that the federal power to define the legal positions of private parties encompassed an ancillary power to impose some duties upon (nonjudicial as well as judicial) state officials: “[s]tate legislative [as well as] judicial decisionmakers must give preclusive effect to federal enactments concerning nongovernmental activity.”⁵⁶ More important, to read *Printz* and *New York* as denying federal power to impose any targeted, coercive duties on nonjudicial state officials would be to read them as undermining the large and long-standing body of preemption case law in which, time and again, the Court has either explicitly authorized or at least not questioned the entry of declaratory or injunctive relief against state enforcement officials, prohibiting the officials from

⁵³ By “duty,” here, we mean a legal, sanction-backed duty.

⁵⁴ 65 US 66 (1861), overruled, *Puerto Rico v Branstad*, 483 US 219 (1987).

⁵⁵ 65 US at 107.

⁵⁶ 456 US at 761, 766.

enforcing preempted state laws (specifically, state laws preempted by federal law that is grounded in the Commerce Clause or another Article I power, and not in the Reconstruction Amendments), under threat of civil or criminal contempt. (Such a duty of nonenforcement is clearly targeted; only state officials, not the population at large, have the power to enforce state law.⁵⁷) To give but one example, in *Morales v Trans World Airlines, Inc.*, with Justice Scalia (the author of *Printz*) writing for the majority, the Supreme Court held that state guidelines governing airline fare advertising were preempted by the federal Airline Deregulation Act, and sustained the district court's entry of that portion of a permanent injunction against the Attorney General of Texas which obliged him not to enforce the preempted guidelines against the airlines.⁵⁸ The Court in *Printz* and *New York* surely did not intend to call into question *Morales* and the numerous other cases like it.⁵⁹

Indeed, a brief passage in *Printz* seemingly acknowledges that the federal government, by virtue of the Supremacy Clause, *does* have the power to impose targeted legal duties on state legislators and enforcement officials, not merely state adjudicators. This acknowledgment comes in the course of the Court's discussion of a passage from Federalist 27.

These problems [in Justice Souter's interpretation of the passage] are avoided, of course, if [the passage is] taken to refer to nothing more (or less) than the duty owed to the National Government, on the part of *all* state officials, to enact, enforce,

⁵⁷ More precisely, only state officials typically have the power to enforce state law in the sense of bringing civil or criminal enforcement actions, or undertaking investigatory activities, in the name of the state. And in the cases referred to here, it is typically state officials alone who are made subject to the declaration or injunction enjoining enforcement. See also *South Carolina v Baker*, 485 US 505, 514 (1988) (suggesting that federal statute which "seek[s] to control or influence the manner in which States regulate private parties" is not "generally applicable") (internal quotation omitted).

⁵⁸ 504 US 374 (1992); see id. at 380–82 (explicitly authorizing injunctive relief under *Ex parte Young*, 209 US 123 (1908)). For similar cases, see, for example, *Barnett Bank v Nelson*, 517 US 25 (1996); *Livadas v Bradshaw*, 512 US 107 (1994); *Gade v Nat'l Solid Wastes Management Ass'n*, 505 US 88 (1992); *Schneidewind v ANR Pipeline Co.*, 485 US 293 (1988); *Capital Cities Cable, Inc. v Crisp*, 467 US 691 (1984); *Shaw v Delta Air Lines, Inc.*, 463 US 85 (1983); *New Mexico v Mescalero Apache Tribe*, 462 US 324 (1983); *Washington v Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 US 658 (1979); *Douglas v Seacoast Products, Inc.*, 431 US 265 (1977); *Ray v Atlantic Richfield Co.*, 435 US 151 (1978); *Jones v Rath Packing Co.*, 430 US 519 (1977); *City of Burbank v Lockheed Air Terminal Inc.*, 411 US 624 (1973).

⁵⁹ Surely, too, the Court did not intend to overrule the line of cases authorizing suit under Section 1983 to enforce federal statutory rights. See *Maine v Thiboutot*, 448 US 1 (1980); *Golden State Transit Corp. v City of Los Angeles*, 493 US 103 (1989).

and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative acts, are *ipso facto* invalid.⁶⁰

This passage is hardly crystalline. But, interpreted in the context of *Morales* and the preemption decisions that *Morales* epitomizes, the passage should be understood to confirm the existence of a demarcation additional to those explicitly set forth by *Printz* and *New York*: the demarcation between preemption and commandeering.

The question remains whether Congress has the power to impose targeted duties on nonjudicial state officials directly, or whether instead it must always do so indirectly, via the federal courts. On the "indirect" view, Congress can pass a statute changing the legal position of private parties, but until a federal court imposes concomitant duties on state officials through some kind of judicial directive, those officials remain free to act as if the federal statute had never been enacted. Surprising as this view might seem, there is real textual support for it in a passage from the *New York* opinion:

Additional cases cited by the United States [to demonstrate the federal power to issue directives to state governments] discuss the power of federal courts to order state officials to comply with federal law. Again, however, the text of the Constitution plainly confers this authority on the federal courts, the "judicial Power" of which "shall extend to all Cases, in Law and Equity, arising under this Constitution. . . ." The Constitution contains no analogous grant of authority to Congress. Moreover, the Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply.

In sum, the cases relied upon by the United States hold only that federal law is enforceable in state courts and that federal courts may in proper circumstances order state officials to comply with federal law, propositions that by no means imply any authority on the part of Congress to mandate state regulation.⁶¹

⁶⁰ 117 S. Ct. at 2374. The language from *New York* discussed immediately below, see 505 US at 179, also constitutes a recognition by the Court that at least some federal governmental entities—namely, the federal courts—can impose certain duties upon nonjudicial state officials.

⁶¹ 505 US at 179 (citations omitted). This language, in turn, seems to trace back to Justice O'Connor's opinion in *FERC v. Mississippi*. See 456 US at 784 n. 13 (O'Connor concurring in the judgment in part and dissenting in part).

What is striking here is both the Court's distinction between judicial and nonjudicial federal directives, and its failure to describe any category of directives that federal bodies other than the federal courts can issue to state (legislative and executive) officials. One of the Court's tasks in future federalism cases will be to provide a definitive gloss on this language from *New York*, and a definitive answer to the problem of direct versus indirect duties.

Our own conclusion is that *Printz* and *New York*, together with other existing lines of federalism cases, are best interpreted as rejecting the indirect view. Congress can, we think, directly issue preemption commands to state legislators or executives and back up such commands with the threat of civil or criminal sanction, quite apart from the power of the federal courts (acknowledged in *New York*) to do so. Consider the substantial body of federal criminal law applicable to state officials, and the multiple Supreme Court cases upholding the prosecution and conviction of state officials pursuant to these statutes.⁶² The indirect view would eviscerate or at least gravely disrupt this jurisprudence. Or consider the well-established doctrine that, where a preempted state law has wrongly been enforced by the state, injured parties may sue for damages under Section 1983.⁶³ The indirect view would require that state officials or state subdivisions never be made defendant to such suits, at least prior to a judicial injunction, declaration, or other directive against them.⁶⁴

In sum, *New York* and *Printz* are best interpreted, in the wider context of relevant case law, to mean the following: Congress can-

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⁶² A recent example is *Salinas v United States*, 118 S Ct 469 (1997). As the Court has explained: "[T]he cases in this Court which have recognized an immunity from civil suit for state officials have presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials." *United States v Gillock*, 445 US 360, 372 (1980).

⁶³ See *Golden State Transit Corp. v City of Los Angeles*, 493 US 103 (1989).

⁶⁴ A further, significant piece of evidence is the Court's opinion in *Printz* itself, which fails to mention *New York*'s distinction between federal judicial and non-judicial directives. Finally, as a matter of constitutional interpretation, the indirect view seems tenuous. The power to issue a sanction-backed directive is hardly a uniquely judicial power, at least where the directive is issued to a class of persons ("all state law enforcement officers," etc.), rather than a named individual. The Court's reasoning in the passage from *New York* implies the conclusion that a federal statute that is addressed to private persons, and that otherwise lies within Congress's Article I powers, cannot be accompanied by a penalty provision threatening those persons with sanction for noncompliance. But since this conclusion is clearly wrong—since, in truth, there is nothing uniquely judicial about the "authority to order [persons] to comply" with federal law—then there is no Article III basis for reserving to the federal courts the unique power to direct compliance by state officials.

not commandeer either state legislators or state executive officials, but it can directly impose some targeted, coercive duties on state executive officials and state legislators⁶⁵ pursuant to its power to define the legal positions of private persons. This leads us to the next question: What kind of targeted, coercive duties for state officials are permissible under *New York* and *Printz*, and what kind constitute impermissible commandeering?

B. NEGATIVE VERSUS AFFIRMATIVE DUTIES

Existing scholarship on *Printz* and *New York* has tended to assume, without much discussion, the proposition for which we have just argued at some length: that the federal power of preemption includes a power to impose certain duties on state officials. Moreover, existing scholarship has tended to assume, without argument, the separate proposition that the category of permissible duties are negative duties, duties of inaction, as opposed to positive duties, duties of action.⁶⁶ Notably, however, the Court in *Printz* and *New York* does not articulate an action/inaction distinction—not surprisingly, given the Court’s failure to confirm, with any clarity, the more basic and logically prior demarcation between commandeering and preemption. We agree with other scholars that the commandeering/preemption distinction is most plausibly and sympathetically fleshed out in terms of (some version of) the action/inaction distinction. But a fair bit of conceptual, interpretive, and normative work is required to accomplish the mapping from preemption onto negative duties, and from commandeering onto affirmative ones.

Let us begin with a paradigm. Paradigmatically, Congress may

⁶⁵ Although the Court in *Tenney v Brandhove*, 341 US 367 (1951), and its sequelae, see *Bogan v Scott-Harris*, 118 S Ct 966 (1998); *Supreme Court of Va. v Consumers Union*, 446 US 719 (1980); *Lake Country Estates, Inc. v Tahoe Regional Planning Agency*, 440 US 391 (1979), has repeatedly held that state legislators are absolutely immune from suit under Section 1983, we take it that this immunity is statutory, not constitutional. Congress can, under the rubric of preemption, impose duties upon state legislators as well as executive officials. See *United States v Gillock*, 445 US 360 (1980) (finding no state legislative immunity in federal criminal prosecution). Notably, the Court in *Printz* took great pains to deny the import of the legislator/executive distinction, see 117 S Ct at 2380–81, and nowhere suggested that the scope of duties constitutionally imposable upon state executives was wider than that imposable upon legislators.

⁶⁶ See Jackson, 111 Harv L Rev at 2201–02; Hills, 96 Mich L Rev at 870–71; Caminker, 1997 Supreme Court Review at 235–36 (all cited in note 1).

oblige state executive officers not to enforce a statute or regulation that creates duties for private persons—this is what is at stake in garden-variety preemption cases—and, we take it, Congress also has the constitutional power to require state legislators (or state agency officials with rule-making power) not to enact a state statute or regulation that creates duties for private persons.⁶⁷ For short, we'll call this the "Preemption Paradigm." Conversely, the federalism doctrine set forth in *Printz* and *New York* prohibits Congress from obliging state officials to enact or enforce a statute or regulation that creates duties for private persons. As the Court explained, in the concluding paragraph of the *Printz* opinion:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.⁶⁸

For short, we'll call this paradigmatic case of impermissible federal duties the "Commandeering Paradigm." What is the distinction between the duties imposed upon state officers in the Preemption Paradigm, and the duties imposed upon them in the Commandeering Paradigm?

Some apparent distinctions either are implausible or fail to sort between the two paradigms at all. For example, although *Printz* and *New York* repeatedly state that Congress may not "compel the States to enact or enforce a federal regulatory program," or words to that effect,⁶⁹ there surely can be federal statutes that do not literally do that—that do not require state officers to enact or enforce *duties* for private persons—but nonetheless constitute impermissible commandeering. Imagine a federal statute (backed by the

⁶⁷ See note 65 (discussing legislative immunity).

⁶⁸ 117 S Ct at 2384.

⁶⁹ See, for example, *Printz*, 117 S Ct at 2369 ("the Brady Act purports to direct state law enforcement officers to participate . . . in the administration of a federally enacted regulatory scheme"); id at 2380 ("[*New York* involved] a federal statute that . . . required the States to enact or administer a federal regulatory program"); id at 2383 ("[t]he Federal Government may not compel the States to enact or administer a federal regulatory program") (quoting *New York*, 505 US at 188).

threat of sanctions for noncomplying states or state officials) that unconditionally requires the state to enact and administer an entitlement program, rather than a program of regulation. We doubt that the Court would uphold a federally required entitlement program of this kind. There is no connection, even an apparent or intuitive one, between federalism values and the regulation/entitlement distinction.⁷⁰

A second distinction between the Preemption Paradigm and the Commandeering Paradigm that can quickly be rejected is the distinction between federal duties that negatively affect the level of state resources and those that do not.⁷¹ For this distinction fails even to observe the boundaries between the two paradigms. Some cases that fall within the Commandeering Paradigm will have very little resource impact, if any, upon the state—consider a federal requirement that the state legislature simply enact a particular duty-creating law, with this law to be implemented by private suit rather than official prosecution. Conversely, cases that fall within the Preemption Paradigm—most obviously, the federal preemption of state taxes⁷²—can diminish state resources considerably.

A third unworkable distinction between the Commandeering Paradigm and the Preemption Paradigm is the distinction between a federal requirement that obliges the state to depart from the status quo, and a federal requirement that does not. The problem here is defining the state of affairs that constitutes “the status quo” in a way that is noncircular and nonarbitrary and yet observes the boundary between the two paradigms.⁷³ Why not say that the state of affairs in which the state enacts and enforces a regulatory program is the status quo, and thus that the Commandeering Paradigm requires no state departure from this baseline? Clearly, to say that the status quo cannot involve federal commandeering

⁷⁰ See *Printz*, 117 S Ct at 2370–71 (distinguishing early federal statute that required state courts to record applications for citizenship, and similar statutes, with reference to judicial/nonjudicial demarcation, not by exempting entitlement commandeering from scope of anti-commandeering rule).

⁷¹ See *National League of Cities v Usery*, 426 US at 846 (relying, in part, on substantial costs imposed by Fair Labor Standards Act upon states and subdivisions to justify invalidating the statute), overruled, *Garcia v San Antonio Metropolitan Transit Auth.*, 469 US 528 (1985).

⁷² See, for example, *Aloha Airlines, Inc. v Director of Taxation*, 464 US 7 (1983).

⁷³ For a discussion of various possible definitions of the status quo baseline, see Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U Pa L Rev 1293, 1351–74 (1984).

would be viciously circular; we are here trying to define commandeering by reference to the status quo. Alternately and noncircularly, one might define the status quo as (a) the state of affairs that would have ensued, absent federal intervention, or (b) the state of affairs that the federal government is authorized to effect or aim at, consistent with its constitutional powers (and with individual rights), apart from the anticommandeering doctrine. But using baseline (a) means that only a subset of otherwise-constitutional commandeerings covered by the Commandeering Paradigm—the subset where the commandeered regulatory program is one that the state itself would not have enacted, absent federal intervention—are unconstitutional. And using baseline (b) means that *no* otherwise-constitutional commandeerings covered by the Commandeering Paradigm are unconstitutional (in short, that the anticommandeering doctrine does no constitutional work at all).

This leads us, finally, to the action/inaction distinction. At the outset, we stress that the distinction is a contested one. What, precisely, makes some person's (or some official's) behavior an "action," as opposed to a mere failure to act, has been and remains a topic of considerable controversy in the philosophical literature.⁷⁴ But there are at least some philosophically respectable versions of the distinction that will count the duty imposed upon state officials in the Commandeering Paradigm as an affirmative duty—a duty of action—and the duty imposed in the Preemption Paradigm as a merely negative duty of inaction. For example, one prevalent account construes the action/inaction distinction as a distinction between physical movement and immobility.⁷⁵ On this account, it is roughly the case that *P* "acts" just in case she moves her body (*P*'s body is voluntarily moved by *P*), and that otherwise there is inaction or failure to act by *P*. And, indeed, one of the differences between the Commandeering Paradigm and the Preemption Paradigm is the difference between movement and immobility. The enactment and enforcement of a duty-creating statute does indeed require physical movements by state legislators and enforcement officers. Some state legislators must open their mouths or raise their hands to vote "yea" for the statute; and state enforcement

⁷⁴ See generally Jonathan Bennett, *The Act Itself* (Clarendon, 1995).

