

Commandeering versus Preemption: A Federalism Perspective

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INTRODUCTION

The Tenth Amendment is one of several doctrinal areas that experienced something of a federalism revival during the 1990s,¹ when the Rehnquist Court breathed new life into the Amendment's seemingly truistic language.² The Court first held that Congress could not order

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¹ The other areas are the Commerce Clause, the Eleventh Amendment, and Section Five of the Fourteenth Amendment. *See infra* notes 20, 92-93 (citing the relevant case law). Noticeably absent from this list is the Spending Clause. *See, e.g.,* Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 *ARK. L. REV.* 731, 765 (2003) ("It seems plain that truly imposing substantive limits on Congress's regulatory reach, which the rhetoric of *Lopez* and *Morrison* describe, and thereby carving out areas of state sovereignty, rather than simply directing Congress to work its will in one way or another, will require the Court to address the Spending Clause."); Lynn A. Baker and Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 *IND. L.J.* 459, 460 (2003) (noting the "many commentators" who "have proposed that Congress should respond to the Rehnquist Court's states' rights decisions by using the spending power to circumvent those limitations on congressional power"); Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 *IND. L.J.* 47, 51-52 (2003) (counseling use of the Spending Clause to circumvent the Court's federalism decisions); Neil S. Siegel, *Getting Off the Dole, or Going Bananas: A Strategic Analysis* (unpublished manuscript on file with author) (using doctrinal analysis and game theory to examine the scope of the conditional spending power available to Congress going forward); *see also infra* note 43 (discussing *South Dakota v. Dole*, 483 U.S. 203 (1987)); *infra* Part II.D (analyzing the conditional spending power from a federalism perspective).

² The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The text of the Tenth Amendment makes explicit what is implicit in both the enumeration of powers allocated to Congress in Article I, § 8 and the bedrock conceptual difference between a national government of limited powers and state governments of plenary powers. *See, e.g.,* *New York v. United*

state legislatures either to regulate low-level radioactive waste in accordance with federal instructions or else to take title to the waste.³ Then, five years later, the Court decided that Congress could not order state executive officials to help conduct background checks on would-be handgun purchasers on an interim basis.⁴ In both cases, the Court supported its conclusion by stressing the importance of political accountability. In *New York v. United States*, for example, Justice O'Connor wrote for the Court that

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

States, 505 U.S. 144, 156-57 (1992) (“The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.”); *United States v. Darby*, 312 U.S. 100, 123-24 (1941) (“Our conclusion is unaffected by the Tenth Amendment which provides: ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people’. The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.”).

³ *New York v. United States*, 505 U.S. 144 (1992) (holding that the “take title” provision of the Low Level Radioactive Waste Policy Amendments Act of 1985, which required states either to regulate radioactive waste according to Congress’ requirements or else to take title to the waste, constitutes unconstitutional compulsion and commandeering of the governmental capacity of state governments).

⁴ *Printz v. United States*, 521 U. S. 898 (1997) (relying on a Tenth Amendment anti-commandeering rationale in holding unconstitutional certain interim provisions of the Brady Handgun Violence Prevention Act, which required state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks).

federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.⁵

Five years later, Justice Scalia insisted for the Court in *Printz* that “[i]t is the very *principle* of separate state sovereignty that [commandeering] offends, and no comparative assessment of the various interests can overcome that fundamental defect.”⁶

The vulnerabilities in the Court’s anticommandeering logic have been exposed in several ways. It is not clear that political accountability is a distinctly Tenth Amendment value that the Justices are supposed to vindicate broadly and aggressively through a categorical rule.⁷ Nor is it evident as a general matter that congressional commandeering of states inevitably generates serious accountability concerns, or that other forms of federal regulation – particularly, preemption – alleviate those concerns to a significant extent.⁸ In many instances, citizens who

⁵ *New York*, 505 U.S. at 168-69.

⁶ *Printz*, 521 U.S. at 932.

⁷ Cf. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2201, 2204 (1998) (“The difficulty, however, is in connecting the values of public accountability--which do seem latent in the constitutional structure--with the anticommandeering rule articulated in *Printz*. . . . Federal commandeering of states . . . can risk confusing the lines of political accountability--but the extent to which this is likely (or more likely than in other forms of federal-state action) depends on the substance and substantiality of the burden. Political accountability may be relevant but does not of itself justify the broad rule adopted by the Court.”); *id.* at 2257 (“Although bright-line rules may offer comparative advantages in reducing risks of error or bias by other decisionmakers (here, lower courts), they do so only at the inevitable cost of being overinclusive or underinclusive in serving their substantive purposes.”).

⁸ See, e.g., Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1054-55 (1995) (“Commandeering precludes state officials from being directly and exclusively responsive to their constituency’s desires, but so does conventional preemption. Although one can use verbal wordplay to make it sound as though commandeering and preemption frustrate accountability in different ways, this is merely definitional manipulation without substance. Prohibiting commandeering but not preemption in the name of securing the accountability of state government is simply arbitrary.”) (footnote omitted); Jackson, *supra* note 7, at 2202 (“Standard preemption – the effect of federal law in negating the area in which state law can operate – can obscure the causes of inaction by state officials. Conditional spending regulatory requirements, though nominally involving a state’s choice to accept federal funds, can result in a very confusing picture of responsibility to voters. Why, then, would commandeering be different?”) (footnote omitted).

pay attention to public affairs and who care to inquire will be able to figure out which level of government is ultimately responsible for a government regulation, and citizens who do not care to inquire may be largely beyond judicial or political help on the accountability front. They are likely not part of “the public” in whose “full view” the federal government preempts state law.⁹ Government officials also have an abiding interest in informing voters when they are (or are not) responsible for certain actions.

Reasonable people can and do disagree about the soundness of the Court’s focus on political accountability in the commandeering context. But regardless of whether one believes that commandeering triggers political accountability concerns that are appropriate for aggressive judicial vindication, the question arises whether accountability exhausts the relevant constitutional considerations, or whether other federalist values are implicated by the Court’s anticommandeering doctrine. This inquiry argues that the constitutional calculus is considerably more complicated than the Court’s opinions suggest. The following analysis captures the various factors in play by articulating a straightforward expected-value equation, and then unpacks the components of that equation to trace out anticommandeering doctrine’s consequences – both widely recognized and counterintuitive – for the Constitution’s commitment to federalism. The investigation shows that several distinct concerns are at stake here – values central to the project of federalism – and further indicates that anticommandeering doctrine causes net harm to federalist values under certain circumstances. Specifically, *New York* and *Printz* protect state autonomy to some extent by requiring the federal government to internalize more of the costs of federal regulation before engaging in regulation. At the same time, however, anticommandeering doctrine harms state autonomy in situations where the (clearly

⁹ *New York*, 505 U.S. at 168.

constitutional) alternative of preemption is available and the commandeering ban places states in danger of losing regulatory control in a greater number of future instances.¹⁰ Unlike commandeering, preemption completely removes states from the regulatory scene.¹¹

In essence, then, this inquiry focuses on the choice between commandeering and preemption from a federalism perspective. The central claim is that the Rehnquist Court's categorical anticommandeering rule does not serve the values of federalism in circumstances where the Court's application of the rule would trigger more preemptive congressional responses going forward, which would cause a greater compromise of federalism values than would commandeering.

One payoff of this approach to assessing the anticommandeering principle is that it turns the conventional wisdom about *New York* and *Printz* on its head. According to the standard accountability account, the "hard" commandeering of the state legislative process at issue in *New York* was constitutionally more invasive and problematic than the relatively "soft," interim commandeering of state and local executive officials implicated in *Printz*.¹² Incorporating concerns about maintaining state regulatory control into the analysis, however, changes the cost

¹⁰ Preemption is the constitutional principle, derived from the Supremacy Clause, *see* U.S. CONST. Art. VI, providing that if a conflict exists between valid federal law and state or local laws, federal law controls and the state or local laws are invalidated on the ground that federal law is supreme. *See, e.g., Gade v. National Solid Waste Management Association*, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.") (internal quotation marks omitted); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (Marshall, C.J.) (concluding that federal law trumps state laws that "interfere with, or are contrary to the laws of Congress" because "[i]n every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it"). In *New York*, Justice O'Connor asserted that preemption, unlike commandeering, does not trigger Tenth Amendment concerns. *See supra* text accompanying note 5.

¹¹ For a discussion of the various values that federalism is thought to advance and their dependence upon meaningful levels of state regulatory control, see *infra* notes 76-85 and accompanying text.

¹² See *infra* Part IV for a discussion of this issue.

calculus significantly. Because federal preemption was readily available (and indeed had already been threatened) in *New York* but not in *Printz*, this inquiry submits that *Printz* remains a close case and *New York* an “easy” one – but that *New York* is easy in exactly the opposite direction. Instead of an “easy kill,” the federal law at issue in *New York* clearly should have been upheld in the face of the state’s Tenth Amendment challenge.