⁷⁵ See, for example, Michael S. Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* (Clarendon, 1993).

officers must raise their pens, or touch their fingers to computer keyboards, so as to issue arrest warrants, subpoenas, indictments, and so on. By contrast, state officials can not-enact or not-enforce a duty-creating statute by remaining entirely immobile. Note further that the movement/immobility distinction correctly categorizes the case of a federally required entitlement program as a case of commandeering—at least where the entitlement (say, an entitlement to state monies) would not exist absent the enactment of a statute or other positive law by the state, since once again the enactment of positive law requires physical movements by the enactors.

So the action/inaction distinction (at least certain versions of it) can do the conceptual work of sorting between the Commandeering Paradigm and the Preemption Paradigm. Further, the conceptual mapping from preemption onto inaction, and commandeering onto action, has some interpretive plausibility, given the role that the action/inaction distinction has played in other parts of the Court's jurisprudence—specifically, in defining the content of constitutional rights. For example, in the *DeShaney* case, where it denied a due process claim brought by an abused child whom governmental social workers had failed to protect, the Court quite clearly and definitively stated that the Due Process Clause generally imposes only negative duties on government officials, not affirmative duties.⁷⁶ There are also some textual hints in the state sovereignty jurisprudence itself (although not much more than that) that the preemption versus commandeering distinction does indeed map onto inaction versus action.⁷⁷

Finally, we suggest that there is a plausible or apparent link between the action/inaction distinction, and at least some of the normative considerations undergirding constitutional federalism. Two of the federalism values we described in Part I—the value of tyranny prevention, and the value of political community—seem to implicate, or plausibly implicate, the distinction. As for tyranny prevention: just as there is considerable philosophical support for the “deontological” view that the action/inaction distinction has

⁷⁶ *DeShaney v. Winnebago County Dept. of Social Services*, 489 US 189, 195–97 (1989).

⁷⁷ See *FERC v. Mississippi*, 456 US at 762–63 n 27, 765, 767–68 n 30 (noting permissibility of even certain “affirmative” federal obligations for state officials); *Printz*, 117 S Ct at 2374 (noting obligation of state officials “not to obstruct” the operation of federal law).

general moral significance,⁷⁸ so it seems plausible that governmental action is worse than governmental inaction, and specifically that tyrannical governmental action is worse than tyrannical governmental inaction. Indeed, this apparent link between action/inaction and the value of tyranny prevention underlies the Court's reasoning in *De Shaney*.

As for the value of political community, it seems plausible that federal statutes compelling a particular subcategory of state action—a subcategory we shall call “authoritative utterances”—do indeed infringe upon the state's functioning as a political community in a distinctive and emphatic way. By “authoritative utterance,” we mean a law-producing action: an action by a state official that is an instance of some legal power of hers to define legal rights, duties, and other legal positions.⁷⁹ Classic authoritative utterances include the legislative action of enacting a statute, the executive action of issuing a command (e.g., an order to produce information, or an order placing some person under arrest), and the judicial action of imposing a sanction upon, or issuing an injunction to, a particular person.

A requirement that state legislators enact a particular statute seems, somehow, to be more of an interference with state autonomy than a requirement that they refrain from enacting a particular statute. For in the case of the affirmative requirement, there is a discrete, authoritative utterance—the enactment of the statute—that the legislators have been compelled to produce. By contrast, in the case of the negative requirement, it is not (or may not be) true of any utterance that the legislators have produced, that it was thus compelled. It is not (or may not be) true of any entry in the set of legislative utterances (the *Statutes at Large*) that the legislators were obliged by external, federal compulsion to produce that utterance. Similarly, it seems, a requirement that state executives

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⁷⁸ For an overview of the debate between deontologists and consequentialists, see Shelly Kagan, *Normative Ethics* (Westview, 1998).

⁷⁹ Notably, however, the statute invalidated in *Printz* did not compel authoritative utterances; state officers were simply required to investigate the legality of gun sales. The “take title” provision invalidated in *New York* did not compel authoritative utterances either, at least insofar as that provision simply required the states to take physical possession of the nuclear waste; however, since such possession, or “title” apart from possession, might lead to judgments against the state, which the state would then be obliged to pay, “authoritative utterances” were arguably involved in *New York*. See 505 US at 154–55, 174–77 (quoting and discussing “take title” provision).

perform an authoritative utterance, of whatever kind, intrudes more sharply on political-community values than a requirement that they refrain from such performance.

In short, we believe that there is a good conceptual, interpretive, and normative case for construing the preemption/commandeering distinction as a distinction between inaction and action. *If* the Court is to craft a jurisprudence that prohibits commandeering, but permits the kind of federal duties for state officials that the preemption case law has long recognized, *then* it should define impermissible commandeering as a targeted, coercive duty for state legislative or executive officials that *requires action* on the part of the officials, and permissible preemption as a duty (perhaps targeted, perhaps coercive, and perhaps addressed to nonjudicial officials) that *does not require official action*.⁸⁰ For the remainder of the article, both in this Part and in subsequent Parts, we use the commandeering/preemption distinction and the action/inaction distinction interchangeably. We shall now argue that the commandeering/preemption distinction—even cashed sympathetically as action versus inaction—is not truly justified by the values of constitutional federalism.

C. PREEMPTION, COMMANDEERING, AND THE VALUES OF CONSTITUTIONAL FEDERALISM

It seems clear that the preemption/commandeering distinction has little to do with the first two federalism values we described in Part I: the value of responsiveness to geographic diversity, and the value of innovation. A federal statute requiring inaction by state officers (permissible preemption) can dampen interjurisdictional policy variation, no less than a federal statute requiring official action (impermissible commandeering).⁸¹ Indeed, neither in *Printz* nor in *New York* did the Court seek to defend the

⁸⁰ There is, however, at least one way in which a straight action/inaction distinction is too crude a construal of the commandeering/preemption distinction. Presumably Congress can impose certain affirmative remedial duties upon state officials who breach their negative federal duties. Some such remedial duties, albeit affirmative, will not (we assume) constitute commandeering. See *Golden State Transit Corp. v City of Los Angeles*, 493 US 103 (1989) (upholding Section 1983 damages action against city, for breach of statutory duties under National Labor Relations Act). Undoubtedly, further refinements to the basic distinction between action and inaction will emerge if the Court explicitly adopts that distinction and persists in the anticommandeering jurisprudence.

⁸¹ See Caminker, 95 Colum L Rev at 1078–79 (cited in note 1).

preemption/commandeering distinction with reference to the values of geographic diversity and innovation. Rather, those values are appropriately protected (if at all) through straight Commerce Clause doctrine plus the doctrines governing the scope of Congress's other Article I powers. These doctrines curb national uniformity, and thereby protect the values of diversity and innovation, by limiting the power of Congress to preempt *or* commandeer.

More plausibly, we have already suggested, there is a link between the preemption/commandeering distinction and the value of political community. In the case of federal directives compelling state actions—specifically, in the case of federal directives compelling authoritative utterances by state officials—there is a particular utterance (a particular state statute, say) that the federal government has compelled the state to perform. That surely seems worse for democratic self-governance than the case in which state officials merely have been compelled to refrain from certain utterances. Is it truly worse? We think not, and will now argue to the contrary.

The political-community defense of constitutional federalism rests upon the premise that it is intrinsically valuable for citizens to participate in governance. Democratic procedures and institutions are premised to have intrinsic value, apart from their instrumental value in improving the quality of governmental outcomes. It is further claimed that a federal regime (by virtue of the smaller size of state governments) instantiates this intrinsic value more fully than a unitary regime. How does commandeering undermine that? Commandeering, it must be stressed, does not change the participatory or democratic structure of state government. Although state legislators are now obliged to enact a statute, or state executives are now obliged to issue a directive, it remains the case that legislators are elected by majority vote at regular elections, that executives either are elected themselves or appointed by elected officials, and that state citizens retain whatever rights they otherwise would have to learn about, comment upon, criticize, and challenge the choices of state legislators and executives.

Rather, commandeering undermines self-governance by limiting the set of options that state legislators and executives have. The choice whether to perform the commandeered utterance is no longer a choice that is open to the officials and, derivatively, the citizenry; it is no longer a choice that is responsive to the exercise

of electoral and other democratic rights by those citizens. But, of course, the same is true of preemption. Preemption, too, limits the choices of state legislators and executives, and in a precisely complementary way. While commandeering reduces the official's choice set from C_0 (perform the authoritative utterance, not-perform the utterance) to C_1 (perform the utterance), preemption reduces the choice set from C_0 (perform the authoritative utterance, not-perform the utterance) to C_2 (not-perform the utterance). In each case, some opportunity for state legislators, executives, and, derivatively, the state citizenry to shape the content of state law has been removed from them.⁸²

To put the point another way: the total corpus of state law is defined both by the authoritative utterances that legislators and executives perform, and by the utterances that legislators and executives refrain from performing. By coercing performances *or* restraints, commandeering *or* preemption constrains the content of state law and in that way reduces the extent to which state law can be shaped by intrinsically valuable procedures or institutions, thereby undermining the value of political community. But it is not the case that this value is especially or asymmetrically undermined by commandeering.

Why not say that affirmative shaping and negative shaping are differentially valuable—that the reduction of the state's choice set from C_0 to C_1 diminishes political community more than the reduction of the choice set from C_0 to C_2 ? We think this claim indefensible. The intrinsic value of political community, such as it may be, inheres in responsible decision making by state citizens, and in associated virtues such as deliberation, dialogue, open-mindedness, and impartiality. Qua the opportunity for decision making, there is no difference between the two reductions in choice sets. To explain why affirmative shaping and negative shaping are differentially valuable, one would need to appeal, not to the intrinsic value of decisionmaking, but to something else—say, the intrinsic value, for a state citizen, of *identifying* with the community of state citizens and its laws. The citizen identifies most strongly—or so it might be claimed—with the utterances that her legislators and

⁸² Professor Caminker makes a similar point, *id.* at 1077–78. In Part III.A. we qualify somewhat the claim that commandeering diminishes choice, but the qualification applies symmetrically to preemption.

executives have performed, not the utterances that they have refrained from performing. Therefore, compelled performance interferes with political community more gravely than compelled refraining. But even if there is something like such an identification value realized by political communities, apart from the value of responsible decision making, we do not see why citizens ought to identify with affirmative utterances (as opposed to the overall corpus of state law), nor do we know of any empirical work to demonstrate that they do in fact thus identify.⁸³

Finally, we come to the fourth value of federalism, and the one explicitly invoked in *Printz* and *New York*: tyranny prevention. Both commandeering and preemption may be tyranny-enhancing, along some dimensions, as compared to straight federal or state directives to private persons—we will not try to deny that here—but we do deny that commandeering is especially tyranny-enhancing, as compared to preemption.

Consider again the choice set we called C_0 : the choice between a state official's performance of an authoritative utterance (or, more generally, of an action) and her nonperformance of that utterance (or, more generally, of that action). Let us assume that federalism is tyranny-preventing, along a given dimension. That is, the federal government's resolution of C_0 is more likely to be unjustifiably responsive to the interests of the given group (economic interest groups, officials of the relevant government, a homogeneous majority of the relevant citizenry) than the state's resolution of C_0 . If the federal government is permitted to decide whether the state official should perform the action, then—we will imagine—that decision is more likely to be tyrannical (in the given way) than a simple decision by the state official, herself, whether to perform the action. Why might this obtain? It might obtain because of the kind of "accountability" considerations adduced by the Court in *Printz* and *New York*.

[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . [I]t may be state officials who will bear the brunt

⁸³ Indeed, we can readily imagine counterexamples to the claim that the state's authoritative utterances have a greater role in characterizing the state, and in fostering identification (or disassociation) by state citizens, than state decisions to refrain from authoritative utterances. Imagine a state that refrains from proscribing marijuana use or assisted suicide, or from regulating abortion.

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.⁸⁴

But, again, this is not an argument against commandeering, as such, because both commandeering and preemption shift C_0 from the state level to the federal level. When federal officials preempt a state statute, they can be confident—if the accountability story is correct—that state rather than federal officials will be held accountable for the nonenactment of the statute. Similarly, when federal officials commandeer a state statute, they can be confident—following the same story—that state rather than federal officials will be held responsible for the enactment of the statute. *Pace* the Court's argument in *New York*,⁸⁵ we see no asymmetry here. The choice between state action and state inaction may be less accountable to the electorate, where that choice is directed by a federal statute rather than resolved by state officials themselves, but, if so, this is true whether the federal directive compels action or inaction.⁸⁶

What about the claim that tyranny is more problematic when state action, as opposed to inaction, ensues? The defender of the preemption/commandeering line might try to reformulate the Court's accountability argument in *New York* and *Printz*; the point, she might argue, is not that compelled state inaction is more likely to be accountable to the electorate than compelled action, but rather that unaccountable state inaction is simply less troubling. But is it really? To begin, it bears emphasis that the anticommandeering rule becomes nonsuperfluous just where it involves commandeered state actions that do not violate constitutional rights. The federal statutes in *Printz* and *New York* did not coerce state officials to perform actions that violated the First Amendment, the Takings Clause, the Due Process Clause, the Equal Protection

⁸⁴ *New York*, 505 US at 168–69. See *Printz*, 117 S Ct at 2377.

⁸⁵ See 505 US at 168–69.

⁸⁶ For similar skepticism about the Court's accountability rationale, with respect either to preemption/commandeering or to the cooperative federalism demarcation, see Caminker, 96 Colum L Rev at 1061–74; Hills, 96 Mich L Rev at 824–30; Jackson, 111 Harv L Rev at 2200–05 (all cited in note 1).

Clause, or any other part of the Bill of Rights; if the federal statutes *had* commandeered rights-violating state action, the Court would not have needed to invoke state sovereignty to justify invalidating those statutes. So the anticommandeering rule (in its non-superfluous portion) involves state action that lies within the zone of permissible action sketched out by the Bill of Rights.

We doubt that state action, at least state action within this zone, is more likely to produce significant harm to the interests or welfare of the citizenry, or of some portion thereof, than state inaction. To see the point, consider the harm to a person *P* that ensues when *P* dies. We'll assume, *arguendo*, that a state government (in some way) produces a graver harm to *P*'s interests or welfare when governmental officials intentionally and directly kill *P* than when they merely fail to prevent *P*'s death. Yet it violates the Bill of Rights for the state government to intentionally and directly kill *P*.⁸⁷ Conversely, where the state governmental action commandeered by federal statute is constitutionally permissible under the Bill of Rights—and thus the anticommandeering rule comes into play—we see no reason to think that such action is worse *per se* for *P* than state governmental inaction. For example, state governmental inaction causes *P*'s death when government fails to regulate the polluters who emit carcinogens into the air that *P* breathes.⁸⁸ State governmental action causes *P*'s death when government prohibits firms from selling *P* the medication that would cure the cancer. Is *P*'s death worse for him or anyone else when Congress requires state governments to prohibit firms from selling *P* the medication than when Congress requires state governments to leave the carcinogen-emitting polluters unregulated? We think not.⁸⁹

⁸⁷ More precisely, it violates the Bill of Rights for state government to intentionally, directly, and unjustifiably kill *P*. See *Sacramento v. Lewis*, 118 S Ct 1708, 1718 (1998) ("It is . . . behavior at the other end of the culpability spectrum [from negligence] that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."). The qualification for justifiable killing, here, does not materially change our argument. Arguably, a justifiable governmental killing of *P* is no worse for him than a governmental failure to prevent his death. And even if this is not true, the case of a justifiable killing is a special one; direct and intentional killings by government will generally violate the Bill of Rights. Indeed, insofar as the proponent of *Printz* and *New York* is focused on tyrannical governmental action—action unjustifiably responsive to particular groups or persons—such action will by definition be unjustified.