Part I briefly surveys the Supreme Court’s Tenth Amendment cases, focusing on the Rehnquist Court’s decisions between 1990 and the present. Part II conducts a theoretical analysis of anticommandeering doctrine from a federalist perspective. Part III offers a non-traditional analysis of *New York* and *Printz* through the analytical lens provided by this inquiry. Part IV anticipates various potential objections to the argument, and Part V provides a timely war-on-terror illustration of the argument’s potential relevance and force. The Conclusion defends substantive standards and balancing, as opposed to categorical rules sounding in symbolism, as an approach to investigating federalism questions in constitutional law, and situates the Court’s accountability concerns within that analytical perspective.

I. A SHORT SURVEY OF TENTH AMENDMENT DOCTRINE

Throughout American constitutional history, one of two basic conceptions of the Tenth Amendment has prevailed at a particular time. During the 1800s, the Supreme Court viewed the amendment not as an independent limit on legislative authority that Congress could violate, but as a mere reminder that the federal government is one of only limited powers, so that Congress may legislate in a certain area only if the Constitution grants it authority to do so.¹³

¹³ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824) (“This [commerce] power, like all others vested in Congress, is complete in itself, may be exercised to the utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. [If], as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over

During the early 1900s and up until 1937, the Court embraced the very different understanding that the Tenth Amendment safeguards state sovereignty from federal overreaching. According to that view, the amendment reserves a zone of exclusive regulatory authority to the states, and courts must hold unconstitutional federal laws that disregard that exclusive reservation of power. Specifically, the pre-1937 Court concluded that the Tenth Amendment left to the states sole control over production, and thus federal laws aimed at regulating production were invalid.¹⁴

From 1937 until the early 1990s, the Court reverted to the nineteenth-century view of the Tenth Amendment.¹⁵ During that period, the Court found only one Tenth Amendment violation, and that decision was explicitly overruled less than a decade later after being distinguished into oblivion several times. In *National League of Cities v. Usery*,¹⁶ the Court held 5-4 that applying the federal Fair Labor Standards Act’s minimum-wage provisions to state and local employees violated the Tenth Amendment because the statute “operate[d] to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions.”¹⁷ The

commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government.”) (opinion of Marshall, C.J., for the Court).

¹⁴ See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 273-74 (1918) (“The Child Labor Case”) (invalidating a federal law prohibiting the shipment in interstate commerce of goods produced in factories employing child labor because “[t]he grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture”).

¹⁵ See *United States v. Darby*, 312 U.S. 100, 124 (1941) (overruling *Hammer v. Dagenhart* in rejecting a constitutional challenge to the Fair Labor Standards Act of 1938 (FLSA), which prohibited the shipment in interstate commerce of goods made by employees whose wages or hours contravened the Act’s protections, in part because the Tenth “Amendment states but a truism that all is retained which has not been surrendered”). See also *supra* note 2 (quoting the opinion of the Court in *Darby*).

¹⁶ 426 U.S. 833 (1976).

¹⁷ *Id.* at 852. The decisive fifth vote was cast by Justice Blackmun, who wrote in an ambiguous and ominous concurrence that he viewed the majority as having adopted “a balancing approach [that] . . .

Court did not explain how to identify a “traditional governmental functio[n],” and it unpersuasively distinguished *National League of Cities* in a series of subsequent decisions.¹⁸ Finally, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁹ holding that the Fair Labor Standards Act could constitutionally be applied to state and local governments. Writing for himself and the four *National League of Cities* dissenters, Justice Blackmun “reject[ed], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular government function is ‘traditional’ or ‘integral.’”²⁰

The Rehnquist Court’s reinvigoration of the Tenth Amendment began in 1991 in a case raising a question of statutory interpretation, not constitutional law. In *Gregory v. Ashcroft*,²¹ Missouri state court judges challenged, as violative of the federal Age Discrimination in Employment Act (“ADEA”),²² the mandatory retirement age set forth in the state constitution.²³

does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.” *Id.* at 856 (Blackmun, J., concurring).

¹⁸ See, e.g., *Federal Energy Regulatory Commission (FERC) v. Mississippi*, 456 U.S. 742 (1982) (rejecting a Tenth Amendment challenge to the Public Utilities Regulatory Policies Act of 1978, which required state utility commissions to consider FERC proposals); *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226 (1983) (rejecting a Tenth Amendment challenge to the Age Discrimination in Employment Act’s application to the states). In each decision, the majority was composed of Justice Blackmun and the four *National League of Cities* dissenters.

¹⁹ 469 U.S. 528 (1985).

²⁰ *Id.* at 546-47. *Garcia* remains good law, and thus states have a legal duty to comply with the FLSA. But the Rehnquist Court severely limited *Garcia*’s impact by holding that state sovereign immunity prohibits most private suits for money damages to remedy even willful state violations of concededly valid federal law in federal or state courts. See *Alden v. Maine*, 527 U.S. 706 (1999); see *infra* notes 92-93 and accompanying text (citing the relevant case law).

²¹ 501 U.S. 452 (1991).

²² 29 U.S.C. §§ 621-634 (2000).

The Supreme Court issued a “clear statement” rule of statutory interpretation. Justice O’Connor wrote for the Court that a federal law will be construed to apply to important state government activities only if Congress issues a clear statement that it wants the law to apply to the states in those circumstances.²⁴ Because the ADEA lacked such a clear statement, the Court concluded that the federal antidiscrimination law did not preempt the state’s mandatory retirement age.²⁵ In so holding for the Court, Justice O’Connor underscored the role served by the states in preventing federal tyranny and the part played by the Tenth Amendment in protecting state autonomy.²⁶

A year later, the Court issued a novel constitutional holding in a Tenth Amendment case.²⁷ At issue in *New York v. United States*²⁸ was the validity of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985,²⁹ which required states to arrange for the safe disposal of radioactive waste produced within their borders. The statute gave states

²³ 501 U.S. at 456.

²⁴ *Id.* at 461.

²⁵ *Id.* at 467.

²⁶ *Id.* at 458 (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”); *id.* at 461 (“This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”); *id.* at 463 (“[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is an authority that lies at the heart of representative government. It is a power reserved to the States under the Tenth Amendment . . .”) (internal quotation marks omitted).

²⁷ One could argue, however, that the 1990s anticommandeering decisions were not entirely novel. *National League of Cities* could be viewed as an indirect form of anticommandeering, preventing Congress from forcing states to increase taxes or reduce services in order to comply with the FLSA’s minimum-wage provisions.

²⁸ *See supra* notes 3-5 and accompanying text.

²⁹ 42 U.S.C. § 2021b *et seq.*

monetary incentives to comply with its requirements and also provided access incentives, permitting states to impose a surcharge on waste coming from other states.³⁰ The most controversial part of the law, included to secure adequate state regulatory action,³¹ mandated that states would “take title” to any radioactive waste within their borders that was not appropriately disposed of by a certain date and would then “be liable for all damages directly or indirectly incurred.”³²

The Court affirmed Congress’ power under the Commerce Clause to regulate the disposal of radioactive waste.³³ The Justices also upheld the act’s financial incentives as within Congress’ power under the Commerce and Spending Clauses,³⁴ and sustained the law’s access incentives as a conditional exercise of Congress’ commerce power – that is, Congress was constitutionally giving states the choice between “regulat[ing] the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or [having] their residents who produce radioactive waste . . . be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites.”³⁵

The Court, however, held that the “take title” provision was unconstitutional. Writing for a six-Justice majority that included Justice Souter,³⁶ Justice O’Connor stated that the “take title”

³⁰ *New York*, 505 U.S. at 152-53.

³¹ See *infra* Part IV for a discussion of the rationale behind the commandeering provision.

³² *New York*, 505 U.S. at 153.

³³ *Id.* at 159-60.

³⁴ *Id.* at 171-73.

³⁵ *Id.* at 174. See *infra* Part IV.C for an analysis of federal laws that give states the choice between commandeering and preemption.

³⁶ See *infra* notes 131-132 and accompanying text for a discussion of Justice Souter’s voting behavior in *New York* and *Printz*.

provision forced states to choose between “either accepting ownership of waste or regulating according to the instructions of Congress.”³⁷ Neither imposition was permissible, she concluded, because requiring states to accept ownership of waste would unconstitutionally “commandeer” state governments, and mandating compliance with federal regulatory acts would unlawfully force states to implement federal statutes.³⁸ Justice O’Connor declared emphatically for the Court that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.”³⁹

As noted above,⁴⁰ the Court’s constitutional concerns centered on the issue of political accountability. In the Court’s view, Congress was requiring the states to regulate, yet the states (not the federal government) might be held politically accountable for the regulatory activity. The Court reasoned that citizens affected by the regulations would see who was doing the regulating, not who had made the decision to order regulation in the first place.⁴¹

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

³⁷ *New York*, 505 U.S. at 175.