⁸⁸ On inaction as causal, see Bennett, *The Act Itself* at 126–30 (cited in note 74).

⁸⁹ What about the claim that, in general, commandeered state action causes serious welfare setbacks, like death, illness, and poverty, while commandeered state inaction will cause

Clearly, there are large, normative issues here that this article cannot hope to resolve definitively.⁹⁰ Someone who believes in the asymmetry of governmental action and inaction is unlikely to be persuaded otherwise by our brief discussion. The most we can really accomplish here is to clarify the normative issues raised by the preemption/commandeering distinction. We suggest that the best defense for that distinction rests upon the value of tyranny prevention, rather than the other federalism values of diversity-responsiveness, innovation, and political community. So the Court in *Printz* and *New York* was correct to invoke that value, as opposed to these other three. But the Court went astray in suggesting that differential accountability could explain the distinction. Rather, the claim would have to be that unaccountable action and unaccountable inaction are differentially problematic. And we have tried to undermine that claim, insofar as it is relevant here. Federal commandeering, insofar as it compels state actions that do not violate the Bill of Rights, is not more problematic, we think, than federal preemption.⁹¹

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less serious setbacks? If commandeered action and inaction are indeed equally accountable, or unaccountable, as we argued above, we see no reason for this asymmetry.

It has been suggested to us that the anticommandeering doctrine is tyranny-reducing, not in the short-run sense that particular acts of commandeering are particularly likely to be unaccountable or problematic, but in the long-run sense that commandeering enfeebles the states as institutions capable of resisting the national government. Given the host of ways in which preemption and commandeering can symmetrically enfeeble states, for example, by diminishing interstate diversity, by reducing state options and the concomitant intrinsic value of state politics, or by diminishing state resources, we are skeptical about this long-run argument as well.

⁹⁰ One standard philosophical justification for the action/inaction distinction, the one we have just addressed insofar as it bears on *Printz* and *New York*, is that certain actions are morally worse than parallel inaction. See, for example, Kagan, *Normative Ethics*, at 70–78 (cited in note 78). Another standard philosophical justification is that affirmative duties are more “demanding”—they interfere more with a person’s own life plan—than negative duties. See, for example, Bennett, *The Act Itself*, at 143–63 (cited in note 74). We doubt, however, that this latter justification applies to governmental actors as opposed to private individuals.

⁹¹ Professor Hills develops a different argument for the preemption/commandeering distinction. The argument is subtle, but we take it that Hills, centrally, is willing to concede the harm to federalism values caused by preemption. Rather, he claims, the commandeering power is uniquely unnecessary for the attainment of national goals. Where Congress needs state governments to act, it can purchase action through voluntary agreement with the states; by contrast, intergovernmental bargaining is insufficient to secure warranted preemption, because states would “hold out” for large payments by the federal government. See 96 Mich L Rev at 855–900 (cited in note 1). We are not persuaded, at least insofar as this differential holdout argument is meant to justify the doctrines set forth in *Printz* and *New York*. First, Hills seems to equate commandeering with a federal duty to regulate, and preemption with a federal duty not to regulate. This is not correct, on our reading of *Printz* and *New York*; rather, commandeering equals a federal duty to act, and preemption equals

III. THE EXPLICIT DEMARCATIONS: COOPERATIVE FEDERALISM, GENERAL APPLICABILITY, AND ADJUDICATION

In this Part, we discuss the three lines of demarcation between permissible and impermissible federal statutes that the Court explicitly set forth in both *New York* and *Printz* and that have been the main focus of scholarly writing in this area: the demarcations concerning cooperative federalism, general applicability, and adjudication. As we see it, these are demarcations *within the set of* affirmative federal duties, since the federal government may permissibly impose negative duties upon state officials as an accompaniment to its power to preempt state law. Thus understood, the three demarcations—like the more basic and implicit distinction between preemption and commandeering—are not justified by the values of constitutional federalism.

A. COOPERATIVE FEDERALISM

The cooperative federalism demarcation distinguishes between so-called “conditional spending” or “conditional preemption” and straight commandeering. Congress may not “compel” the states

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a federal duty to refrain from action. If, for example, the federal government obliges a state legislature to *repeal an existing regulation*, then that counts as commandeering—because the legislature has been obliged to take the action of repeal—on our understanding of the preemption/commandeering distinction. (There is a possible refinement to the action/inaction interpretation mentioned in note 80, for affirmative remedial duties, but a federal duty to repeal an existing regulation is not necessarily remedial; it might just be deregulatory.) Why should there be lesser holdout problems in securing a state’s repeal of an existing regulation than in securing agreement not to enact the regulation in the first place?

Even leaving this point aside, we are not convinced by Hills’s argument. *Printz* and *New York* concern the federal power to impose duties upon state legislatures and executives, not the federal power to impose duties upon (a) private persons, (b) federal officials, or (c) state adjudicators. Call the regime in which the federal government only has the power to impose duties upon (a), (b), and (c) the “Baseline Regime.” What Hills needs to show, to justify *Printz* and *New York*, is that (1) the Baseline Regime must be supplemented by a federal power to oblige state legislators and executives to refrain from action (paradigmatically, to refrain from regulation), because of insuperable holdout problems otherwise; but (2) the Baseline Regime need not be supplemented by a federal power to oblige state legislators and executives to act, because of the absence of significant holdout problems here. We do not think Hills has demonstrated that, or even focused on the problem in this way. Note that, in the Baseline Regime, state legislatures could enact regulations that conflict with federal law, and state enforcement officials could prosecute violators, but state and federal adjudicators would not impose penalties on the violators. Further, the federal government could enact its own regulations and enforce them through the federal courts. This is the baseline from which the federal government would need to purchase state legislative or executive action or inaction; relative to that baseline, we are not convinced that differential holdout problems afflict the two kinds of purchases.

to "enact or enforce a federal regulatory program"⁹² (on our interpretation, to perform actions), but it may "encourage"⁹³ the states to do so, either by (1) making the payment of federal monies to a state conditional upon the state's performance of the actions, or (2) making nonpreemption of state law conditional upon the state's performance of the actions. This demarcation was integral to the holding of *New York*, where the Court struck down one provision of the federal statute at stake, but upheld two others (corresponding to the two permissible subcategories of conditional spending and conditional preemption); and it was implicitly reaffirmed by the Court in *Printz*.⁹⁴

A fair bit of doctrinal work remains to be done in fleshing out the precise content of the commandeering/cooperative federalism distinction. We take it that commandeering occurs where Congress induces state officials to perform actions by threatening a sanction for nonperformance.⁹⁵ The problem then becomes distinguishing between the impermissible threat of a "sanction" and a permissible threat to terminate federal funding or initiate federal preemption unless the action is performed. The Court's basic understanding of this distinction, at least the basic understanding that emerges in *New York*, seems to be this: If Congress threatens state officials with some outcome *O*, conditional on their failure to perform the actions, where it would be *unconstitutional for Congress to impose O unconditionally*, then that counts as commandeering. By contrast, if Congress threatens state officials with some outcome *O'*, conditional on their failure to perform the actions, where it would be constitutional for Congress to impose *O'* unconditionally, that counts as permissible "encouragement."⁹⁶ Conditional spending and preemption statutes fall on the permissible side of this demarcation (because Congress can unconditionally deny federal funds to the States, and can unconditionally preempt state law). By contrast, the following cases, all of which seem intuitively

⁹² *Printz*, 117 S Ct at 2384.

⁹³ *New York*, 505 US at 166.

⁹⁴ See notes 18–19 and accompanying text.

⁹⁵ If the imposition of an affirmative but unenforced federal duty upon the states were sufficient to constitute commandeering, the Court's frequent references to "compulsion" and "coercion" would be otiose. See, for example, *Printz*, 117 S Ct at 2371 n 2, 2375, 2379, 2383, 2384; *New York*, 505 US at 149, 161, 165, 168, 174, 175, 188.

⁹⁶ See, for example, *New York*, 505 US at 175–77.

to be cases of commandeering, are indeed classified that way by the basic test here described: (1) Congress threatens that, unless the actions are performed, the state itself will be "fined," that is, state tax dollars (untraceable to previous federal grants) will be confiscated by federal officers;⁹⁷ (2) Congress threatens that, unless the actions are performed, state officers will be personally fined; (3) Congress threatens that, unless the actions are performed, state officers will be jailed.

Note, however, that this basic approach may need to be amended if the anticommandeering doctrine is to have practical significance. For, given the wide range of outcomes that Congress can unconditionally impose, this approach seemingly enables Congress to circumvent the anticommandeering doctrine with ease. The problem of "unconstitutional conditions" looms, here as elsewhere in constitutional law. For example, what is to prevent Congress from making the payment of highway funds to the states conditional upon state enactment of legislation restricting abortion, homosexual sodomy, and the possession of guns near schools?⁹⁸ What is to prevent Congress from threatening that, where a state fails to enact and enforce a particular program to regulate nuclear waste, all waste-disposal laws (or all environmental laws!) in that state will be preempted?⁹⁹ Either the commandeering/cooperative federalism distinction will be refined by the Court, such that certain action-inducing threats will count as commandeering, notwithstanding the fact that the threatened outcome could be imposed unconditionally; or, seemingly, the no-commandeering prohibition will become a formality.¹⁰⁰

We doubt that the Court will succeed in refining the commandeering/cooperative federalism demarcation in a coherent and workable fashion. In the area of conditional spending, there

⁹⁷ See *New York v. United States*, 326 US 572 (1946) (indicating that Congress cannot levy tax falling only upon the States).

⁹⁸ See, for example, *South Dakota v. Dole*, 483 US 203 (1987) (upholding federal statute that conditioned highway funds upon state adoption of 21 as the drinking age); *Virginia v. Browner*, 80 F3d 869 (4th Cir 1996) (upholding federal statute that conditioned highway funds upon acceptable state air-pollution plan).

⁹⁹ See, for example, *FERC v. Mississippi*, 456 US at 764-70 (upholding conditional-preemption statute, threatening sweeping preemption of state law).

¹⁰⁰ See Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 Colum L Rev 1911 (1995) (discussing risk that Congress's conditional spending power may moot federalism constraints on regulation).

is in fact a refinement already on the books, one briefly mentioned by the Court in *New York*: the so-called *Dole* test, which requires that a spending condition be “germane[],” that is, “reasonably related to the purpose of the expenditure.”¹⁰¹ But the Court has never, in fact, invalidated a conditional spending program for failing the “germaneness” requirement—in particular, it did not do so either in *Dole* or in *New York* itself—and with good reason: the germaneness requirement, in its current form, is vacuous. Consider three possible conditions upon the granting of federal highway funds to the state: (a) that the state maintain the highways in good physical repair, (b) that the state raise the drinking age to 21, and (c) that the state prohibit gun possession in school yards. Intuitively, the first condition is germane, the second (actually upheld by the Court in *Dole*) is a boundary case, and the third is nongermane. But can the intuition be justified? To do so, we need a non-vacuous criterion for individuating purposes, one that the Court has as yet failed to provide. The third condition is nongermane if the purpose of the federal grant is “highway safety.” But why not say that its purpose is “physical safety,” including both highway safety *and* safety from gun violence? In theory, an individuation criterion might require that a spending condition be germane to the “maximally narrow” (but still constitutional) construal of the purpose behind the spending program, apart from the condition. Even assuming the notion of “maximally narrow” is coherent, it is clear that this kind of criterion is much too restrictive to permit the spending programs upheld in *Dole* or, for that matter, *New York*. The permissible purpose of “maintaining the physical condition of highways” is narrower than the purpose the Court needed to invoke in *Dole*, namely, highway safety. So some lumping of narrow purposes is permissible—but the Court has as yet provided absolutely no clue as to the boundary between permissible and impermissible lumping.

As for the area of conditional preemption, the Court has yet even to announce a doctrinal refinement analogous to the *Dole* “germaneness” test—let alone a workable and coherent one. *New*

¹⁰¹ *South Dakota v. Dole*, 483 US at 208; *New York*, 505 US at 172. The other parts of the four-pronged *Dole* test are not responsive to the problem of unconstitutional conditions raised here. Although *Dole* further suggests that a spending statute satisfying the test might nonetheless be unconstitutionally “coercive,” see 483 US at 211, it gives no explanation what that means.

York simply stated that “where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’s power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation”;¹⁰² and *Printz* added nothing to this formulation. This unrefined formulation is problematic, as Professor Rick Hills has explained: “If there are no limits on Congress’s power to use conditional preemption, then *New York* is a meaningless formality, because the national government could always require that state and local governments either make policy according to federal standards or disband themselves [i.e., have all state and local law within the scope of federal power preempted].”¹⁰³ Indeed, the Court in *FERC v Mississippi*, the pre-*New York* decision from which conditional preemption doctrine stems, held that Congress could induce state electricity and gas regulatory commissions to adopt certain federal policies by means of a sweeping threat of federal preemption. (The permissible threat was that, if the commissions failed to adopt the policies, state regulation of electric and gas utilities would be preempted.)

In sum, the constitutional permissibility of conditional spending and conditional preemption threatens to make the anticommandeering rule of *Printz* and *New York* a practical nullity. But even on the assumption that the anticommandeering rule (as eventually refined by the Court) turns out to be coherent, workable, and practically important, we propose a normative critique of the rule: like the background demarcation between duties of inaction and duties of action, the further distinction between state action secured through commandeering versus state action secured through conditional spending or conditional preemption is a distinction poorly justified in light of the values that lie behind constitutional federalism.

Once again, the values of innovation and responsiveness to diversity can be dispensed with fairly quickly. Straight commandeering seems no more likely to produce national uniformity than conditional spending or preemption. One might object that, because Congress must *pay* for uniformity when it purchases state regulation, through conditional spending, the overall degree of

¹⁰² 505 US at 167.

¹⁰³ Hills, 96 Mich L Rev at 921 (cited in note 1).

uniformity (or of unjustified uniformity) is lower than if both conditional spending and commandeering were permissible. Note, however, that Congress funds its conditional payments to the states through the taxation of resources that would otherwise be available for state taxation and for the (geographically variable) state programs that state taxation could fund; so the net effect of conditional spending as opposed to commandeering on overall uniformity is, at best, speculative. As for conditional preemption, the cost for the federal government of converting a straight, sanction-backed directive to state officials into a directive backed by the threat of preemption for noncompliance seems to be sufficiently low that the demarcation between conditional preemption and straight commandeering cannot be justified on uniformity grounds.¹⁰⁴

Here, as with the preemption/commandeering distinction, it strikes us that a more plausible argument for the Court's new jurisprudence of federalism rests upon the value of political community. Is it not the case that, when Congress compels state legislators or executives to perform an action—in particular, an authoritative utterance—Congress has reduced the set of choices available to those officials, derivatively to the state citizenry, and has thereby diminished the intrinsic values of democratic participation and deliberation? By contrast, is it not true that, in the case of a conditional spending or preemption program, the state's choice set is simply shifted rather than reduced? Prior to the threat, the choice set was (perform, not-perform); subsequent to the threat, the choice set becomes (perform and receive monies, not-perform) or (perform, not-perform and incur preemption). Is there not less of an intrusion on the scope of state choice here than with straight commandeering?

In responding to this objection, we will focus on the case of conditional spending. (Our analysis carries over, *mutatis mutandis*, to the case of conditional preemption; so as to avoid repetition, we will not duplicate the analysis for that case, but rather leave the details to the reader.) Technically, commandeering does not reduce the state official's choice set. It remains physically possible

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¹⁰⁴ See Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum L Rev 267, 419–32 (1998) (arguing that conditional federal spending and preemption, like commandeering, threaten interstate variation).

for the official to refrain from performing the commandeered utterance. But if the mandate to perform is backed by the threat of a harsh sanction, to be imposed personally upon the official, then, for purposes of political-community values, the effect on official choice is virtually equivalent to a physical constraint. That is, the choice for the official shifts from (perform, not-perform) to (perform, not-perform and go to jail) or (perform, not-perform and pay a large personal fine). Given the large personal stakes for the official, it is unlikely that she will choose between the options in a manner that advances intrinsic political values—by giving equal weight to the interests of each citizen, with no special weight for her own interest, and relatedly by sincerely responding to citizen proposals and challenges framed in terms of the public good. As the Court explained in the *Spallone* case, where it distinguished between sanctions directed at a municipality and personal sanctions directed against municipal legislators:

The imposition of sanctions on individual legislators is designed to cause them to vote, not with a view to the interest of their constituents or of the city, but with a view solely to their own personal interests. Even though an individual legislator took the extreme position—or felt that his constituents took the extreme position—that even a huge fine against the city was preferable to [complying with a federal court directive], monetary sanctions against him individually would motivate him to vote to enact the ordinance simply because he did not want to be out of pocket financially. Such fines thus encourage legislators, in effect, to declare that they favor an ordinance not in order to avoid bankrupting the city for which they legislate, but in order to avoid bankrupting themselves.

This sort of individual sanction effects a much greater perversion of the normal legislative process than does the imposition of sanctions on the city for the failure of these same legislators to enact an ordinance.¹⁰⁵

Indeed, it would be unfair to ask that an official, faced with jail or a large personal fine, sacrifice self-concern and thereby permit the process of impartial public deliberation to carry on. Conversely, in the unlikely event that an official were to assume a superhuman attitude of impartial public spiritedness in the face of grave personal threat, and treat that decision as no different from

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¹⁰⁵ *Spallone v United States*, 493 US 265, 279–80 (1990).

the ordinary decision C_0 between (perform, not-perform), then—we want to claim—the values of political community would *not* be diminished.

Consider now a case of commandeering that does not involve large personal stakes for the official decisionmaker. Congress directs state legislators, say, to enact a particular statute, and threatens to impose a \$10 million fine—to be paid from the state treasury—for each year that the legislation is not in force for the entire year. Let us call this the Fine Case. Contrast that with what we shall call the Payment Case: Congress conditions a yearly payment of \$10 million to the state upon the statute's being in force for the entire year. It is December 31. In the Fine Case, the state legislator faces a choice between (enact the statute, not-enact the statute and deplete the state fisc by \$10 million). In the Payment Case, a case of permissible conditional spending, the state legislator faces a choice between (enact the statute and receive a \$10 million federal payment, not-enact the statute). One might say that, in the Fine Case, "extraneous" considerations have been introduced into the pre-threat choice between (enact, not-enact), and that the intrinsic value of the pre-threat choice has been diminished. We deny that this is true; the federal government, by its own actions and utterances, constantly changes the effective choice sets available to state legislators, and unless the federal actions and utterances are independently unconstitutional (say, under ordinary Commerce Clause doctrine), we fail to see how their occurrence amounts to the introduction of "extraneous" or "value-reducing" considerations into state choice-sets. But even if it *were* true, our point here is that precisely symmetrical considerations are introduced into state deliberations in the Payment Case. The state, in that case, no longer faces the baseline choice between (enact, not-enact), but the new choice between (enact and receive funds, not-enact). The two cases differ only in this: in the Fine Case, but not the Payment Case, the federal action in response to the legislators' choice is not an action that the federal government could take unconditionally. But we do not see how, from the perspective of political-community values, that bears on the value or importance of state legislators having this choice to make.

The upshot of this analysis is that the doctrinal line between commandeering and cooperative federalism fails to track the value of political community. Commandeering, as such, no more under-

mines state autonomy—specifically, it no more reduces the scope and value of the choices open to state officials and state citizens—than conditional spending or conditional preemption. What does (or may) track that value is a *cross-cutting* distinction—between threats to the state itself, and personal threats to state officials—that the Court has elsewhere recognized (as in *Spallone*) but specifically rejected in *Printz*.¹⁰⁶

Finally, with respect to the value of tyranny prevention, we concur in Professor Hills's analysis. As Professor Hills crisply puts it, "[E]rosion of political accountability is endemic to all forms of cooperative federalism."¹⁰⁷ Although cooperative federalism statutes and straight commandeering statutes may both reduce accountability, relative to ordinary federal or state statutes directly regulating private persons, the demarcation between cooperative federalism and commandeering cannot be justified in terms of accountability.¹⁰⁸

B. GENERAL APPLICABILITY

In both *New York* and *Printz*, the Court intimated that the inflexible prohibition on commandeering would not extend to federal laws of general applicability. Some such distinction is necessary if the prohibition on commandeering is not to immunize states and state subdivisions from Commerce Clause regulation even more broadly than did the regime of *National League of Cities*, which preceded *Garcia* and protected only integral state functions.¹⁰⁹ An unlimited anticommandeering principle would preclude federal antipollution mandates for municipal trash haulers, minimum wage requirements for state universities, or application of environmental regulations to the furnaces of local police stations.

The distinction between laws of general applicability and those

¹⁰⁶ See 117 S Ct at 2382 (declining to distinguish between federal statute directed at state itself, and federal statute directed at state officers, at least insofar as actions directed are official).

¹⁰⁷ Hills, 96 Mich L Rev at 828 (cited in note 1).

¹⁰⁸ Nor, of course, can it be justified (à la *De Shaney*) in terms of the differential moral significance of state action and state inaction, because, to reiterate, the very point of the Court's exemption for cooperative-federalism schemes is to create a permissible mechanism by which Congress can induce state officials to perform actions.

¹⁰⁹ See *Garcia*, 469 US at 537 (summarizing *National League of Cities* regime).

which are directed at a protected area of state sovereignty echoes other lines of demarcation drawn in constitutional law. The Court's negative Commerce Clause doctrine is centrally focused on the differential treatment of interstate commerce;¹¹⁰ the Free Exercise Clause, as currently construed, is almost exclusively concerned with discrimination against religious actors, and permits their activities to be burdened by generally applicable laws;¹¹¹ "content discrimination" triggers heightened scrutiny under the Free Speech Clause.¹¹² Indeed, in wrestling with the comparable issue of state immunity from federal taxation, Justice Frankfurter championed the position that the primary determination should turn on whether the taxes were of general applicability.¹¹³

But the easy availability of a doctrinal tool does not prove its propriety. The exception for laws of general applicability harbors both difficulties of definition and of justification.

First, the concept of "general applicability" is not pellucid. Is a generally applicable statute simply one written broadly enough to encompass private as well as public entities? In an era of rampant privatization, it is hard to identify many governmental functions that are not carried out by at least some private entities. A law regulating "prisons" would encompass some public and some private entities; likewise a statute regulating "adjudicators." If the Brady Act had applied to "entities with easy access to information about criminal records," rather than "chief law enforcement officer[s],"¹¹⁴ thereby including credit bureaus and private investigators, would that have saved the statute?

The Court could avoid such difficulties by identifying essentially governmental functions: a federal statute targeting such functions, even if it included some private actors, would then be taken as falling within the scope of the anticommandeering prohibition. In-

¹¹⁰ See, for example, *Camp Newfound/Owatonna, Inc. v Town of Harrison*, 520 US 564 (1997).

¹¹¹ See *Employment Division v Smith*, 494 US 872 (1990).

¹¹² See, for example, *Boos v Barry*, 485 US 312 (1988).

¹¹³ *New York v United States*, 326 US 572 (1946) (opinion of Frankfurter). See also *M'Culloch v Maryland*, 17 US 316, 435-36 (1819); *South Carolina v Baker*, 485 US 505, 514-15 (1988). It is somewhat awkward for the defender of *Printz* and *New York* to rely upon the Frankfurter opinion in view of the fact that Justice Rehnquist's opinion for the Court in *National League of Cities* disparaged it as lacking authority. See 426 US at 843 n 13.

¹¹⁴ See 117 S Ct at 2369 (quoting Act).

deed, Justice Scalia's opinion in *Printz* steers toward this approach.¹¹⁵ But distinguishing between governmental and nongovernmental functions is a notoriously tricky business. The Court's difficulties in specifying conceptually or historically "public" activities led to its abandonment of the line in intergovernmental tax immunity cases,¹¹⁶ and constituted one ground for abandoning *National League of Cities*.¹¹⁷ *Printz* itself hardly seemed to involve an essentially governmental function; the chief law enforcement officers purportedly commandeered by the Brady Act were simply required to check their records.

In the alternative, the distinction might turn on whether the federal regulation in question specifically identified the objects of regulation as governmental actors. But here again difficulties abound. The rule in *Gregory v Ashcroft* requires that when Congress seeks to include certain state activities in a regulatory scheme, it must clearly so state.¹¹⁸ Does such a statutory statement make the statute targeted rather than generally applicable? If not, then what about a federal statute that covers both private and public entities, but specifies different duties for the different players?¹¹⁹ Or a statutory amendment that includes state officials in a scheme that formerly excluded them?¹²⁰

Second, it is far from clear why a regulation of general application should be less problematic in terms of the standard federalism values than a targeted regulation. Commentators who are sympathetic to the anticommandeering principle acknowledge that the line between generally applicable and targeted laws is difficult to

¹¹⁵ See *id.* at 2383 n 17 ("The Brady Act does not merely require CLEOs to report information in their private possession. It requires them to provide information that belongs to the State and is available to them only in their official capacity; and to conduct investigation in their official capacity, by examining databases and records that only state officials have access to. In other words, the suggestion that extension of this statute to private citizens would eliminate the constitutional problem posits the impossible.").

¹¹⁶ See *Garcia*, 469 US at 540-43 (discussing tax-immunity cases).

¹¹⁷ See *id.* at 537-47.

¹¹⁸ See notes 10-11 and accompanying text.

¹¹⁹ See, for example, the Americans with Disabilities Act, 42 USC §§ 12131 et seq (1994) (duties applicable to public entities); *id.* §§ 12181 et seq (duties applicable to private entities that operate public accommodations or services).

¹²⁰ See, for example, *Maryland v Wirtz*, 392 US 183 (1968) (upholding amendment to Fair Labor Standards Act that removed exemption for certain government employers).

defend.¹²¹ An imposition uniformly applied to public and private sectors can suppress innovation, impair responsiveness to geographic diversity, and so on, quite as effectively as one precisely targeted at governmental entities.

Nor are more indirect arguments persuasive. The passage of a generally applicable regulation, it might be argued, could signal the existence of a national interest sufficiently important to justify infringing whatever federalism values might obtain. But this argument overlooks the fact that the federal legal system regularly and in wholly noninvidious circumstances imposes duties on public entities that it omits for private parties. Public entities may not discriminate against federally protected labor arrangements either in their provision of benefits or in regulatory advantages;¹²² private entities may choose their own agendas. Persons acting "under color of any [law] of any State" may be sued for violating federal statutory mandates in circumstances where no comparable action is available against private parties.¹²³ Extortion by public officials constitutes a distinct crime.¹²⁴ A variety of considerations, ranging from the unique ability of state officials to frustrate or further national policy, to a desire to acknowledge state priorities, to the unwillingness of state courts to grant relief against public officials, justify this special treatment.

Reciprocally, it could be claimed that generality of application provides the protection of virtual representation; majorities and powerful interests who must themselves live with the results of a

¹²¹ See Hills, 96 Mich L Rev at 916–21 (cited in note 1); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U Colo L Rev 815, 826–27 and n 57 (1994) (arguing that concept of general applicability can be linked to Guarantee Clause, but also stating that "a Supreme Court ruling based squarely on the Guarantee Clause is preferable to one maintaining the distinction *New York* suggested between 'generally applicable laws' and laws aimed specifically at a state").

¹²² See, for example, *Livadas v Bradshaw*, 512 US 107 (1994) (state government may not refuse to prosecute claims of workers who are governed by arbitration clause); *Golden State Transit Corp. v Los Angeles*, 475 US 608 (1986) (local government may not condition franchise renewal upon firm's settlement of strike); *Wisconsin Dept. of Industry, Labor and Human Relations v Gould Inc.*, 475 US 282 (1986) (state government may not refuse to do business with firms that violate federal labor law).

¹²³ See, for example, *Wilder v Virginia Hospital Ass'n*, 496 US 498 (1990) (Section 1983 action for failure to comply with federal reimbursement laws); *Golden State Transit Corp. v Los Angeles*, 493 US 103 (1989) (Section 1983 action for local action that was preempted by NLRA).

¹²⁴ See *Evans v United States*, 504 US 255, 261 (1992) (extortion defined as obtaining property inter alia "under color of official right" pursuant to 18 USC § 1951).

law will be reluctant to permit the federal government to impose onerous regulations. As the Court put the matter in the context of intergovernmental tax immunities, "[W]here a government imposes a nondiscriminatory tax, . . . the threat of destroying another government can be realized only if the taxing government is willing to impose taxes that will also destroy itself or its constituents."¹²⁵ This, indeed, has been the argument of some of the commentators who support the distinction between targeted and generally applicable laws.¹²⁶ But the argument from virtual representation is of dubious value in this context, for the evil that the anticommandeering doctrine purports to prevent is not the total destruction of state governments (they would be useless to enforce federal policy if they were destroyed) but rather their subservience to national policy. Federal regulation can undermine the values that state governments serve—tyranny prevention, political community, innovation and diversity—without literally "destroying" those governments or, more generally, without imposing requirements sufficiently onerous to trigger the generalized outrage posited by virtual representation theorists. To put the point more concretely, we fail to see why a federal requirement that state governments properly find obnoxious would necessarily trigger hostility from private entities who are brought within the scope of the requirement. Indeed, in the case where federal regulation hinders the responsiveness of state governments to geographically diverse citizen preferences, beliefs, etc., one might well expect businesses to be less attuned to the local enthusiasms than public officials.¹²⁷

Finally, in other areas of constitutional law, general-applicability requirements are defended as prophylactic measures to screen out problematic governmental motivation.¹²⁸ At some points, the

¹²⁵ *South Carolina v. Baker*, 485 US 505, 525–26 n 15 (1988).

¹²⁶ See, for example, D. Bruce La Pierre, *Political Accountability in the National Political Process—the Alternative to Judicial Review of Federalism Issues*, 80 Nw U L Rev 577, 648–51 (1985); Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and The Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 Vand L Rev 1355, 1385, 1411–12 (1993).

¹²⁷ Thus, for example, Professor Lessig recounts that many southern white business owners in fact supported the Civil Rights Act of 1964 as a means of allowing them to maximize profits without offending local norms of racial subordination. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U Chi L Rev 943, 965–66 (1995).

¹²⁸ The content-discrimination component of free speech doctrine is defended this way. See, for example, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 227–33 (1983).

Court in *Printz* seems to defend the general applicability component of anticommandeering doctrine this way.¹²⁹ But the degree to which federal regulations infringe upon the values of federalism seems to be wholly independent of the motives or intentions of the officials who adopt the regulations. At best, motive or intention may be relevant within an expressive account of the anticommandeering doctrine—an account that we consider in Part V below.

C. ADJUDICATION

The third demarcation explicitly drawn by the Court in *Printz* and *New York* concerns the nature of the commandeered function. The federal government may permissibly commandeer the performance of judicial functions by state officials, but it may not compel them either to legislate or to undertake the variety of tasks best understood as executive rather than judicial (e.g., the investigative tasks at issue in *Printz* itself). *Printz* made clear that the line lay between adjudication and other functions, not between legislation and other functions: “*Testa [v Katt]* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause (‘the Judges in every State shall be bound [by federal law]’). . . . [T]hat says nothing about whether state executive officers must administer federal law.”¹³⁰ Although the investigative, law-enforcement function commandeered by the Brady Act in *Printz* was not legislative, neither was it judicial, and therefore directing state officials to perform that function was unconstitutional. *Printz* also stated explicitly that the line was a functional one: state officials who were not judges were nonetheless subject to commandeering, insofar as they performed adjudicatory functions.