³⁸ *Id.*

³⁹ *Id.* at 188.

⁴⁰ *See supra* text accompanying note 5.

⁴¹ *Ibid.* See *infra* Part IV for an argument that the Court’s concerns were misplaced on the facts of *New York*.

local regulatory activity.⁴² Moreover, the Court affirmed that Congress could condition federal funding of state and local government activities on their compliance with related regulatory requirements that Congress could not impose directly:

This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. . . . [U]nder Congress' spending power, 'Congress may attach conditions on the receipt of federal funds.' *South Dakota v. Dole*, 483 U.S., at 206⁴³

Regarding the specific issue implicated in *New York*, therefore, Congress could induce states to clean up radioactive waste by placing strings on federal grants, even though Congress could not force states to clean up the waste. Finally, the Court declared that the Constitution allows Congress to give states the choice between being commandeered and being preempted.⁴⁴

The Court rendered its next Tenth Amendment decision of the 1990s five years later. In *Printz v. United States*,⁴⁵ the question presented was whether the federal Brady Handgun Violence Prevention Act⁴⁶ contravened the Tenth Amendment by requiring state and local law

⁴² See *supra* text accompanying note 5; see also *supra* note 10.

⁴³ 505 U.S. at 166-67. In *Dole*, the Supreme Court held 7-2, with Chief Justice Rehnquist writing the majority opinion and Justices Brennan and O'Connor dissenting, that Congress may condition five percent of federal highway funds on a recipient state's adopting a 21-year-old drinking age, even assuming (but not deciding) that the Twenty-First Amendment would prohibit Congress from imposing a national minimum drinking age directly. *Id.* at 217-18. The Chief Justice stressed that the condition imposed by Congress was "clearly stated," *id.* at 208, was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel," *id.*, and was not "so coercive as to pass the point at which pressure turns into compulsion," *id.* at 211.

⁴⁴ 505 U.S. at 167; see also *infra* note 148 (quoting this portion of the Court's opinion in *New York*). For an analysis of this option, see *infra* Part IV.C. See *infra* Part III for a discussion of Justice White's dissent in *New York*.

⁴⁵ See *supra* notes 4-6.

⁴⁶ Note following 18 U.S.C. § 922 (2000).

enforcement officers to conduct background checks on would-be handgun buyers on an interim basis – that is, until a federal computer database was up and running.⁴⁷ Writing for a five-Justice majority, Justice Scalia declared the law unconstitutional. He stressed, among other things,⁴⁸ that Congress was unlawfully commandeering state executive officers to enforce a federal requirement. In the early years of the Republic and throughout American history, Justice Scalia wrote, Congress had not engaged in such commandeering. The Court reaffirmed *New York* and concluded that the Tenth Amendment prohibits Congress from conscripting state governments.⁴⁹

*Reno v. Condon*⁵⁰ is the most recent Tenth Amendment case decided by the Court. The Justices there rejected a Tenth Amendment challenge to a federal statute. At issue was the federal Driver’s Privacy Protection Act (“DPPA”), which prohibits states from disclosing personal information gained by departments of motor vehicles (DMVs), including home addresses, phone numbers, and social security numbers.⁵¹ The Court unanimously reversed the judgment of the United States Court of Appeals for the Fourth Circuit, which had held that the DPPA unconstitutionally commanded states not to disclose the information.⁵² Writing for the Court, Chief Justice Rehnquist distinguished *New York* and *Printz*; he reasoned that Congress

⁴⁷ See *infra* note 161 for a discussion of the federal database, which is now operating.

⁴⁸ The Court also concluded that the Act violated the separation of powers because Congress had taken some of the executive power that Article II vests exclusively in the President and given it to state and local law enforcement officers. *Printz*, 521 U.S. at 922.

⁴⁹ *Id.* at 923. In a dissent joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens underscored the need for the Brady Act and rejected the animating principle of *Printz*: “When Congress exercises the powers delegated to it by the Constitution, it may impose affirmative obligations on executive and judicial officers of state and local governments as well as ordinary citizens.” *Id.* at 939 (Stevens, J., dissenting).

⁵⁰ 528 U.S. 141 (2000).

⁵¹ 18 U.S.C. § 2721 (2000).

⁵² 155 F.3d 453, 465 (4th Cir. 1998).

was not regulating private actors indirectly by commandeering the regulatory apparatus of the states; rather, Congress was regulating directly all entities that possess the driver’s license information – states and private entities alike.⁵³ Accordingly, the Court concluded that the DPPA did not trigger accountability concerns.

The Court has not issued a Tenth Amendment holding since 2000. Nor has a federal court of appeals invalidated any other federal law on Tenth Amendment grounds in recent years.⁵⁴

II. A THEORETICAL ANALYSIS OF ANTICOMMANDEERING DOCTRINE

A. *The Federalism Costs of Commandeering: A Model*

The components of a thorough examination of anticommandeering doctrine – one that includes but transcends the Supreme Court’s focus on accountability – can be captured by the following expected-value equation:

$$E(C_{\text{fed reg}}) = p(\text{fed reg}) * C_{\text{fed reg}}.^{55}$$

⁵³ *Condon*, 528 U.S. at 146-51.

⁵⁴ A question worth exploring concerns why *New York* and *Printz* have had so little generative force in the lower courts. Some possible explanations include: few federal laws commandeer; states do not want to challenge some federal statutes that commandeer because of political agreement with the laws; sometimes the costs to the states imposed by commandeering are minimal; and states may fear that preemption would follow a successful constitutional challenge to a federal law that commandeers, and preemption would be worse from their point of view.

⁵⁵ Of course, the simple model in the text is not essential to advance this inquiry’s argument; anything that can be done with a model can be done without one. But models provide a potentially powerful way to privilege certain causal considerations over others. And this particular model usefully underscores the fact that federalism values are affected by both the probability of federal regulation and the federalism costs imposed by such regulation. As explored below, moreover, the model nicely captures the counterintuitive theoretical tradeoff among federalism values that anticommandeering doctrine can generate.

$E(C_{fed\ reg})$ represents the expected costs to federalism values of a mandatory federal regulation, whether commandeering or preemption; $p(fed\ reg)$ is the probability that the federal government will regulate; and $C_{fed\ reg}$ identifies the costs to federalism values imposed by the federal regulation. The probability of federal regulation ($p(fed\ reg)$) is a function of the financial and political costs associated with engaging in federal regulation. The costs to federalism values ($C_{fed\ reg}$) sound in economics, public policy, and politics. Specifically, they include: (1) the temporal and financial costs of complying with or implementing federal regulations,⁵⁶ including opportunity costs;⁵⁷ (2) the loss (or imposition) of regulatory control that federal regulations may

⁵⁶ Professor Vicki Jackson notes the possible “difference . . . between Congress requiring the states to do something that costs a lot (in terms of time or money) [and] something that does not.” Jackson, *supra* note 7, at 2202. She argues, however, that such a concern “would not justify a flat anticommandeering rule, but might instead lead to rules that focus on the substantiality of the burdens, or the possibility of federal subsidy or waiver for localities for which a requirement is particularly burdensome.” *Id.* at 2202-03 (footnotes omitted).

⁵⁷ Opportunity costs are critical because commandeering “absorbs government resources that the states might direct elsewhere.” Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580 & n.65 (1994); Jackson, *supra* note 7, at 2204 (“the more substantial the burden, the greater the possibility that state officers will be unable to attend to state business because of the need to carry out federal directives”). Professor H. Jefferson Powell’s defense of the anticommandeering principle articulated in *New York* sounds in related prudential considerations:

The sort of conscription of state processes with which *New York v. United States* is concerned denies to the states both initiation and immunity. As Justice O’Connor wrote in her *FERC* opinion, federal preemption of an area of legislative concern means that “the States may simply devote their resources elsewhere.” As a result, the states retain the power of initiation in areas Congress has not occupied, and their deliberative processes remain immune from federal control. The imposition of a congressional agenda on state institutions, on the other hand, “drains the inventive energy of state governmental bodies” by commandeering scarce resources of time, attention, and public concern. The states thus become “less able to pursue local proposals” because their lack of immunity from federal agenda-setting increasingly denies them the practical possibility of exercising whatever powers of initiation the national government has theoretically left undisturbed.

H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 63, 686-87 (1993) (quoting *FERC v. Mississippi*, 456 U.S. 742, 787 (1982) (O’Connor, J., concurring in the judgment in part and dissenting in part)).