It is within the power of the States, as it is within the power of the Federal Government, to transfer some adjudicatory functions to administrative agencies, with opportunity for subsequent judicial review. But it is also within the power of Congress to prescribe, explicitly or by implication (as in the legisla-

¹²⁹ “But where, as here, it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a ‘balancing’ analysis is inappropriate.” *Printz*, 117 S Ct at 2383.

¹³⁰ Id at 2381 (second alteration in original).

tion at issue in *FERC v. Mississippi*), that those adjudications must take account of federal law.¹³¹

Evan Caminker, a prominent scholarly critic of *Printz*, has denied a textual warrant for the Court's distinction between judicial and nonjudicial functions.¹³² Professor Caminker has argued, persuasively, that there is no specific basis in the Supremacy Clause for the judicial/nonjudicial distinction, and we would add that there is no specific textual basis for that distinction anywhere else in the Constitution.¹³³ On the other hand, Caminker has not shown, nor does he purport to show, that the text of the Constitution specifically precludes this demarcation. If, for example, the demarcation were justified in light of certain federalism values, then that demarcation could be constitutionally justified, insofar as those values figure in constitutional adjudication (say, via the Tenth Amendment).

Can the judicial/nonjudicial line be thus defended, in light of some or all of the values we described in Part I? Consider two alternate federal statutes. One statute, *D*, directs a state regulatory agency (e.g., an environmental agency, or a health-and-safety agency) to enact and enforce certain rules in a particular area, and preempts all other rules and all private causes of action in that area. A counterpart statute, *D'*, directs the agency to entertain specified causes of action, which are granted to private citizens (e.g., to persons harmed by pollution, or to injured workers), and preempts all rules and all other causes of action in that area. If *Printz* had declined to draw a demarcation between judicial and nonjudicial functions, then both *D* and *D'* would count as unconstitutional commandeering. *D* imposes an affirmative obligation upon state regulators, and so does *D'*. For *D* unconditionally requires the regulators to issue rules and initiate prosecutions, while *D'* unconditionally requires them to issue adjudicative orders conferring benefits (damages or injunctive relief) upon successful

¹³¹ *Id.* at 2381 n. 14 (citation omitted).

¹³² See Caminker, 1997 Supreme Court Review at 212–15 (cited in note 1).

¹³³ In particular, the fact that Article III permits Congress to refrain from establishing lower federal courts may lend textual support to the exclusion of state judges from the anticommandeering rule, but not to the further exclusion of state officials who are not judges but exercise the judicial function, such as the regulators in *FERC*. See *Printz*, 117 S. Ct. at 2371 (relying upon Article III to justify imposition of federal obligations upon state judges).

federal claimants, whose claims the regulators are, in turn, unconditionally required to adjudicate. But, we take it, *D'* is now constitutionally permissible.¹³⁴

Does statute *D*, in fact, offend federalism values more gravely than statute *D'*? We think not. Statute *D* imposes a federal policy upon the states, by a combination of preemption plus a requirement that the agency issue and enforce certain rules. Statute *D'* imposes a federal policy upon the states, by a combination of preemption plus a requirement that the agency entertain certain causes of action. It is very hard to see how *D* and *D'* differ, *ceteris paribus*, with respect to the values of responsiveness to diversity and innovation. If, for example, the provisions of *D'* defining the commandeered causes of action are quite open-ended, then there will be a fair bit of room for interstate variation here. Then again, if the provisions of *D* defining the commandeered rules are quite open-ended, there will be analogous room for variation. To put the point another way: Commandeering statutes such as *D* and *D'* differentially facilitate interstate variation insofar as they differentially delegate authority to the states; but it is hard to see how two statutes that delegate an equal amount of authority should differentially facilitate variation just by virtue of the function (legislative or executive versus judicial) that the statutes commandeer.¹³⁵

Consider next the tyranny-prevention function of federalism. Here, the distinction between judicial and nonjudicial functions cuts the wrong way, at least with respect to certain kinds of tyrannies: the tyranny of organized groups, and official tyranny. There is a well-developed literature, both theoretical and empirical, for the proposition that agency policy-making through adjudication is

¹³⁴ *D'* is, in fact, loosely based on the statute upheld in *FERC v. Mississippi*. See 456 US at 759–61. Insofar as *D'* simply instructs an existing agency with adjudicatory authority to entertain federal causes of actions where the agency has jurisdiction over “analogous” state claims, it would not (we take it) be constitutionally impermissible despite the fact that it constitutes commandeering. See note 17; *FERC*, 456 US at 760 (upholding requirement that state regulatory commissions can comply with by adjudicating claims, over challenge by Mississippi Public Service Commission, because “[t]he Mississippi Commission has jurisdiction to entertain claims analogous to those granted by [the federal statute], and it can satisfy [the statutory] requirements simply by opening its doors to claimants”).

¹³⁵ Notably, the Court in *Printz* declined to draw a demarcation, either way, along the dimension of delegation. See 117 S. Ct. at 2382 (rejecting argument that “requiring state officers to perform discrete, ministerial tasks specified by Congress does not violate the principle of *New York* because it does not diminish the accountability of state or federal officials”).

less salient to the general public, and thus more likely to facilitate the "capture" of agencies by organized groups or bureaucratic interests, than the relatively high-visibility process of rule making.¹³⁶ The rules impermissibly commandeered by statute *D* will be more salient, not less salient, than the adjudicatory orders permissibly commandeered by statute *D'*.

The defender of *Printz* might object here that just because the rules are more salient, they are more likely to (unjustifiably) reflect majority interests within the state. The judicial/nonjudicial distinction cuts the wrong way with respect to interest-group and official tyranny, but the right way with respect to majoritarian tyranny—or so the defense of *Printz* might go. While there is some plausibility to this line of argument, we think that it faces two difficulties: (a) the difficulty of making commensurate different tyranny types that we mentioned in Part I, and (b) the difficulty that the tyranny types most relevant to constitutional doctrines that limit national power would seem to be official or minoritarian tyranny, not majoritarian tyranny, since a unitary national government is particularly prone to the first two types of tyranny, not the last.¹³⁷

Finally, consider the value of political community. Do *D* and *D'* differ with respect to this value? Note, crucially, that in each case the commandeered officials are state agency officials—that is, officials who are typically unelected. Thus it is hard to see how *D* and *D'* differentially impede the flourishing of a state political community—at least on the standard view that it is via electoral politics, paradigmatically, via the lawmaking activities of elected state legislators, that intrinsic political values are fostered by constitutional federalism. To be sure, the state agency rule makers and prosecutors in *D* are formally and informally subject to elected officials (the state governor and the state legislators), but the same is true, or may be true, of the state agency adjudicators in *D'*. Notably, nothing in *Printz* restricts the applicability of the judicial-function category to politically insulated adjudicators. For example, it is constitutionally permissible for the federal government

¹³⁶ See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin L Rev 59, 59–60 (1995) (summarizing benefits of rule making).

¹³⁷ See Rapaczynski, 1985 Supreme Court Review at 385–86 (arguing that federalism is not tyranny-reducing with respect to majoritarian tyranny, except for the oppression by the national government of geographically defined minorities) (cited in note 24).

to require that state commissioners adjudicate federal claims and defenses—as indeed the federal government did in the statute upheld in *FERC v Mississippi*—and *Printz* explicitly preserves this aspect of *FERC*, even though commissioners are notoriously not insulated from electoral politics.¹³⁸

IV. THE SOURCE OF FEDERAL POWER: THE RECONSTRUCTION AMENDMENTS AS BOUNDARIES

The cases in which the Court has enunciated and elaborated the anticommandeering principle have exclusively concerned statutes adopted under the Commerce Clause. As a result, there is as yet no authoritative guidance concerning how that principle applies to statutes grounded in other grants of congressional power. Prior commentators have generally viewed this as an open question, though the majority position has been a tentative conclusion that statutes adopted pursuant to the Thirteenth, Fourteenth, and Fifteenth Amendments will fall outside of the prohibition on commandeering.¹³⁹

In our view, the hesitancy of the commentators is misplaced, for a demarcation between federal statutes grounded on the Reconstruction Amendments, and federal statutes grounded on the Commerce Clause or other Article I powers—unlike the demarcations discussed in Parts II and III—is well grounded in constitutional history, judicial doctrine, and legislative practice, as well as being justified by the values of constitutional federalism. We believe, however, that the fuzziness of this demarcation—tied as it is to the Court's fuzzy doctrine, articulated in the *Boerne* case, concerning the scope of the power granted to Congress by the Reconstruction Amendments—will make the demarcation, like its less theoretically satisfying cognates, a shaky foundation for a workable federalism jurisprudence.

¹³⁸ A classic article is Barry R. Weingast and Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J Pol Econ 765 (1983).

¹³⁹ See Caminker, 95 Colum L Rev at 1006 n 13, 1087 n 325; Hills, 96 Mich L Rev at 888–89 (both cited in note 1); Merritt, 88 Colum L Rev at 45–46 (cited in note 24); Merritt, 65 U Colo L Rev at 832 (cited in note 121). Professor Caminker appears recently to have gained confidence in the view that the anticommandeering principle is bounded by Section 5 of the Fourteenth Amendment as well by the parallel enforcement provisions of the Thirteenth and Fifteenth Amendments. See Caminker, 1997 Supreme Court Review at 238–42 (cited in note 1).

A. HISTORY, DOCTRINE, AND PRACTICE

The proposition that the Reconstruction Amendments are exceptional, for federalism purposes, is not newly minted for the anticommandeering cases. The Supreme Court has long held that legislation adopted pursuant to the Reconstruction Amendments stands on a uniquely strong ground vis-à-vis the claims of federalism.

The issue was fully ventilated in *Ex Parte Virginia*,¹⁴⁰ where a decisive majority of the Court rejected claims that the enforcement power of Congress under Section 5 of the Fourteenth Amendment was constrained by considerations of state autonomy. The case involved a Virginia judge who had been indicted and arrested pursuant to a federal statute for excluding African Americans from service as grand and petit jurors, and who filed a petition for writ of habeas corpus. Joined by a similar petition by the state of Virginia itself, the judge claimed that the statute unconstitutionally intruded on state autonomy in violation of “the rights of the state of Virginia.”¹⁴¹ The argument persuaded two justices, Field and Clifford, who—relying on antebellum conceptions of federalism and cases such as *Kentucky v Dennison*—argued that nothing

could have a greater tendency to destroy the independence and autonomy of the states; reduce them to a humiliating and degrading dependence upon the central government . . . than the doctrine asserted in this case, that Congress can exercise coercive authority over judicial officers of the states in the discharge of their duties under state laws. It will be only another step in the same direction towards consolidation, when it assumes to exercise similar coercive authority over governors and legislators of the States.¹⁴²

Seven members of the Court, however, rejected the attack on the federal statute. They did not deny the previous constraints of fed-

¹⁴⁰ 100 US 339 (1879).

¹⁴¹ *Id.* at 341.

¹⁴² *Id.* at 358 (Field dissenting). Justice Field continued, in language reminiscent of some contemporary commentators, “No legislation would be appropriate [under Section 5] which should . . . conflict with the implied prohibitions upon Congress. They are as obligatory as the express prohibitions. The Constitution, as already stated, contemplates the existence and independence of the States in all their reserved powers.” *Id.* at 361. Justices Field and Clifford reiterated their position in dissent from *Strauder v West Virginia*, 100 US 303 (1879).

eralism, but recognized that the framing and ratification of the Reconstruction Amendments had effected a large change in federal-state relations. According to the Court:

[It does not] make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty . . . . Indeed, every addition of power to the general government involves a corresponding diminution of the governmental power of the States. It is carved out of them.¹⁴³

This conception of the Reconstruction Amendments as a pro tanto diminution of the immunities otherwise accorded to the states has remained firm in the face of succeeding waves of enthusiasm for states' rights. *Ex Parte Virginia* has been regularly invoked by the Court in support of the proposition that the existence or threat of violations of those amendments justifies federal infringement of state sovereignty.¹⁴⁴ Most recently, during the last period of revival of enforceable federalism constraints on the national government—the *National League of Cities* period—the Court repeatedly confirmed that constraining doctrines would be qualified by the Reconstruction Amendments. In school desegregation and other institutional reform cases, federal decrees intruded into the prerogatives of state officials in ways that would seemingly¹⁴⁵ constitute commandeering: the officials were commanded affirmatively to exercise their sovereign authority. The Court, however, rejected Tenth Amendment challenges to such decrees.¹⁴⁶

¹⁴³ 100 US at 346.

¹⁴⁴ See, for example, *Mitchum v Foster*, 407 US 225, 240, 242 (1972); *South Carolina v Katzenbach*, 383 US 301, 325–27 (1966).

¹⁴⁵ We say “seemingly,” given the possible exception from the anticommandeering doctrine for certain affirmative remedial duties. See note 80.

¹⁴⁶ See *Missouri v Jenkins*, 495 US 33, 55 (1990) (“The Fourteenth Amendment . . . was avowedly directed against the power of the States, and so permits a federal court to disestablish local government institutions that interfere with its commands.”) (internal quotations and citations omitted); *Milliken v Bradley*, 433 US 267, 291 (1977) (“[T]here is no merit to petitioners’ claims that the relief ordered here violates the Tenth Amendment and general principles of federalism.”); *Monell v Department of Social Services*, 436 US 658, 690 n 54 (1978) (“There is certainly no constitutional impediment to municipal liability [under Section 1983 for a violation of the Fourteenth Amendment] . . . . *National League of Cities v Usery* is irrelevant to our consideration of this case.”).

Similarly, despite increasingly solicitous regard for “the Eleventh Amendment, and the principle of state sovereignty which it embodies,”¹⁴⁷ the Court has remained clear that in the exercise of its power under the Reconstruction Amendments, Congress may impose otherwise impermissible liability on the states in federal courts. In *Fitzpatrick v Bitzer*, Justice Rehnquist, writing for seven members of the Court, quoted *Ex Parte Virginia* at length to support the holding that the Fourteenth Amendment constituted an “expansion of Congress’ powers—with the corresponding diminution of state sovereignty” sufficient to permit Congress to impose damage liability on states notwithstanding the Eleventh Amendment.¹⁴⁸ The power of Congress under Section 5 to impose liability on states has since remained a staple of the Supreme Court’s Eleventh Amendment jurisprudence.¹⁴⁹

Under settled doctrine, Congress may invade state sovereignty by appropriate legislation designed to protect against violations of the Reconstruction Amendments. The leading case is *City of Rome v United States*,¹⁵⁰ where the Court reviewed the application of the preclearance provisions of the Voting Rights Act to changes in municipal governance, though the changes did not in themselves (the Court assumed) violate the Fifteenth Amendment. The City of Rome argued that *National League of Cities* precluded federal intervention into the integral state function of self-government by popular election, and indeed it is difficult to imagine what function lies closer to the heart of state autonomy. Yet the Supreme Court rejected the claim on the basis of *Ex Parte Virginia* and *Fitzpatrick v Bitzer*.¹⁵¹

¹⁴⁷ *Fitzpatrick v Bitzer*, 427 US 445, 456 (1976).

¹⁴⁸ *Id.* at 455.

¹⁴⁹ See *Idaho v Coeur d’Alene Tribe*, 117 S Ct 2028, 2039 (1997) (opinion of Kennedy); *Seminole Tribe of Fla. v Florida*, 517 US 44, 59, 65 (1996); *Missouri v Jenkins*, 491 US 274, 279 (1989); *Dellmuth v Muth*, 491 US 223, 227 (1989); *Will v Michigan Dept of State Police*, 491 US 58, 66 (1989); *Atascadero State Hosp. v Scanlon*, 473 US 234, 238 (1985); *Pennhurst State School & Hosp. v Halderman*, 465 US 89, 99 (1984); *Maher v Gagne*, 448 US 122, 132 (1980); *Hutto v Finney*, 437 US 678, 693 (1978); *Pennsylvania v Union Gas Co.*, 491 US 1, 41 (1989) (Scalia concurring and dissenting), overruled, *Seminole Tribe of Fla. v Florida*, 517 US 44 (1996).

¹⁵⁰ 446 US 156 (1980).

¹⁵¹ *Id.* at 178–80. The dissenters in *City of Rome* did not disagree with the proposition that Congress may infringe state autonomy so as to vindicate rights under the Reconstruction Amendments, but rather rejected the majority’s view of the scope of Congress’s enforcement power. See *id.* at 200–05 (Powell dissenting); *id.* at 209–19 (Rehnquist dissenting).

... *Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation." Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. Applying this principle, we hold that Congress had the authority to regulate state and local voting through the provisions of the Voting Rights Act.¹⁵²

The Court has since reiterated that "when properly exercising its power under § 5 [of the Fourteenth Amendment], Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers."¹⁵³

It is true that the Court, in our newest period of revived federalism constraints, has not squarely held that the Reconstruction Amendments constitute an exception to the current, constraining doctrines—namely, the anticommandeering doctrines announced by *Printz* and *New York*. But last Term's opinion in *Yeskey* clearly suggests as much. The Court's language in *Yeskey* implies that the anticommandeering doctrines limit only legislation adopted pursuant to the Commerce Clause, and are inapplicable to a federal statute appropriately grounded in the Fourteenth Amendment.¹⁵⁴

¹⁵² *Id.* at 179–80.

¹⁵³ *EEOC v. Wyoming*, 460 US 226, 243 n 18 (1983). See *id.* at 259 (Burger dissenting); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 US 264, 287 n 28 (1981). To be sure, in *Gregory v. Ashcroft*, the Court observed that "this Court has never held that the Amendment may be applied in complete disregard for a State's constitutional powers," 501 US at 468, but *Yeskey* reads *Ashcroft* as a case involving canons of statutory construction. See 118 S Ct at 1954. The Court's most recent word on the subject is to reaffirm that: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Boerne*, 117 S Ct at 2163 (quoting *Fitzpatrick v. Bitzer*, 422 US at 455). As this article went to press, the Supreme Court, in a Voting Rights Act case, reiterated the position that the "Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States" and repeated the language quoted above from *Boerne*. *Lopez v. Monterrey County*, 119 S Ct 693, 703–4 (1999).

¹⁵⁴ In declining to address the merits of the constitutional challenge to the ADA, the Court commented: "We do not address another issue presented by petitioners: whether application of the ADA to state prisons is a constitutional exercise of Congress's power under either the Commerce Clause, compare *Printz v. United States* with *Garcia v. San Antonio Metropolitan Transit Authority*, or § 5 of the Fourteenth Amendment, see *City of Boerne v. Flores*." 118 S Ct at 1956 (citations omitted). A fair implication of the comment is that *Printz* limits legislation adopted pursuant to the Commerce Clause, while legislation adopted pursuant to the Fourteenth Amendment is exempt from that limit if appropriate under the standards of *Boerne*. To be sure, however, a dictum articulated in the process of refusing to address a substantive issue is not hindering precedent.

Given the deep roots of this position, and the reliance of the Court in *Printz* on “historical understanding and practice, . . . the structure of the Constitution, and . . . the jurisprudence of this Court”¹⁵⁵ as the elements used to identify the “‘essential postulate[s]’”¹⁵⁶ of federalism, there is every reason to believe that the Court will confirm this suggestion in a definitive holding when the issue is squarely presented.

A skeptic might respond that interventions under the Fourteenth Amendment do not require commandeering of the sort condemned by *New York* and *Printz*. One might argue that, since the Constitution protects only against government action rather than government inaction, the only legislation required to implement the Fourteenth Amendment will impose negative duties and will thus be a permissible exercise of the federal preemption power. But such a response fails to account both for the scope of well-settled constitutional doctrine and for the legitimacy of congressional action under the Fourteenth Amendment to prevent, as well as to remedy, constitutional violations.

The point is clear with respect to the Equal Protection Clause. An invidious refusal to provide protection or benefits is as much an invasion of the constitutional mandate as an invidious imposition of punishment. In theory, the former refusal can be cured by refusing to provide benefits to anyone; but in practice, such a refusal may be out of the question. Thus equality norms will often, in effect, require affirmative action by the state. To take one example of particular salience to the framers of the Fourteenth Amendment: the Reconstruction Congress was concerned with the differential failure to enforce state laws against the Ku Klux Klan.¹⁵⁷ Obviously, a state will not come into compliance with the Fourteenth Amendment and its implementing statutes by refusing to enforce state laws against anyone; rather, state officials will be required to take affirmative and authoritative action to protect African Americans and Union sympathizers.¹⁵⁸

¹⁵⁵ 117 S Ct at 2370.

¹⁵⁶ Id at 2376 (quoting *Principality of Monaco v Mississippi*, 292 US 313, 322 (1934)) (alteration in original).

¹⁵⁷ See *Monroe v Pape*, 365 US 167, 171–83 (1961) (describing this concern), overruled on other grounds, *Monnell v Department of Social Services*, 436 US 658 (1978).

¹⁵⁸ This analysis depends in part on a matter the Court has not yet addressed: the tightness of the connection between the federal directive and action by state officials, necessary to constitute commandeering. It is as yet unclear whether a directive constitutes impermissible

With respect to the Due Process Clause and incorporated rights, the objection has somewhat greater force. But even in the area of due process, constitutional doctrine not infrequently requires state actors to take affirmative measures to live up to constitutional norms,¹⁵⁹ and in such cases an exception for Fourteenth Amendment obligations will be necessary. Moreover, in all areas, it is entirely plausible that Congress may legitimately impose some prophylactic affirmative obligations.¹⁶⁰

The Court's failure to recognize a Reconstruction-Amendment exception to the anticommandeering principle would disrupt large segments of our current legal structure. A wide array of federal legislation is premised on the proposition that, in implementing the Reconstruction Amendments, Congress can impinge on the way that state entities choose to structure their internal processes. Some of this legislation is contained in conditional grants like Title VI (although even here the capacity of Congress to allow damage actions in defiance of the Eleventh Amendment is of some relevance).¹⁶¹ But much other legislation—most prominently Title VII¹⁶² and the voting rights legislation sustained in *City of Rome*, as well as municipal responsibility for deliberate indifference to constitutional violations¹⁶³—also requires the states to take affir-

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commandeering only if it logically entails state action, or more broadly if such action is effectively compelled. The facts of both *Printz* and *New York* suggest the broader view, which would give the anticommandeering doctrine wider scope and require more insistently the exception for equal protection norms.

¹⁵⁹ Thus, for example, due process can obligate a state to provide medical services to individuals in state custody, see *West v. Atkins*, 487 US 42 (1988); *City of Revere v. Mass. General Hosp.*, 463 US 239 (1983); *Youngberg v. Romeo*, 457 US 307 (1982); *Estelle v. Gamble*, 429 US 97 (1976) (Eighth Amendment, applied against states via due process component of Fourteenth Amendment); and to provide retroactive relief to entities from which unlawful taxes have been collected, see *Reich v. Collins*, 513 US 106 (1994); *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 US 18 (1990). Although the federal imposition of certain affirmative remedial obligations upon the states arguably constitutes permissible preemption, quite apart from any special exception from the anticommandeering doctrine for statutes grounded upon Section 5 of the Fourteenth Amendment, see note 80, a Section 5 exception would surely be needed to accommodate the *Youngberg* line of cases.

¹⁶⁰ Although the Court in *Boerne*, discussed in Part IV.C., limited the scope of congressional power under Section 5, *Boerne* also affirmed that some prophylactic legislation is authorized by that provision. See, for example, 117 S. Ct. at 2163–64.

¹⁶¹ 42 USC § 2000d-7 authorizes damage actions against state entities under various federal civil rights statutes including Title VI, notwithstanding the strictures of the Eleventh Amendment. See *Franklin v. Gwinnett County Public Schools*, 503 US 60, 72 (1992).

¹⁶² See *Fitzpatrick v. Bitzer*, 427 US 445, 448 n.2 (1976) (discussing 1972 amendments, extending Title VII to public employers).

¹⁶³ See *City of Canton v. Harris*, 489 US 378 (1989).

mative measures to comply with federal civil rights mandates. The Court in *Yeskey* virtually invited a properly raised challenge to the provisions of the Americans with Disabilities Act that require state accommodation of the needs of handicapped individuals, but such a challenge could not be sustained without overturning large elements of the federal civil rights regime.¹⁶⁴

B. JUSTIFICATION

The question remains whether a distinction between Congress's powers under the Reconstruction Amendments and Congress's powers under Article I can be justified. The proposition that Congress must have the authority to override putative state-sovereignty constraints, pursuant to its powers under the Reconstruction Amendments, is perfectly consistent with the proposition that Congress should also have such authority pursuant to its powers under the Commerce Clause and the other power-conferring provisions of Article I. After all, although the provisions of the Fourteenth Amendment "by their own terms embody limitations on state authority,"¹⁶⁵ the Commerce Clause has also been understood since *Gibbons v. Ogden*¹⁶⁶ to limit state authority, and the Supremacy Clause explicitly mentions the states. Nonetheless, we believe that a distinction between the Reconstruction Amendments and Article I, for purposes of federalism constraints on the national government, is indeed justified by federalism values.

Innovation and diversity. A capacity of state government to experiment with the rights protected by the Fourteenth Amendment¹⁶⁷

¹⁶⁴ To the extent one can read tea leaves, the ADA might well be sustained against such a challenge. The Court denied certiorari after *Yeskey* in *Armstrong v. Wilson*, a prison case where the Ninth Circuit rejected a plain-statement challenge to the entry of a structural injunction under the ADA, and *Clark v. California*, which held that the ADA was a legitimate exercise of congressional power under Section 5 of the Fourteenth Amendment and thus properly abrogated the states' Eleventh Amendment immunity. See *Armstrong v. Wilson*, 124 F3d 1019 (9th Cir 1997), cert denied, 118 S Ct 2340 (1998); *Clark v. California*, 123 F3d 1267 (9th Cir 1997), cert denied, 118 S Ct 2340 (1998). While this article was in press, the Court specifically amended an order granting certiorari to exclude the question of whether the ADA exceeds congressional powers under Section 5 of the Fourteenth Amendment. *Olmstead v. L.C.*, 119 S Ct 633 (1998).

¹⁶⁵ *Fitzpatrick v. Bitzer*, 427 US at 456.

¹⁶⁶ 22 US 1 (1824).

¹⁶⁷ For the sake of analytic clarity and simplicity, the following discussion focuses on the distinction between Section 5 of the Fourteenth Amendment and the Commerce Clause; but we believe that our arguments can be generalized to support a distinction between all of the enforcement provisions of the Reconstruction Amendments and all of Congress's Article I powers.

cannot rest on the usual federalist arguments about state innovation and responsiveness. The case for interstate variation is usually framed in terms of the maximization of preference satisfaction (or, more generally, the maximization of good consequences).¹⁶⁸ A system in which constituent preferences are better satisfied is, *ceteris paribus*, taken to be a superior one; and, at this level, all preferences are taken to be pretty much equal. In short, the normative presuppositions underlying the innovation and diversity arguments for federalism, as these arguments are usually framed, are straightforwardly consequentialist. And the political economy of Commerce Clause legislation fits nicely with these consequentialist presuppositions. Such legislation is, for the most part, the product of “low” or “ordinary” politics.

By contrast, a Section 5 determination is (usually) a matter of “high politics.” It purports to implement basic rights that trump (ordinary) measures of good or bad consequences. Indeed, after *Boerne*, legislation grounded upon Section 5 must be commensurate with a threatened or past violation of the Constitution recognized by the Court itself.¹⁶⁹ Whereas Commerce Clause statutes may serve any plausible account of the national interest, statutes under the Fourteenth Amendment must be keyed to preserving the rights of individuals under the Due Process or Equal Protection Clauses.

The degree to which citizen preferences are satisfied by such statutes, or to which they maximize good consequences, is not the relevant criterion. Our system of constitutional federalism does not contemplate that Americans should lose human rights embedded in our national Constitution when they travel from state to state,¹⁷⁰ and states may not in general legitimately act on the proposition that they would prefer not to enforce national norms of equality and liberty. The “privileges” and “immunities” of citizenship are national, not local.

To be sure, one might argue that a decision by state officials to decline compliance with national mandates is a potentially important judgment that should be grappled with by the national polity

¹⁶⁸ For a clear example, see McConnell, 54 U Chi L Rev at 1493–94 (cited in note 24).

¹⁶⁹ See Part IV.C.

¹⁷⁰ States may, pursuant to their own constitutions, statutes, or case law, protect these interests to a greater degree than the national norms require, but they may not fall below the national baseline.

in making appropriate decisions about how best to realize constitutional aspirations.¹⁷¹ This argument is not without force, but we find it ultimately unpersuasive.

First, it is worth considering exactly who the participants in the dialogue are likely to be. To the extent that the anticommandeering doctrine protects only against requiring state or local legislatures to adopt statutes according to federal design, the argument seems plausible. Legislatures are potential coauthors of an ongoing constitutional specification, and the doctrine parallels the Court's reluctance to allow state and local legislators to be sued for adopting unconstitutional laws.¹⁷² Just as legislative immunity can be defended as a means of allowing state and local challenges and constitutional dialogue regarding controversial decisions of the Court, the ability of state and local legislatures to refuse to participate in congressional interpretations of the Constitution may be salutary. But, as currently framed, the anticommandeering principle is hardly so limited. After *Printz*, it includes every state nonjudicial official who exercises governmental power, and there is reason to doubt whether the constitutional understanding of the sheriff's deputy in Boise, Idaho, the welfare caseworker in New York, and the librarian in Huntsville, Alabama, carries the same normative force as the Kentucky and Virginia Resolutions.¹⁷³ Just as the Court declines to extend immunity to such executive officials for defiance of constitutional norms under Section 1983, there is good reason to refuse them the immunity of the anticommandeering doctrine.¹⁷⁴

Second, since every state nonjudicial official has license to participate in the dialogue in question, the "discussion" is likely to be less than a focused interaction on matters of constitutional prin-

¹⁷¹ See, for example, Barry Friedman, *Dialogue and Judicial Review*, 91 Mich L Rev 577 (1993); Robert A. Burt, *The Constitution in Conflict* (Belknap, 1992); Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton U Press, 1988); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv L Rev 4 (1983).

¹⁷² See cases cited in note 65.

¹⁷³ See David Yassky, *Eras of the First Amendment*, 91 Colum L Rev 1699, 1712 (1991) (describing Kentucky and Virginia Resolutions).

¹⁷⁴ See Adler, 145 U Pa L Rev at 813–44 (cited in note 45) (arguing that judicial review of agency decisions may not be countermajoritarian even if judicial review of statutes is); Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 Wm & Mary Bill of Rts J 427, 506–08 (1997) (arguing that street-level bureaucrats are not likely to be good constitutional decision makers).

ciple. When every such official may demand her reservation price as the condition of participating in a federal program, what emerges is a market that measures the desire of state officials to resist national norms. Since these norms represent judgments by the national polity that the states are inadequately protecting the rights of their minorities in the first place, it is no surprise that state officials disagree. The strength of their disagreement is less than a persuasive ground for rethinking national priorities.

Finally, the variation that will emerge from normative dialogue by states has costs. One of the boasts of America in the aftermath of the Civil War is that all have identical rights of national citizenship. The Fourteenth Amendment rejected the proposition in *Dred Scott*¹⁷⁵ that national rights are derived from state citizenship. Section 5 legislation purports to provide the benefits of the Fourteenth Amendment to all the citizenry; the interstate equality of constitutional rights, and of statutory rights that enforce them, is, we suggest, in part what constitutes the United States as a *national* political community.