Although he is generally critical of the Court’s anticommandeering doctrine, Professor Caminker agrees that, “[a]s a result of externalities from increased fiscal and administrative burdens, . . . unfunded

demand; and (3) the accountability costs that federal regulations may cause states to incur and associated voter disapproval.⁵⁸

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

First, voters may hold state officers politically accountable for a choice that was not theirs, or which the officers were forced by federal law to make, without appreciating the source of the substantive rule or the forced nature of the decision, respectively. Second, voters may fail to hold federal officials politically accountable for choices they do make that impose further choices, or costs, on state governments. And third, federal legislators may not themselves feel as politically accountable, and responsible, if they can direct states to carry out programs (especially if these programs are not financed from federal revenues).⁵⁹

Professor Jackson’s second and third types of accountability concerns affect the probability of federal regulation; her first category implicates the federalism costs imposed by federal regulation.

mandates generally do have a greater constraining effect on residual state discretion, thereby threatening to undermine somewhat the advantages of local tailoring and aggregate diversity of governmental packages.” Caminker, *supra* note 8, at 1074; *see also id.* at 1079-80 (“When Congress requires states to fund an expensive enforcement program, the state might be forced to respond by diverting energies and funds from existing state programs in order to comply with the federal mandate. In this fashion ‘unfunded mandates’ can generate what might nontechnically be called externalities; not only do they constrain state discretion over the subject matter being federally regulated, but the costs they impose can pressure the state to cut back on unrelated programs.”).

⁵⁸ The model in the text might seem oversimplified because it assumes that federal regulation imposes only costs from the standpoint of federalism values, not benefits. Federal regulation may be beneficial for any number of reasons. For example, the federal government may be best equipped to deal with a problem confronting citizens of the state, perhaps because interstate externalities like pollution are present. This inquiry’s exclusive focus on costs can be justified, however, because the various federalism benefits conferred by federal regulation can be expressed analytically in terms of negative costs.

⁵⁹ Jackson, *supra* note 7, at 2201.

B. *The Standard Account of Anticommandeering Doctrine*

To the extent anticommandeering doctrine advances the cause of federalism,⁶⁰ it is by forcing the federal government to internalize more of the financial and political accountability costs associated with regulating in a certain area.⁶¹ As basic law and economics teaches, actors that do not internalize the full costs of their behavior tend to engage in too much of that behavior.⁶² The same holds true for government regulators. All other things being equal, anticommandeering doctrine reduces $E(C_{fed\ reg})$ by lowering $p(fed\ reg)$.⁶³

In this way, the anticommandeering principle advances the values of federalism in two ways. First, the doctrine reduces the probability of preemptive federal regulation being enacted because the federal government may not be willing to bear all the costs of such regulation, and

⁶⁰ For a discussion of the various values that federalism is thought to advance, see *infra* notes 76-85 and accompanying text.

⁶¹ Note that the federal government does not internalize *all* of the costs of federal regulation when it preempts state law because states are bound by valid federal law and often must incur costs to comply. See *infra* notes 88-89 and accompanying text.

⁶² See, e.g., Robert Cooter & Thomas Ulen, LAW & ECONOMICS 40-42 (3rd ed. 2000) (discussing externalities and the role of law in encouraging the internalization of external costs).

⁶³ Accord Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 35 (2004) (arguing that “the anticommandeering doctrine helps shore up the political safeguards of federalism by forcing the national government to internalize the costs—both fiscal and political—of its actions”); *id.* at 127-28 (discussing the “two kinds of costs” that “[f]orbidden commandeering requires the national government to internalize”); 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, 901-04 (1998) (advancing a similar argument); Caminker, *supra* note 8, at 1073 (“Congress might enact a commandeering statute where, absent this possibility, it would have enacted no federal legislation at all. The result is an increase in the total quantity of federal legislation, shifting exercised regulatory power from the states to the federal government.”). Note that Young and Hills, like the efficiency analysis in the text, assume that the federal government internalizes all of the benefits of federal regulation. The optimal level of federal regulation would change if that assumption were false in a particular setting. For example, public confusion might allow state officials to reap some of the political rewards for popular federal regulations that the states had no hand in enacting or implementing. In that scenario, cost-benefit efficiency might be advanced by having the federal government externalize some of the costs of federal regulation in addition to some of the benefits.

some degree of cost externalization through commandeering is not available.⁶⁴ Second, the ban on commandeering prevents any kind of mandatory federal regulation when preemption does not constitute a feasible congressional alternative and the regulatory reality is commandeering or nothing.⁶⁵ Preemption will not always be viable, as is suggested by the difficulty of coming up with preemptive alternatives in *Printz*.⁶⁶ Anticommandeering doctrine cannot compromise state regulatory authority on balance when more onerous regulatory alternatives are not available to the federal government.

This cost-internalization rationale for the anticommandeering principle provides a relatively clear, analytically tractable principle, one that is ideologically evenhanded. Illustrations of this rationale for anticommandeering doctrine occurred shortly after the terrorist attacks of September 11, 2001.⁶⁷ For example, the federal government asked state and local law enforcement officers to help execute a “nationwide plan to interview as many as 5,000 Mideast

⁶⁴ The costs to the federal government of preemption vary widely depending on the context. Sometimes, the costs are negligible. For instance, having Congress develop federal regulations for nuclear-waste disposal would seem to involve little in the way of costs. At other times, however, the costs are substantial. For example, it likely would have been very expensive for the federal government to have conducted all background checks on would-be firearms purchasers from the moment the Brady Act went into effect. *See supra* Part I (discussing *Printz*).

⁶⁵ Congress would still have available non-mandatory federal regulation through use of the conditional spending power. *See supra* notes 1 and 43 and accompanying text; *infra* Part II.D (analyzing the conditional spending power from a federalism perspective).

⁶⁶ *See infra* text following note 75.

⁶⁷ *See generally* Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231 (2004) (discussing the several states and many local governments that have resisted the perceived excesses of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001), either by announcing their disapproval or by ordering their law enforcement personnel not to cooperate in enforcing the law); *see also* Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1279 (2004) (arguing, *inter alia*, that “the question of the national government’s ability to require state and local cooperation with federal anti-terrorism initiatives . . . illustrates the several different ways in which federalism promotes and protects individual freedom, resonating with a long, if mostly forgotten, history of state governmental resistance to national measures thought to encroach on civil liberties”).

men ages 18 to 33 here on visas.”⁶⁸ While most state and local law enforcement officials obliged, “[t]he Portland, Ore., chief said his department wouldn’t assist the government, while Ann Arbor Police Chief Daniel Oates – with 79 people in his city to be interviewed – ha[d]n’t committed to allowing his officers to conduct interviews.”⁶⁹ Presumably because of anticommandeering doctrine, it was common ground among all the parties involved that the federal government could not require state and local law enforcement officers to conduct the interviews. In this instance, the unavailability of commandeering served the interests not only of champions of states’ rights but also of people who perceived threats to civil liberties.

To recognize the force of this example, one need not agree that the PATRIOT Act in particular compromises civil liberties. The ratio of state and local to federal law enforcement personnel in the United States is greater than 10 to 1.⁷⁰ “At least in the short term,” therefore, “the FBI and other federal law enforcement institutions are unlikely to cover the many responsibilities that ‘homeland security’ entails without substantial state and local assistance.”⁷¹ Because the anticommandeering principle requires the federal government to internalize more of the costs of regulation before engaging in regulation, the doctrine can help to safeguard civil

⁶⁸ David Shepardson, *FBI to Help Question 650 Men*, THE DETROIT NEWS, Nov. 27, 2001, at 1A.

⁶⁹ *Id.*

⁷⁰ See Young, *supra* note 67, at 1281 (contrasting the more than one million state and local law enforcement personnel with the roughly 93,000 full-time federal law enforcement personnel from surveys conducted in 2000 and 2002, respectively); see also William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2181 (2002) (documenting that the overwhelming majority of law enforcement personnel nationwide are state and local police officers).

⁷¹ Young, *supra* note 67, at 1281. See also Althouse, *supra* note 67, at 1232 (“[I]n carrying out the massive federal effort needed to deal with terrorism after September 11, 2001, the national government inevitably looks to the vast number of police, health workers, and other personnel employed at the state and local government levels.”).

liberties *any* time a proposed federal law would compromise individual rights – either by reducing the likelihood of enactment or by reducing enforcement.⁷²

C. *Problematizing the Standard Theory*

But – and this is a potentially big “but” – all other things are not always equal when the Court removes commandeering as a congressional option. Anticommandeering doctrine may increase $C_{fed\ reg}$ because the unavailability of commandeering may result in more instances of federal preemption going forward. And preemption, an obvious and constitutional alternative to commandeering,⁷³ may impede the vindication of federalist values by eliminating a regulatory role for the states at the level of policy implementation.⁷⁴ When states are commandeered, they retain (often significant) discretion to determine how to implement the federal mandate. Preemption, by contrast, bypasses the regulatory authority of the states entirely.⁷⁵ In a *New*

⁷² There is a flip side, of course. Federal legislation aimed at protecting constitutional rights – as opposed to protecting national security at the potential expense of civil liberties – would also be less likely to be enacted or enforced in the presence of a constitutional ban on commandeering.

⁷³ See *supra* notes 5, 42.

⁷⁴ Another option at Congress’ disposal is use of the conditional spending power. See *supra* notes 1 and 43 and accompanying text (discussing *Dole*); *infra* Part II.D (analyzing the conditional spending power from a federalism perspective). Still another viable alternative would be for Congress to give states a choice between being preempted and being commandeered. See *supra* notes 35 and 44 and accompanying text (recording the *New York* Court’s validation of that approach); *infra* Part IV.C (analyzing its implications for the legitimacy of commandeering).

⁷⁵ See, e.g., Caminker, *supra* note 8, at 1002, 1006-07 (“In some situations Congress can even use state intermediaries as a means of preserving a significant role for state discretion in achieving specified federal goals, where the alternative is complete federal preemption of any state regulatory role. . . . Indeed, on occasion this approach allows Congress to govern in a decentralized manner that is more respectful of state autonomy.”); *id.* at 1011 (distinguishing “two basic commandeering techniques” – that is, “ministerial mandates” and “bounded discretion mandates” – the latter of which “order state officials to reach a specified federal objective, but afford these officials some degree of discretion in deciding how to do so,” an approach that “is particularly supportive of states’ political discretion” and “enhances the prospect that the resulting policy will reflect local needs and concerns as well as the national interest”); *id.* at 1079 (“Bounded discretion statutes leave state officials with greater local autonomy, and consequently

York-type situation, for example, states that regulate low-level radioactive waste in accordance with federal instructions have more say regarding how such waste is regulated than states whose regulatory activities are preempted by federal law. In the *Printz* scenario, to consider another example, Congress could have used its commerce power to prohibit states from issuing any permits for handguns that have moved in interstate commerce and could have further provided that all such permits would be issued by the federal government. Defenders of federalism, who want states to participate in the regulation of gun possession, might sensibly prefer that states be commandeered than preempted.

Herein lies a tradeoff between lines of accountability and the exercise of state regulatory power.⁷⁶ Any adult who has had to deal with a traffic cop, just like any school child who has had to contend with a lunch monitor, learns quickly that those who implement the law often have a great deal of power to determine what the law is in terms of its actual impact on people's lives. Constitutional law is not different in this regard, for at least two reasons. First, and of comparatively less significance, regulatory control means coercive power, even when the rules are generally pretty clear, because the rule enforcer usually has discretion to decide when and whether to act. Traffic rules are clear and not discretionary, but traffic cops in fact retain a great deal of discretion to decide whom to cite for a violation.

Second, and more importantly in the commandeering context, regulatory control often means an opportunity for public policy making. That is why federalists, who want states to

promote diversification and constrained experimentation more than would a fully specified and federally enforced congressional statute.”).

⁷⁶ Thus the implications for political accountability of Professor Caminker's commandeering categories, *see supra* note 75, are the opposite of their implications for state regulatory control. As Professor Jackson observes, “statutes that offer substantial discretion to the states in carrying out a substantial, federally mandated duty might pose a greater threat to the clarity of responsibility and thus to political accountability than do statutes imposing more limited, ministerial duties.” Jackson, *supra* note 7, at 2203-04.

retain regulatory control, will tend to prefer such control most in situations where the federal regulation comes in the form of a standard rather than a rule. Lunch monitors often enforce general standards of good behavior on the part of students, and in so doing, make law regarding what such behavior entails. Lunch monitors would prefer to be commandeered by the principal than preempted.

To be clear, the threat that federal preemption – and thus the preemption-encouraging ban on commandeering – poses to state retention of regulatory control is significant not because state regulatory control is important for its own sake. Rather, the critical point is that such regulatory autonomy is necessary to the realization of any of the values that federalism is thought to advance. That is, state regulatory autonomy remains critical no matter which of the commonly proffered virtues of federalism are under consideration. Specifically, tyranny prevention is said to be advanced when multiple levels of government compete for political power.⁷⁷ Democratic self-government is supposed to be facilitated when there exists a robust space for participatory

⁷⁷ See, e.g., James Madison, THE FEDERALIST NO. 51 (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“Perhaps the principal benefit of the federalist system is a check on abuses of government power. “The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties.’ ” 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.”) (internal citations omitted); *Federal Energy Regulatory Commission (FERC) v. Mississippi*, 456 U.S. 742, 790 (1982) (O’Connor, J., dissenting) (“[O]ur federal system provides a salutary check on governmental power. As Justice Harlan once explained, our ancestors ‘were suspicious of every form of all-powerful central authority.’ To curb this evil, they both allocated governmental power between state and national authorities, and divided the national power among three branches of government. Unless we zealously protect these distinctions, we risk upsetting the balance of power that buttresses our basic liberties.”) (quoting John Marshall Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A.J. 943, 944 (1963)); *supra* note 26 (quoting the majority opinion in *Gregory v. Ashcroft*); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 S. Ct. REV. 341, 380-95.

politics at levels closer to the people.⁷⁸ Political responsiveness is believed to be encouraged when states compete for mobile citizens.⁷⁹ Value pluralism is promoted when state policies are allowed to differ along various dimensions of cultural difference.⁸⁰ Social problem solving can be encouraged when the public-policy equivalent of science laboratory experiments are run at the state level.⁸¹ Finally, the efficient delivery of local public goods by states saves various costs

⁷⁸ See, e.g., *Gregory v. Ashcroft*, 501 U.S. at 458 (“This federalist structure of joint sovereigns preserves to the people numerous advantages. It . . . increases opportunity for citizen involvement in democratic processes”); *FERC v. Mississippi*, 456 U.S. at 789 (O’Connor, J., dissenting) (“[F]ederalism enhances the opportunity of all citizens to participate in representative government. Alexis de Tocqueville understood well that participation in local government is a cornerstone of American democracy.”) (referencing 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 181 (H. Reeve trans. 1961)); Rapaczynski, *supra* note 77, at 395-408.

⁷⁹ See, e.g., *Gregory v. Ashcroft*, 501 U.S. at 458 (“This federalist structure of joint sovereigns makes government more responsive by putting the States in competition for a mobile citizenry.”); Richard A. Epstein, *Exit Rights Under Federalism*, 55 *LAW & CONTEMP. PROBS.* 149 (1992) (arguing for competition among states); ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 129-30 (2000) (analyzing the circumstances in which mobile citizens contribute to efficiency in the delivery of local public goods); Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, in *PERSPECTIVES ON PUBLIC CHOICE* (Dennis C. Mueller ed., 1997) (providing necessary and sufficient conditions for the existence of an efficient allocation of citizens across jurisdictions); Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416 (1956) (providing the first formulation of the mobility problem).

⁸⁰ See, e.g., *Gregory v. Ashcroft*, 501 U.S. at 458 (“This federalist structure of joint sovereigns assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society”). Contemporary examples abound, including some of the most controversial in American culture: abortion, gay marriage, and physician-assisted suicide. Whatever one thinks of value pluralism normatively regarding a particular issue, it is uncontroversial descriptively to suggest that uniform federal rules prevent different parts of the country from governing themselves in ways that vary across the nation. That is the case whether the federal rule takes the form of: (1) a constitutional decision by the Court, see *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the right to privacy recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and protected by the Due Process Clause embraces a right to abortion); (2) a proposed constitutional amendment, see *President Calls for Constitutional Amendment Protecting Marriage*, Feb. 24, 2004, at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> (last visited Dec. 28, 2005); or (3) a federal statute interpreted by the government to have preemptive effect, see *Gonzales v. Oregon*, No. 04-623 (raising the question whether the Attorney General permissibly construed the federal Controlled Substances Act to prevent implementation of Oregon’s Death with Dignity Act, a voter-passed initiative that allows physician-assisted suicide in the state).

⁸¹ See, e.g., *Gregory v. Ashcroft*, 501 U.S. at 458 (“This federalist structure of joint sovereigns allows for more innovation and experimentation in government”). *FERC v. Mississippi*, 456 U.S. at 788-89 (O’Connor, J., dissenting) (“Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state

when states or regions make different, more cost-effective choices than the federal government would make for the nation as a whole.⁸² When federal preemption eviscerates state regulatory control – and thus the ability of states to make choices, including resource choices⁸³ – all of those federalist values can be compromised.⁸⁴

innovation is no judicial myth. When Wyoming became a State in 1890, it was the only State permitting women to vote. That novel idea did not bear national fruit for another 30 years. Wisconsin pioneered unemployment insurance, while Massachusetts initiated minimum wage laws for women and minors. After decades of academic debate, state experimentation finally provided an opportunity to observe no-fault automobile insurance in operation. Even in the field of environmental protection, an area subject to heavy federal regulation, the States have supplemented national standards with innovative and far-reaching statutes. Utility regulation itself is a field marked by valuable state invention.”) (footnotes omitted); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). *But see* Rapaczynski, *supra* note 77, at 408-14 (criticizing the notion that state experimentation is a fundamental component of a federalist jurisprudence).