Tyranny prevention. In the area of Commerce Clause legislation, the outcome of a legitimate state political process may provide a locus of justifiable resistance to national tyranny. A tyrannical national initiative would, on this theory, be met not with armed resistance, but with the increased costs, both political and practical, that come from determined noncooperation by state governments.¹⁷⁶ But the theory rests on the premise that the state decision of noncooperation is the outcome of a legitimate process—specifically, in this context, a process that is less likely to be unjustifiably responsive to the interests of particular groups, that is, “tyrannical.” The theory does not plausibly extend, for example, to trash haulers who wish passively to resist the Resource Conservation and Recovery Act. The “double security” claim is not a brief for anarchy, but for countervailing legitimate public power.

Unlike Commerce Clause legislation, the mandates of the Fourteenth Amendment set the parameters of what constitutes a legitimate polity. To the extent that constitutional provisions can be

¹⁷⁵ *Scott v Sandford*, 60 US 393 (1857).

¹⁷⁶ Consider the unsuccessful efforts by New York City to invoke *Printz* in refusing to cooperate with federal anti-immigrant initiatives. *City of New York v United States*, 971 F Supp 789 (SDNY 1997).

clearly characterized as protecting the elements of a functioning democracy, the point is obvious. A decision made by a state entity that fails to abide by baseline notions of equality and political participation cannot be credited with resisting national tyranny. Where it undercuts the very norms that block the capture of state governments by powerful factions, state resistance to national mandates abets tyranny rather than reducing it.

The harder case arises where the constitutional rights Congress seeks to enforce are not quite so directly connected with political participation.¹⁷⁷ Consider, for example, the obligation imposed by the Americans with Disabilities Act to affirmatively accommodate citizens with disabilities who seek services from state authorities.¹⁷⁸

The legitimacy of such interventions arises from the nature of legislation under the Fourteenth Amendment. As we noted earlier, in federal-state conflicts there are cross-cutting risks of tyranny: a failure of federal intervention may permit state tyranny, but imposition of federal determinations risks national tyranny. In the case of Commerce Clause legislation, nothing in the nature of the Commerce Clause doctrine suggests that such legislation will systematically represent anything more than the desires of a national majority. By contrast, after *Boerne*, proponents of legislation enacted under Section 5 of the Fourteenth Amendment must persuade a court that the legislation is commensurate with the requirements of the Fourteenth Amendment.

At a minimum, then, where the federal courts conclude that federal intervention is justified under *Boerne*, the probability of national tyranny is substantially diluted. Further, to the extent that constitutional rights, albeit not protective of the democratic process itself, are nonetheless targeted against tyranny in the sense that they prohibit outcomes likely to be the result of unjustified responsiveness to particular groups or persons—the Takings Clause is an example—then a Section 5 statute will be doubly different from the ordinary Commerce Clause statute. In such a case, the risk of national tyranny will be lower, and the risk of state

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¹⁷⁷ Of course, some commentators claim that large elements of the Bill of Rights are in fact crucially linked to the preservation of a legitimate political process. See, for example, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harv U Press, 1980); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131 (1991).

¹⁷⁸ See 42 USC §§ 12131 et seq (1994).

tyranny will be higher, as compared to the case where Congress is simply operating under the Commerce Clause.

Political community. The final federalist value we have highlighted prizes state decision making because of the intrinsic value of democratic politics. But the point we made above about the role of the Reconstruction Amendments in defining political legitimacy can be repeated here. To the extent that congressional determinations under Section 5 implement constitutional norms that define political legitimacy, countervailing determinations by states do not promote the value of political community. There is nothing intrinsically valuable or important about citizen “participation” in state institutions that fail to abide by baseline, legitimacy-defining norms of equality and due process. And although, with respect to other kinds of constitutional rights, there may in fact be intrinsic, democratic values realized by the process of state dissent from federal statutes enforcing such rights under the Fourteenth Amendment, we hope to have shown here how such statutes are sufficiently different from straight Commerce Clause statutes—with respect to the remaining federalism values of innovation, diversity, and tyranny prevention—to warrant a general exception from the anticommandeering doctrine.

C. LIMITS

The Fourteenth Amendment is capacious. The Due Process Clause protects all “liberty” and “property” against arbitrary deprivation; the Equal Protection Clause potentially implicates every government decision that classifies its subjects. In the absence of some limiting principle, therefore, a Section 5 exception from the anticommandeering doctrine might reach so widely as to eviscerate the practical import of *Printz* and *New York*. Almost any federal intervention might be, with one degree of persuasiveness or another, justified as an effort to prevent the oppression of some in-state minority.¹⁷⁹ Similarly, any government action that threatens

¹⁷⁹ For examples of some far-reaching claims, see *Wheeling & Lake Erie Railway Co. v PUC*, 141 F3d 88 (3d Cir 1998) (holding that the Railroad Revitalization and Regulatory Reform Act is Section 5 legislation protecting railroads from discriminatory taxation); *Oregon Short Line Railroad Co. v Dept. of Revenue*, 139 F3d 1259 (9th Cir 1998) (same); *CSX Transportation, Inc. v Bd. of Public Works*, 138 F3d 537 (4th Cir 1998) (leaving issue open); *Abril v Virginia*, 145 F3d 182 (4th Cir 1998) (rejecting the claim that the Fair Labor Standards Act is Section 5 legislation); *id.* at 185–86 (citing decisions from four other circuits rejecting this claim); *Biddlecome v University of Texas*, 1997 WL 124220 (SD Tex 1997).

the liberty or property of any citizen might conceivably be subject to federal regulation as a prophylactic protection against arbitrary deprivation.¹⁸⁰

The *Boerne* Court adopted a tailoring doctrine to limit the scope of congressional power under the Fourteenth Amendment. The Court's standard requires a "congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."¹⁸¹ The principle appears to have two dimensions. First, before it may be accepted as a legitimate exercise of enforcement power under Section 5, a statute must be shown to be directed toward the remedy or prevention of a harm that would be regarded as a constitutional violation under the principles enunciated by the Court. Second, the degree of intrusion into state prerogatives must be "proportional[]" to the degree or likelihood of a constitutional violation.¹⁸²

The *Boerne* limitations serve to cabin what would otherwise be a potentially all-engulfing exception from the anticommandeering doctrines, and to bolster the normative case (in light of federalism values) for the existence of that exception. Our normative arguments, above, for such a distinction generally assumed that Section 5 legislation would be fairly closely tied to the underlying constitutional norms. But it bears emphasis that *Boerne*'s tailoring doctrine itself is fuzzy, not clear. How well settled a constitutional proposition must be to support a Section 5 statute, how analogous the evil aimed at must be to what the Court would recognize as a constitutional violation, how likely the evil at issue must be, and how narrowly tailored an intrusion must be to survive scrutiny un-

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(holding that Family and Medical Leave Act is Section 5 legislation); *Thomson v Ohio State Univ. Hosp.*, 5 F Supp 2d 574 (SD Ohio 1998) (holding that FMLA is not).

¹⁸⁰ Compare *College Savings Bank v Fla. Prepaid Postsecondary Education Expense Bd.*, 148 F3d 1343 (Fed Cir 1998) (holding that protection of patent rights against deprivation without due process constitutes a Section 5 basis for statute that permits suit against state for patent infringement), cert granted 1999 WL 5331 (US), with *College Savings Bank v Fla. Prepaid Postsecondary Education Expense Bd.*, 131 F3d 353 (3d Cir 1997) (rejecting comparable claim under Lanham Act), cert granted 1999 WL 5330 (US), and *Chavez v Arte Publico Press*, 157 F3d 282 (5th Cir 1998) (same). See also *In re Sacred Heart Hosp.*, 133 F3d 237 (3d Cir 1998) (rejecting "privilege or immunity" clause as basis for abrogation of Eleventh Amendment immunity by Bankruptcy Code).

¹⁸¹ *Boerne*, 117 S Ct at 2169 (citation omitted).

¹⁸² *Id* at 2164.

der *Boerne* are all matters of degree. Any one of these variables offers room for extensive debate. Since the ultimate judgment under *Boerne* will be a function of all the variables taken together, we have serious doubts whether the tailoring doctrine will prove workable. And since the Section 5 demarcation within anticommandeering jurisprudence is tied to *Boerne*, we similarly doubt the clarity and workability of that line, as now drawn by the Court.¹⁸³

V. AN EXPRESSIVE DEFENSE?

We have argued above that the bases for most of the distinctions the Court has used to cabin the disruptive potential of the anticommandeering principle are at best obscure. On many of these fronts, the best explanation one can muster for the lines the Court has drawn seems to be that permitted actions “look” or “feel” different. So, too, the actual placement of the line between permissible and impermissible federal programs is difficult to discern. The important fact seems to be that some line has been drawn, not exactly where the line falls.

The absence of a (nonexpressive) justification for the lines of demarcation combined with the lack of definition of the lines themselves suggests that the Court is not so much implementing an effort to achieve particular policy goals or to embody particular historical understandings as to express what it regards as the core of American federalism. In line with the suggestion advanced by a number of recent commentators that the law’s “expressive function” may justify rules that are inexplicable apart from what the rules “say” or “mean,”¹⁸⁴ the prohibition on commandeering as defined by the Court could be justified as expressive of our regime of constitutional federalism.

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¹⁸³ The opinion in *Boerne* is focused on Section 5 of the Fourteenth Amendment. But if, as we assume, its tailoring doctrine is also applicable to the parallel enforcement provisions of the Thirteenth and Fifteenth Amendments, our critique can be generalized: the line between a permissible commandeering grounded in one of the Reconstruction Amendments, and an impermissible commandeering merely grounded in Article I, will prove unclear and perhaps unworkable.

¹⁸⁴ See, for example, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U Pa Rev 2021 (1996); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U Chi L Rev 943 (1995); Richard H. Pildes and Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances after Shaw v Reno*, 92 Mich L Rev 483 (1993).

The expressive story proceeds at two levels.¹⁸⁵ First, just as it is argued that some laws may be valuable as a means of altering the norms that are ultimately internalized and implemented by private actors, the prohibition of commandeering could be a mechanism for strengthening the norm of regard for state interests in the federal political process. Second, the Court's decisions may be *intrinsically* important for the statements they make. *Printz* and *New York* may in and of themselves express the nation's constitutive commitment to state autonomy in a way that defines us as a nation.

A. INSTRUMENTAL EFFECTS ON POLITICAL NORMS

1. *The mechanisms.* An instrumental expressive account could be fleshed out in several ways. First, the prohibition of commandeering could alter the structure of political decision making: by forcing federal legislators (or at least legislative assistants) to think about where proposed legislation falls on a series of vaguely defined boundaries, the doctrine will, at the very least, temporarily put issues of federalism on the legislative agenda. In framing any legislation that affects states, a federal legislator must contemplate whether the legislation constitutes commandeering or preemption, and—if the former—whether it falls within the exceptions the Court has recognized to the anticommandeering principle. None of these evaluations will necessarily prevent enactment of the legislation, but like rules of etiquette in the private sector, they may tend to guard against unthinking violation of relevant values (in this case, the values of federalism).¹⁸⁶

A second, complementary, line of analysis rests on the proposi-

¹⁸⁵ These two levels track Professor Sunstein's account of two types of expressive theories of law. See 144 U Pa L Rev at 2025–27 (cited in note 184).

¹⁸⁶ The following excerpt from oral argument in *New York v United States*, see 1992 US TRANS LEXIS 197, *10–*11, suggests that the Court understands an anticommandeering principle will be indicative rather than determinative:

MR. SCHIFF: No. We think *FERC* is quite distinguishable. The majority of this Court in *FERC* made it quite clear that the state had a choice. It didn't really have to do what that act of Congress required it to do because it didn't have to regulate public utilities, while—

QUESTION: Well, you know that it, you know that's a, just a dream world. . . . What are the underlying values that you're trying to further by the Tenth Amendment argument that you urge upon us? Is it, is this simply just a matter of etiquette and form, the etiquette of federalism, or is there something more substantial?

tion that the Supreme Court's decisions have independent norm-generating force beyond the specific threat of judicial invalidation. When the Supreme Court invalidates commandeering legislation as inconsistent with the values of federalism, even if the precise reasoning behind the determination is obscure, the Court lends support to those who argue against federal legislation on grounds of state autonomy. Recognition that the Supreme Court views the limitation of federal interference with state decision making as constitutionally enforceable could galvanize these proponents of autonomy.¹⁸⁷ Within Congress itself, legislators who regard the Court as a source of normative guidance will view infringements on state sovereignty with a more skeptical eye. To be sure, Congress has not infrequently asserted a willingness to take issue with the Court, but the norm-reinforcing effect of the Court's decisions need only change the vote of the marginal legislator to be significant. At the very least, pro-federalism decisions by the Supreme Court make claims of constitutionally based state autonomy a legitimate part of political discourse.

Third, the anticommandeering doctrine may be a part of a strategy of normative change directed at the federal judiciary itself. A requirement that lower court judges engage in the exercise of distinguishing commandeering from noncommandeering statutes might make them sensitive to federalism concerns in other areas. This doctrine may constitute one part of a broader revival of state autonomy that, along with *Lopez*, *Boerne*, and *Seminole Tribe*, could unleash the common-law evolution of federalism jurisprudence in the lower federal courts. And allowing state attorneys general to invoke *Printz* in adjudication might embolden them to press federalist claims in other areas. Arguably this has in fact occurred, although it is not often that such "law reform" arguments (justifying legal change in one area of law, by reference to what is needed in another) carry the day.

2. *The virtues of ambiguity.* In each of these scenarios, the formidable obscurity of the anticommandeering doctrine is arguably a benefit rather than a cost. Justice Scalia commented in *Printz* that

¹⁸⁷ Just as *Brown v Board of Education* and subsequent cases gave social force to claims of proponents of African-American rights, the Court's recent series of statutory invalidations may provide an impetus to proponents of state autonomy.

“an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one.”¹⁸⁸ We have argued that, despite this disclaimer, anticommandeering doctrine, as set forth by the Court, is in fact made up of a series of “imprecise barriers.” For purposes of changing political norms, however, unclear boundaries may sometimes be better than clear ones.

Insofar as the point of *New York* and *Printz* is to establish rules of etiquette that highlight the importance of state autonomy within Congress, the enemy of meaningful ritual is rote. In the normal course of events, we might expect the following cycle over time. At the first stage, Congress begins to pass legislation without a backward glance at state autonomy. At the second, the Court imposes boundaries that put federalism back on the agenda because they require Congress to affix some sort of formal “seal” indicating it has considered federalism. The seal may take the form of a clear statement; the inclusion of a background threat of preemption (to bring the statute within the permissible category of conditional preemption) or a provision applying it to private parties (to make it generally applicable); or a statement of findings in the legislative history articulating a connection to interstate commerce or constitutional violations. But, whatever the formal prerequisites, in order to affix the seal, someone in the legislative process has to think about federalism.

The difficulty, from the point of view of the Court, is that such a level of attention will not be stable. If doctrine is predictable, a third stage is likely to evolve in which congressional aides discover a repertoire of standard techniques that meet the formal requirements imposed by the Court, and begin to employ those techniques as a matter of course. Once the forms are safely in the word processor, federalism becomes a matter of an aide calling up the appropriate language, and Congress returns to its first mode of proceeding in routine disregard of state autonomy where politics so dictates.¹⁸⁹

¹⁸⁸ 117 S Ct at 2381 (rejecting proposed distinction between policy-making and non-policy-making functions).

¹⁸⁹ This is the equilibrium in the Eleventh Amendment area that emerged in response to the clear statement rule of *Atascadero State Hosp. v Scanlon*, 473 US 234, 238–39 (1985). Congress pretty quickly learned the drill. See, for example, *Seminole Tribes of Fla. v Florida*, 517 US 44 (1996) (clear statement in Indian Gaming Regulatory Act; abrogation of Eleventh Amendment immunity held ineffective on other grounds); *Dellmuth v Muth*, 491 US 223, 229–30 (1989) (noting apparent clear statement in amendments to Rehabilitation Act).