⁸² See *infra* note 89 (providing an example of an efficiency rationale for local control).

⁸³ See, e.g., *National League of Cities*, 426 U.S. at 851-52 (“Our examination of the effect of the 1974 amendments [to the FLSA], as sought to be extended to the States and their political subdivisions, satisfies us that both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral governmental functions of these bodies. . . . [T]heir application will . . . significantly alter or displace the States’ abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States’ “ ‘separate and independent existence.’ ” . . . [T]he dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States’ “ability to function effectively in a federal system.”) (footnotes and internal citations omitted).

⁸⁴ For more recent discussions of the various values that federalism might be thought to serve, see generally COOTER, *supra* note 79; DAVID SHAPIRO, *FEDERALISM: A DIALOGUE* (1995); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 U.C.L.A. L. REV. 903 (1994). For an overview of the normative federalism debate and citations to the relevant literature, see ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 109-12 (2d ed. 2005).

This is well-trodden intellectual ground. To be clear, this inquiry does not take sides in the normative federalism debate. Rather, it advances the (hopefully uncontroversial) proposition that state retention of regulatory control is needed to realize any of the commonly understood values advanced by federalism, and then argues (more controversially) that anticommandeering doctrine undermines federalism by reducing state regulatory control insofar as a greater quantity of preemption results from the Court's commandeering ban. There is no meaningful sense in which states can prevent federal tyranny, advance political participation, encourage political responsiveness through interjurisdictional competition for mobile citizens, express the distinctive value commitments of the governing majority of their populations, serve as laboratories of experimentation, or efficiently deliver public goods with respect to a particular set of issues if they are removed from the regulatory scene through federal preemption. Accordingly, regardless of whether anticommandeering doctrine advances political accountability, the extent to which states lose regulatory control is co-extensive with the extent to which they no longer function as autonomous sovereigns in a federal system.⁸⁵

None of this is to suggest that commandeering triggers only accountability concerns and not any of the federalism values discussed above. To be sure, the Rehnquist Court stressed

⁸⁵ In response, one could invoke Feeley and Rubin's distinction between federalism as a constitutional requirement and the managerial concept of decentralization. *See generally supra* note 84. Even in a world without judicially enforced federalism, so the argument goes, Congress and federal agencies could design experiments and try different approaches to social problems in different regions of the nation. Similarly, the federal government could preempt in such a way as to allow for regional participation, competition, or expressions of value, or the efficient local delivery of public goods. (Tyranny prevention is another matter because in a world without federalism, the central authority decides how much decentralization takes place.) To be sure, Feeley and Rubin make some powerful political points and raise an intriguing theoretical possibility. But as the various federal laws discussed throughout this article illustrate, experience shows that regional experimentation and encouragement of participation, competition, diversity, and efficiency are not what tends to happen when Congress preempts state and local law. That is not to say, however, that it would be impossible for Congress to do some significant decentralizing, a concept that is itself analytically connected to a central or national perspective.

accountability,⁸⁶ but that Court's selective focus should not control a comparative normative analysis of commandeering and preemption from a federalism perspective. Theoretically, Congress could commandeer in ways that sap state regulatory control to as great an extent as would preemption. As a general matter, however, that equivalence seems unlikely. Preemption completely removes states from the regulatory scene; commandeering does not. And when commandeering empowers states to make regulatory choices, a constitutional rule that categorically bans commandeering but allows preemption would not seem to make sense insofar as federalism is supposed to be concerned with preserving state regulatory autonomy.

A critical premise underlying this analysis of anticommandeering doctrine is that the values of federalism are compromised when states lose regulatory control, regardless of whether state officials are eager to cede regulatory authority to the federal government for any number of reasons – for example, saving the financial costs of regulatory actions, deferring to the superior expertise of federal officials, taking advantage of economies of scale available at the national level, or evading political responsibility for unpopular decisions. As some commentators have argued forcefully, however, state officials sometimes do seek to relinquish regulatory power to the federal government.⁸⁷ Insofar as that is the correct behavioral assumption in the context of

⁸⁶ See, e.g., *supra* note 5 and accompanying text.

⁸⁷ See, e.g., Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 941 (2005) (“[T]here is no logical relationship between the policy interests of state citizens and the amount of regulation flowing from the federal government or left to the states. Federal regulation and spending obviously can, and often does, benefit state-level constituencies. Consequently, state officials who are primarily interested in maximizing political support will have no reliable interest in decreasing federal power (or, the equivalent, in increasing state power).”) (footnotes omitted); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 797 (1995) (“However valuable federalism may be for the citizenry at large, it is not always of value to state and local officials. To begin with, it is sometimes in the interest of state and local officials for *them* to pass the buck on the hardest problems of government by deferring to the folks in Washington, D.C. The exercise of power brings with it accountability and enemies, and politicians interested in reelection have no interest in being any more accountable than they have to be.”).

certain federal-state interactions, the cost-benefit calculation might be thought to change significantly because the policy-discretion and accountability variables are no longer in conflict.

In most situations, moreover, it is unlikely that the financial costs to the states associated with preemption are so much greater than the costs associated with commandeering that those financial costs outweigh the redirection of regulatory authority and accountability advanced by anticommandeering doctrine in the circumstances posited immediately above. It seems more probable that preemptive federal legislation is less costly to the states as a general matter because they do not have to incur the costs of enforcement, but that preemption might be more expensive in certain circumstances – for example, if Congress imposed onerous regulatory standards under the Commerce Clause,⁸⁸ or if the uniform federal solution is less cost-effective in parts of the country than the choices that states in those regions would have made.⁸⁹

⁸⁸ Preemption can impose significant costs on the states if they must meet burdensome federal standards in pursuing their activities in areas where those activities are also performed by private individuals. Examples might include operating cars or running a utility. Imagine two possibilities: (1) Congress requires the states to decrease pollution by X amount; or (2) Congress imposes standards for pollution control that require the most expensive abatement technology, standards that are far more costly than states would be allowed to choose under (1). Even when states are not market participants, moreover, preemption can impose significant costs on them. Imagine that after *New York*, Congress enacted super-strict waste storage requirements, and no private business could afford to comply with them. States with such businesses in their jurisdictions would then have to spend money to subsidize them, or else risk losing them and all the associated tax revenue, jobs, and other economic benefits – either because the businesses would leave for another jurisdiction or have to shut down.

⁸⁹ For example, it is often observed that Rust Belt states favored national emissions standards for factories in order to reduce or eliminate a competitive advantage enjoyed by Sun Belt states in the competition for new industry. If the only standards were air quality standards, the Sun Belt states could offer less pollution control because their air was cleaner. So the Rust Belt states lobbied for a federal requirement that every new factory of a certain type had to install the same abatement technology. See generally B. Peter Pashigan, *Environmental Protection: Whose Interests are Being Protected?*, 23 ECONOMIC INQUIRY 551 (1985) (analyzing votes on critical Clean Air Act amendments and verifying that Rust Belt legislators voted to nationalize these rules). See also Robert Glicksman and Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS. 249, 285 (1991) (observing that “when differential geographical benefits are at stake, congressional voting patterns fall out along remarkably congruent geographical lines, suggesting that congresspeople are aware of the legislation’s geographic implications, and that they vote consistently with the theory of pessimistic pluralism”).

More generally, the blanket assumption that states always care about losing regulatory control is too simplistic. A continuum exists – from strongly wanting the federal government to assume regulatory control, to not caring at all what the federal government does, to strongly not wanting the federal government to assume regulatory control. Political and social reality is sufficiently complex that the preferences of states over outcomes may depend heavily on the area in question and the circumstances.

Yet it is important not to overstate the point. The relevant normative question is not what state officials tend to prefer in various situations, but what the constitutionally grounded values of federalism identify as the appropriate level of state regulatory control in those settings. Normatively, as opposed to descriptively, it would be odd for a federalism that values states as guardians against federal tyranny to countenance evasions of political responsibility as a benefit conferred by anticommandeering doctrine. Indeed, the vision of federalism defended by the Court in such cases as *United States v. Lopez* and *United States v. Morrison* relies upon the idea of states as autonomous sovereigns that are jealous of their regulatory authority and thus are concerned not to lose regulatory control.⁹⁰

From a constitutional perspective that takes federalism seriously, the optimal extent and form of federal regulation is ultimately a normative question of constitutional law, not a descriptive issue that turns on the actual, potentially self-interested political preferences of state officeholders at a particular time.⁹¹ Constitutional law and economics, unlike other kinds of economic analysis, cannot take all preferences as given. Rather, a normative theory of value –

⁹⁰ See *infra* notes 92 and 174 and accompanying text (discussing *Lopez* and *Morrison*).