One virtue of an opaque doctrine lies in its ability to delay the emergence of the third stage of the process. As long as the Court's doctrine lacks clarity, congressional drafters can never be sure that any particular rote mechanism will avoid invalidation, and so must proceed mindful of the brooding presence of the value of state autonomy. Clear boundaries would allow proponents of federal legislation to defend appropriately structured interventions on the ground that the statutes do not violate norms of federalism. By contrast, a doctrine precluding commandeering whose exact parameters are indeterminate casts a normative pall over every piece of legislation that interferes with state activities. Further, as a matter of judicial realpolitik, an opaque doctrine may be superior, for it allows the Court to threaten invalidation of a wide array of legislation, without binding itself to invalidate any particular (and popular) mandate. In this way, the Court puts federalism on the political agenda without depleting its own political capital.

Finally, if the Court is seeking to inculcate a sensitivity among lower courts and governmental officials to the importance of values of federalism, clarity is not as much of a virtue as generativity. The Court has embarked on a common-law effort to elaborate a series of limitations on federal authority. Although it cannot specify exactly what federalism requires, the Court can identify certain cases that clearly overstep the bounds, and over time the nature of the requirements will be fleshed out by the particular choices it makes and the distinctions it draws. To facilitate this process, an initial doctrine that throws up a large number of controverted examples in the lower courts is preferable to one that allows courts and litigants to resolve issues without reflection.

3. *The dark side of norm manipulation.* Although the instrumental, expressive argument just sketched out has some plausibility—the anticommandeering doctrines might be explained as an attempt, by the Court, to express regard for federalism and thereby to shape norms governing political actors—we are ultimately unpersuaded.

First, we doubt the empirical presuppositions of the argument.

So, too, in the area of Commerce Clause regulation. The practice of deference to congressional fact finding, see, for example, *Perez v. United States*, 402 US 146, 155–57 (1971); *Katzenbach v. McClung*, 379 US 294, 299–301 (1964), resolved into a ritual announcement of an effect on interstate commerce as the predicate for the exertion of national power. One function of the lack of clarity of the Court's opinion in *United States v. Lopez*, 514 US 549 (1995), is to allow the Court to announce the existence of new limits that Congress must worry about, without providing easily evaded boundaries.

For the anticommandeering doctrines to exert normative force on members of Congress and other political actors, the doctrines should at least be a subject of discussion. But a LEXIS survey of the Congressional Record disclosed only six mentions of *Printz*.¹⁹⁰ *New York* was referred to marginally more often (21 times in six years).¹⁹¹ The cases appear somewhat more often in congressional testimony,¹⁹² and perhaps this could support a claim that their expressive effect is the mobilization of interest groups that will raise the flag of federalism. But it is equally consistent with the hypothesis that—encased in a doctrine too opaque for most observers to justify or fathom—the message has had little serious impact on dialogue or decisions by Congress.¹⁹³

¹⁹⁰ The references in 1998 were contained in one article on the inscrutability of Supreme Court decisions, authored by a Judge Jerome Ferris, inserted into the Congressional Record by Senator Leahy, see 144 Cong Rec S 11872, 11880 (Oct 8, 1998); two claims that preemption of state products liability laws would be unconstitutional, authored by the National Conference of State Legislatures and inserted into the Congressional Record, see 144 Cong Rec 7707 (July 9, 1998); 144 Cong Rec S 7526 (July 7, 1998); and a claim by Senator Hatch that limitations on attorneys fees in tobacco settlements violate *Printz*, see 144 Cong Rec S 6149, 6168 (June 11, 1998). The 1997 references were contained in an article inserted into the record by Senator Leahy which criticized conservative judicial activism, see 143 Cong Rec S 11938, 11939 (Nov 7, 1997); and a list of recent Supreme Court cases, see 143 Cong Rec S 12023, 12026 (Nov 7, 1997).

¹⁹¹ A LEXIS search on November 29, 1998, of the Congressional Record in the Genfed; Record library for "New York v. United States and Date > 1991" yielded 21 citations. Nor do the cases appear frequently in legislative history. A November 29, 1998, LEXIS search for "Printz v. United States or New York v. United States and Date > 1991" in the Legis;Cmtrpt library identified only three committee reports. Two involved legislation that was crafted to avoid the anticommandeering limitation by attaching requirements to spending programs. See Committee on Commerce, *National Salvage Motor Vehicle Consumer Protection Act of 1997*, HR Rep No 105-285 pt 1, 105th Cong, 1st Sess (Sept 30, 1997); Committee on Commerce, Science, and Transportation, *Internet Filtering Systems*, S Rep No 105-226, 105th Cong, 2d Sess (June 25, 1998). One involved an assertion that *Printz* had little impact because it only struck down an interim provision and "the vast majority of local law enforcement officials" complied voluntarily. Committee on Judiciary, *Violent and Repeat Juvenile Offender Act of 1997*, S Rep No 105-108, 105th Cong, 1st Sess 203 (Oct 9, 1997) (views of Senators Kennedy, Biden, Kohl, Feinstein, Durbin, and Torricelli).

¹⁹² A Nov 29, 1998, LEXIS search for "Printz v. United States" in the Legis;Cngtst library of testimony before congressional committees yielded 21 citations; a LEXIS search for "New York v. United States and Date > 1991" yielded 47 citations.

¹⁹³ It might be argued that the Court's overall activism in the area of federalism has raised the profile of Tenth Amendment constraints on federal authority, even though no particular case is mentioned in congressional debate. The evidence here might initially suggest such an effect. Our LEXIS research revealed that, in the six years between June 1986 and July 1992, the Tenth Amendment was mentioned in 88 documents in the Congressional Record; the period between June 1992 (following *New York*) and July 1998 contains 287 documents mentioning the Tenth Amendment. But the profile of these mentions makes another explanation more likely. The period 1992-93 contains 17 documents mentioning the Tenth Amendment; 1993-94 contains 21. In 1994-95 the documents surge to 108, but 1995-96 contains 63 documents, 1996-97 contains 34, and 1997-98 contains 44. The fact that the

The second difficulty with an expressive justification is that, whatever the impact on norms of political discourse and decision making, the Court's message is conveyed by invalidating duly enacted federal statutes. Invalidation may impose substantial collateral damage on real people and entities who seek the benefits of the statutes. In both *New York* and *Printz*, the Court was in a position to deliver its message essentially cost-free. In *New York*, the Court upheld two of three mechanisms for implementing the low-level nuclear waste statute, and these two were likely to be adequate to the task. In *Printz*, the Court struck down an enforcement mechanism for the Brady Act that was due to be superseded in short order¹⁹⁴ and that, in any event, most states voluntarily followed.¹⁹⁵ But the reach of the anticommandeering principle is hardly limited to issues of peripheral practical importance. The doctrine's lack of clarity and potential expansiveness are likely to invite activist members of the lower federal judiciary to constitute themselves as censors of the federal government in more important cases. In these subsequent cases, the opportunity to exhort Congress may not come so cheaply.

The imperative not to overrule large bodies of existing case law has already led the Court to install a series of escape hatches in the anticommandeering doctrine. In circumstances where significant federal statutes are at stake, we expect the Court to make use of those exceptions to allow Congress to work its will, or to find new exceptions to permit the statute at hand. With the emergence of a patchwork of ad hoc exceptions, the doctrine will lose whatever normative force it had initially.

Indeed, the nature of the federal judicial system itself will impose a continued pressure to abandon the field. The Supreme

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surge in 1994–95 preceded the Court's exertions in *Lopez* and *Seminole Tribe* (70 of the 108 mentions in 1994–95 preceded *Lopez*, the earlier decision) and subsided at the end of the congressional term despite the Court's continued activism persuades us that the increase is better accounted for by the election of 1994 and the Contract with America. For discussion of the political climate of the period and congressional maneuvering on the issue of unfunded mandates, see Timothy J. Conlan et al., *Deregulating Federalism? The Politics of Mandate Reform in the 104th Congress*, PUBLIUS 23 (Summer 1995).

¹⁹⁴ Specifically, the provisions struck down in *Printz* were interim provisions, to be superseded by the Attorney General's establishment of a national instant background check system, which the Act required him to do by Nov 30, 1998. See 117 S Ct at 2368–69.

¹⁹⁵ See Committee on Judiciary, *Violent and Repeat Juvenile Offender Act of 1997*, S Rep No 105–108, 105th Cong, 1st Sess 203 (Oct 9, 1997) (views of Senators Kennedy, Biden, Kohl, Feinstein, Durbin, and Torricelli).

Court cannot review every case decided by the lower federal judiciary; its doctrine will be applied by a series of lower court judges around the country. In the absence of some doctrinal regularity, the total work product of the judiciary will collapse into an unworkable hodgepodge. One of the potential virtues of the kind of common-law approach followed by the Court in the anticommandeering area is the treatment of similarly situated individuals and institutions in a similar fashion. But, absent some degree of doctrinal predictability, congressional authority will vary from circuit to circuit, and neither state nor federal officials will be able to foresee the scope of their legal authority. The easiest way for the Court to avoid a flood of federalism litigation, and to achieve predictability and uniformity, will be to abandon the field. This was the fate of *National League of Cities*, and the decision to dodge the constitutional issue in *Yeskey*, combined with the denial of certiorari in the parallel case raising the question whether the ADA is Section 5 legislation,¹⁹⁶ suggests that the Supreme Court has started down the same road.

To the extent the Court does in fact sustain some commandeering challenges, the instrumental difficulty takes on another cast. Since, as we have argued, the doctrinal lines between permissible and impermissible exercises of national power are unjustified in light of federalism values, the damage to the interests of the citizenry will be arbitrarily distributed. A doctrine that reinforces pro-federalism norms in the political process, at the expense of the interests of an arbitrarily selected segment of the citizenry, is not one which does the Court much credit, or which is likely to strengthen respect for federalism over the long run.

B. EXPRESSING OUR FEDERALISM

Some recent proponents of the expressive function of law maintain that the message contained in a law can play not just the instrumental role of changing norms, but the intrinsic role of consti-

¹⁹⁶ See *Clark v California*, 123 F3d 1267 (9th Cir 1997), cert denied, 118 S Ct 2340 (1998). While this article was in press, the Court followed the pattern of *Yeskey* and *Clark* by specifically amending an order granting certiorari to exclude the question of whether the ADA exceeds congressional powers under Section 5 of the Fourteenth Amendment. *Olmstead v L.C.*, 119 S Ct 633 (1998).

tuting "the political identity of a state."¹⁹⁷ By parity of reasoning, the anticommandeering principle of *Printz* might express the fact and importance of our regime of constitutional federalism—and thereby be partly constitutive of that regime—quite apart from any effect on the political process. Conversely, one might argue that a law that commandeers state officials expresses an understanding of the political structure at odds with the core federalist commitments of America.

At one level it is hard to disagree with these kinds of claims, since what is expressed to some extent lies in the eye of the beholder. If a majority of the Court says that commandeering expresses values at odds with Our Federalism, who can argue? Such legislation apparently expresses those values to a majority of the Court.

Still, this is an awfully loose concept with which to make legal decisions. As we argued above, it is likely to be unstable. Moreover, as it stands, the doctrine is both substantially overinclusive and substantially underinclusive relative to federalism values and, relatedly, to the subjective reactions of most of the polity. Despite some overheated rhetoric surrounding the issue, it is difficult to believe that the provisions of the Brady Act at issue in *Printz*—requiring state law enforcement officers to expend reasonable efforts to determine the legality of gun purchases—express disrespect for federalism sufficient to make them unconstitutional. Does anyone think that the Brady Act was really read by a substantial segment of the public as the precursor to the elimination of state sovereignty? *New York* might have been a stronger case for the expressivist, but the Court has specifically declined to limit the anticommandeering principle to areas which involve political choices and to policy-making.¹⁹⁸

Reciprocally, given the demarcations that surround it, the anticommandeering doctrine appears to strain at gnats while swallowing camels. On any sensible definition of federalism, it is hard to distinguish—in terms of regard for state autonomy—the message expressed by a federal requirement whose sanctions are that a state "take title" to nuclear wastes (the requirement invalidated by *New*

¹⁹⁷ Jean Hampton, *Punishment, Feminism and Political Identity: A Case Study in the Expressive Meaning of the Law*, 11 Can J L & Juris 23, 23 (1998).

¹⁹⁸ See *Printz*, 117 S Ct at 2380–81.

York) from the message expressed by federal requirements backed by the threat of preempting state law or of eliminating state access to federal resources (the requirements upheld in *New York*). And does anyone believe that a total preemption of state gun laws would express less intrusion on state sovereignty than the Brady Act?¹⁹⁹

To put the point more generally: an intrinsic, expressive theory of federalism doctrine, to be plausible, must presuppose some objective semantic rules for attaching "meanings" to acts of federal legislation. But we know of no such rules independent of the federalism values at stake in this area. A federal statute seems to (objectively) say the right thing about federalism just insofar as it is otherwise justified on federalism grounds. Because the anti-commandeering doctrines cannot, we have argued, be otherwise justified on federalism grounds, the expressive story fails as well.

VI. CONCLUSION

This article has presented an internal critique of the anti-commandeering doctrines emerging in *New York*, *Printz*, and *Yeskey*. Someone who denies that a federal structure serves important values, or that those values take constitutional status, or that the thus-constitutionalized values ought to be judicially enforced, will need little persuading that the anti-commandeering doctrines are misconceived. So we have assumed (without endorsement) the view that *some* federal statutes should be invalidated by constitutional reviewing courts on federalism grounds, and have argued that the emerging doctrines fail to sort between permissible and impermissible statutes in a coherent and attractive way.

The proponent of the doctrines might respond that they have a textual or originalist warrant. But in fact they have no such warrant, as other scholars have shown.²⁰⁰ We have therefore directed

¹⁹⁹ While this article was in press, the Court upheld the jurisdiction of the Federal Communications Commission, under the Telecommunications Act of 1996, to promulgate rules concerning local telephone pricing and other aspects of local telephone markets, to be implemented by state commissions. This led Justice Breyer, in dissent, to object that "[t]oday's decision does deprive the States of practically significant power, a camel compared with *Printz's* gnat." *AT&T Corp. v. Iowa Utilities Board*, 1999 WL 24568, * 32 (US) (Breyer concurring in part and dissenting in part).

²⁰⁰ See Jackson, 111 Harv L Rev at 2199–2200; Caminker, 1997 Supreme Court Review at 209–17; Caminker, 95 Colum L Rev at 1030–50 (all cited in note 1); Erik M. Jensen and Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition*

our attention, instead, to the question whether the lines of demarcation constitutive of the anticommandeering doctrines can be justified in light of standard federalism values, and we have answered that question in the negative. It is no response, either, that any rule-like doctrines will be underinclusive or overinclusive relative to supporting values. For what we have shown—if we have been successful—is that the *Printz*, *New York*, and *Yeskey* demarcations do not even track federalism values in a probabilistic way, let alone perfectly. There is simply no difference, even in general, between permissible preemption and impermissible commandeering with respect to the values of innovation, diversity, tyranny prevention, and political community—and the same is true of all the other demarcations except for the Reconstruction Amendment demarcations. Further, the sacrifice in accuracy associated with rule-like doctrines ought to be made up by a gain in clarity; and yet the doctrines at issue here are generally quite unclear. These normative failures in the doctrines have, in turn, emboldened us to make the positive prediction that the doctrines will soon be abandoned, as was *National League of Cities* a generation ago. A jurisprudence that consists of nothing more than some arbitrary rules of “etiquette” ought to be, and we hope soon will be, outgrown.

Power: New York v. United States Revisited, 15 Const Comm 355 (1998). See also Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 Va L Rev 1957 (1993) (arguing that original understanding supports anticommandeering rule for state legislatures but not executives).