⁹¹ Professors Levinson and Calabresi make this point effectively. See *supra* note 87.

here, one supplied by federalism theory and doctrine – is necessary to determine which costs and benefits are admissible in a theoretical analysis of state autonomy.

The Rehnquist Court’s apparent lack of concern for the impact of broad federal preemption on state regulatory control in the commandeering context is hardly *sui generis*. It is one of the enduring puzzles of the Court’s legacy that the same Justices who wrote passionately about the virtues of federalism were tone deaf to the implications of preemption for the vindication of a substantive vision of state autonomy. The five Justices in the states’ rights majority in critical cases involving the scope of congressional power under the Commerce Clause⁹² or Section Five of the Fourteenth Amendment⁹³ were the most likely to hold state law

⁹² See *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating, for the first time since the New Deal, a federal statute regulating private conduct – the Gun Free School Zones Act of 1990 – as beyond Congress’ commerce power); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacked authority under either the Commerce Clause or § 5 of the Fourteenth Amendment to enact a provision of the Violence Against Women Act of 1994 (VAWA) creating a private civil remedy for victims of gender-motivated violence). *But see Gonzales v. Raich*, 125 S. Ct. 2195, 2205-09 (2005) (holding that the Commerce Clause authorizes Congress to prohibit the local cultivation and use of marijuana in states allowing such activity). See also *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress may not use any Article I, § 8 power to abrogate state sovereign immunity). The Court appears to have since recognized that it spoke too hastily in *Seminole Tribe* in not limiting its holding to the commerce power. See *Tennessee Student Assistance Corporation v. Hood*, 124 S. Ct. 1905, 1908 (2004) (“We granted certiorari to determine whether th[e Bankruptcy] Clause grants Congress the authority to abrogate state sovereign immunity from private suits. Because we conclude that a proceeding initiated by a debtor to determine the dischargeability of a student loan debt is not a suit against the State for purposes of the Eleventh Amendment, we affirm the Court of Appeals’ judgment, and we do not reach the question on which certiorari was granted.”). The Court likely will decide the question whether Congress may abrogate state sovereign immunity under the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, during the October 2005 Term. See *Central Virginia Community College v. Katz*, No. 04-885, certiorari granted April 4, 2005. Oral argument was held on Monday, October 31, 2005, after which the case was submitted for decision.

⁹³ See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act of 1993 (RFRA) exceeds Congress’ enforcement power under § 5 of the Fourteenth Amendment); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (holding that Congress could not lawfully abrogate state sovereign immunity from patent infringement suits because the provisions of the Patent and Plant Variety Protection Remedy Clarification Act of 1992 are beyond Congress’ § 5 power); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act of 1967 (ADEA) is beyond Congress’ § 5 power); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) (holding that Title I of the of the Americans with Disabilities Act of 1990 (ADA), which prohibits employment discrimination

preempted.⁹⁴ Professor Ernest Young has made that point repeatedly,⁹⁵ as have other commentators of diverse ideological commitments.⁹⁶ The Court, however, has not so much as acknowledged the apparent tension.

against the disabled, is beyond Congress' § 5 power); *Morrison, supra* note 92, 529 U.S. at 598. *But see* Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) (upholding the family-care leave provision of the Family and Medical Leave Act of 1993 (FMLA) as a valid exercise of Congress' § 5 power to combat unconstitutional sex discrimination); Tennessee v. Lane, 541 U.S. 509 (2004) (holding that, as it applies to the class of cases implicating the fundamental right of access to the courts, Title II of the Americans with Disabilities Act of 1990 (ADA) constitutes a valid exercise of Congress' § 5 power to enforce § 1's substantive guarantees). On May 16, 2005, the Court granted certiorari in, and consolidated, two cases involving the § 5 validity of Title II as applied to the administration of prison systems. *See* United States v. Georgia, No. 04-1203; Goodman v. Georgia, No. 04-1236. Oral argument was held on Wednesday, November 9, 2005, after which the case was submitted for decision. On January 10, 2006, the Court held unanimously that insofar as Title II creates a private cause of action for damages against states for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity. 120 Fed. Appx. 785.

⁹⁴ *See* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 462 (2002) (observing that the Rehnquist Court held in favor of federal preemption in almost two-thirds of the then thirty-five preemption cases decided since Justice Thomas joined the Court); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 369-70 (studying the Rehnquist Court's voting alignments in eight nonunanimous preemption cases decided during the October 1999-2001 Terms; noting that "Justice Scalia voted to preempt in all eight, the Chief Justice and Justices O'Connor and Kennedy in seven each, and Justice Thomas in six"; and further observing that "in those same eight cases, Justices Souter, Ginsburg, and Breyer each voted to preempt only twice and Justice Stevens never voted to preempt").

⁹⁵ *See generally* Young, *supra* note 63 (distinguishing "sovereignty" in the sense of legal unaccountability for violations of federal law from "autonomy" defined as the ability of states to govern; submitting that "[t]he Court's preference for sovereignty over autonomy is the most obvious hallmark of the 'federalist revival'; and arguing that "[a]ny set of federalism doctrines focused on autonomy must make preemption its primary concern"); *see also, e.g.*, Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1377-84 (2001) (discussing the fact that the Rehnquist Court's allegedly state-rights majority often votes against the states in preemption cases); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 39-40 (contending that the Court's preemption decisions are significantly more important for state autonomy than are the rulings articulating a robust conception of state sovereign immunity); Young, *supra* note 67, at 1304 (asserting that the Court's preemption cases "implicate the core of the States' capacity to govern themselves; federal preemption, after all, displaces state law in favor of policies enacted at the national level").

⁹⁶ *See, e.g.*, Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004) (critiquing the Rehnquist Court's preemption decisions for broadly interpreting federal law in favor of commercial interests and at the expense of progressive state regulatory measures); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 508 (2002) ("It is hard to understand why Justices who are so aware of the values of federalism in *Lopez*, *Morrison*, or *Garrett* exhibit such blindness to those values when presented with a preemption case.

When preemption is a feasible alternative, then, the relevant cost-benefit questions for a federalism concerned with state regulatory control are: (1) whether anticommandeering doctrine causes $p(fed\ reg)$ to decline; (2) whether it causes $C_{fed\ reg}$ to increase; and (3) whether it causes $p(fed\ reg)$ to decline more than it causes $C_{fed\ reg}$ to increase.⁹⁷ As with many unresolved empirical questions, there is room for reasonable disagreement on this issue. But even preempirically, some important points can be recorded with some measure of confidence.

To begin with, there is cause to believe that anticommandeering doctrine causes $p(fed\ reg)$ to decline little. To be sure, the Court's anticommandeering doctrine has taken away a congressional option, and having fewer options with which to accomplish a desired legislative objective should tend to make the federal government worse off by increasing the costs of imposing federal regulations, at least in some circumstances. The upshot, theoretically, is less federal regulation.

The problem with such reasoning, however, is that the federal government is not like private actors who are required to balance their checkbooks if they want to stay afloat financially, or like those state governments that are required to balance their budgets. Instead, the federal government tends to regulate now and concern itself with paying later. Greater cost internalization, in other words, may increase the federal budget deficit, not reduce the quantity of federal regulation.

Given the broad range of issues over which Congress has undoubted power to regulate, the failure of the Court to apply preemption doctrine sparingly, and with real attention both to Congress's intent and the values of federalism, will in the long run prove disastrous to perpetuation of the very real values underlying the diffusion of power inherent in federalism.”); Fallon, *supra* note 94, at 471-72; Meltzer, *supra* note 94, at 362-78.

⁹⁷ When preemption is not a feasible alternative, the costs imposed by mandatory federal regulation are irrelevant because the probability of such federal regulation goes to zero.

Moving from political and economic theory to political and fiscal reality, moreover, it is difficult to think of a single instance in which Congress chose the commandeering option with the intent or effect of externalizing political accountability. Nor is it straightforward conceptually to envision how Congress could pursue such a course in the real world with any confidence that it would succeed in “getting away with it.” If that is right, then requiring the federal government to preempt rather than commandeer – which the federal government has almost always chosen to do voluntarily anyway⁹⁸ – does not lower *p(fed reg)* to a significant extent, at least in most situations.⁹⁹

⁹⁸ In *Printz*, Justice Scalia observed for the majority that historically Congress has not engaged in commandeering. 521 U.S. at 907. *See supra* text accompanying note 49. For Justice Scalia, this historical lesson indicated that commandeering is unconstitutional. Ironically, the truth of his observation may suggest that anticommandeering doctrine does not advance the cause of federalism by making the states any better off because the doctrine does not lower the probability of federal regulation to any appreciable extent.

⁹⁹ The claim that the probability of federal regulation is relatively insensitive to the form it takes raises some interesting questions. First, it may not be apparent why the federal government would ever choose to commandeer. Two possibilities, discussed *infra* Part III in analyzing *New York* and *Printz*, respectively, is that the states prefer commandeering to preemption and they influence the federal legislative process, or that preemption is not a feasible alternative. Second, the suggestion that anticommandeering doctrine causes the probability of federal regulation to decline little may seem empirically suspect. After all, Congress did not impose a preemptive solution after *New York*. *See, e.g.*, U.S. Nuclear Regulatory Commission, Our Governing Legislation, Low-Level Radioactive Waste Policy Amendments Act of 1985, at <http://www.nrc.gov/who-we-are/governing-laws.html#llrpaa-1985> (last visited Dec. 23, 2005) (“This Act gives States the responsibility to dispose of low-level radioactive waste generated within their borders”); CRS Issue Brief for Congress IB92059: Civilian Nuclear Waste Disposal, July 30, 2001, at http://www.ncseonline.org/NLE/CRSreports/Waste/waste-2.cfm?&CFID=569153&CFTOKEN=46244765#_1_19 (last visited Dec. 23, 2005) (“Disposal of low-level radioactive waste, which generally consists of low concentrations of relatively short-lived radionuclides, is a state responsibility under the 1980 Low-level Radioactive Waste Policy Act and 1985 amendments.”). But what happened *ex post* regarding the legislative problem reviewed in *New York* or any other case proves nothing one way or the other. The argument advanced by this inquiry is not that the Court should allow commandeering with respect to issue X because otherwise Congress will be likely to respond by preempting state action with respect to that issue. There are any number of reasons why a future Congress might not (re)turn its attention to issue X – for example, different priorities, resources, or members. The point fleshed out in the text, rather, is that if Congress knows it cannot commandeer under any circumstances, *ex ante* it will be more likely to preempt state and local regulations in enacting future legislation regarding issues X, Y, and Z.

Even if requiring the federal government to preempt rather than commandeer does not lower $p(\text{fed reg})$ to a significant extent, there remains the question whether preemption, as compared with commandeering, imposes greater federalism costs (that is, $C_{\text{fed reg}}$) in the form of loss of regulatory control than it saves states financially and in terms of accountability. That is a nice empirical question, the answer to which likely depends on the circumstances.¹⁰⁰ Yet it is a striking feature of contemporary anticommandeering doctrine that the Court does not pause to consider the economic and policy dimensions of the problem. Indeed, the anticommandeering principle is so broad¹⁰¹ – so context insensitive – that it applies not just in the face of a compelling government interest (for example, commandeering of state and local officials in the wake of a terrorist attack or devastating hurricane),¹⁰² but also where accountability concerns are minimal (perhaps because “everybody knows” the federal government is in charge) and preemption would impose huge costs on the states (relative to commandeering) both financially

¹⁰⁰ It is, of course, one thing to call a question “empirical” and quite another to resolve the issue with empirical evidence. It is difficult, if not impossible, to investigate in a rigorous empirical fashion the extent to which anticommandeering doctrine advances or thwarts the vindication of federalism values in various circumstances. The chief obstacle lies in deriving a common metric according to which the various costs can be compared. Financial costs are, by definition, measured in monetary terms, but the problem of monetizing accountability and regulatory-control costs seems intractable as a general matter. It is not as if the analyst can ask states how much they would be willing to pay to avoid accountability or to retain regulatory control. Nor are the political preferences of state officers the decisive concern. The most that can be hoped for empirically in the face of the inevitable lack of knowledge is the context-sensitive, rough balancing of incommensurable values that is typical of doctrinal analysis in constitutional law. That said, current anticommandeering doctrine would be significantly improved if the Court were to take all the relevant costs into account. As noted in the foregoing (and following) discussions of *New York* and *Printz*, the Court has fixated on the issue of political accountability. In cases in which the record is particularly clear, moreover, empirical problems will not pose a serious obstacle to sound constitutional analysis of the relevant considerations. *See infra* Part III.

¹⁰¹ For a discussion of “breadth” and “depth” as characteristics of judicial decision making, see generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Neil S. Siegel, *A Theory In Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005) (analyzing Sunstein’s theory of judicial minimalism).

¹⁰² *See infra* Part V.

and in terms of lost regulatory control. That does not seem a sensible constitutional outcome to the extent that anticommandeering doctrine's animating purpose is the federalist enterprise of protecting state autonomy.

D. Conditional Federal Spending

Unlike preemption or commandeering, Congress' use of its conditional spending power – that is, conditioning provision of federal funds on the states' agreeing to be commandeered – does not constitute a mandatory form of federal regulation. States, in other words, may avoid being commandeered by turning down the money. As noted above,¹⁰³ Justice O'Connor stressed for the *New York* Court that Congress may constitutionally place strings on federal grants in the commandeering context:

This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. . . . [U]nder Congress' spending power, 'Congress may attach conditions on the receipt of federal funds.' *South Dakota v. Dole*, 483 U.S., at 206¹⁰⁴

Although Justice O'Connor distinguished conditional spending from commandeering on grounds of coercion and thus accountability,¹⁰⁵ commentators have debated vigorously whether many forms of conditional federal spending are mandatory in practice because the Rehnquist Court

¹⁰³ See *supra* note 43 and accompanying text.

¹⁰⁴ *New York*, 505 U.S. at 166-67.

¹⁰⁵ Coercion and accountability are related in that state officials are appropriately held accountable for accepting conditional federal grants if and only if they had a choice in the matter – that is, they were not coerced into accepting the conditions in order to get the money. If coercion exists, conditional spending may give the false impression of a choice.

declined to put teeth into *Dole*'s non-coerciveness requirement.¹⁰⁶ To the extent one believes that particular congressional uses of the conditional spending power are non-coercive, so that states have a genuine choice in deciding whether to accept or turn down federal dollars, it may not seem apparent how Congress' putting strings on federal money might make the states as worse off as congressional commandeering. While commandeering leaves states with no choice, a state can turn down a conditional grant and thereby avoid being commandeered.

One powerful response is that state officials have no real choice but to accept large quantities of federal money in many situations, so that Justice O'Connor draws distinctions without a real-world difference in *New York*. For example, no state realistically could afford to give up highway money from the government in *Dole*.¹⁰⁷ Conditions can be inherently coercive; it is extraordinarily difficult to draw a line beyond which a condition becomes coercive; and thus conditional spending can be every bit as coercive as preemption or commandeering.

There is, however, a potentially crucial difference from a federalism perspective between conditional federal spending on the one hand, and commandeering or preemption on the other. That difference sounds in relative financial and opportunity costs.¹⁰⁸ States receive something of value with conditional spending, but arguably nothing of value (from their point of view) with

¹⁰⁶ See *supra* note 1 (collecting exemplary sources that take different positions on this issue); see also *supra* note 43 (stating the noncoerciveness requirement).

¹⁰⁷ See *supra* note 43.

¹⁰⁸ See *supra* notes 56-57 and accompanying text. There would not seem to be much difference between conditional spending and commandeering in terms of regulatory control because the federal government gives the money in exchange for the states' agreement to be commandeered. A difference exists only to the extent one views the states' choosing between the money and the commandeering as itself an exercise of regulatory control. Moving beyond the commandeering context and thinking about conditional grants in general, the degree of state regulatory control depends on the specificity with which Congress sets the conditions. Conditions can be general and leave great flexibility (for example, "set a reasonable speed limit"), or they can be very specific (for example, "set a 55 mph speed limit"). The amount of regulatory control retained by states depends on the situation.

preemption or commandeering. At least with conditional federal spending, states “get paid” when they are commandeered. Moreover, to the extent that conditional spending pays the costs of federal regulation, it avoids the problem of displacing state and local budget choices underscored by the Court in *National League of Cities*.¹⁰⁹ With commandeering or preemption, by contrast, states may face an unfunded mandate and thus have to forgo other regulatory opportunities.¹¹⁰

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

E. A Transnational Comparison

The above emphasis on the potentially huge impact for federalism of states losing regulatory control is borne out by the European experience. The general view of member states of the European Union on the anticommandeering/preemption issue is the opposite of the U.S.

¹⁰⁹ See *supra* note 83 and accompanying text.

¹¹⁰ See *supra* note 57 and accompanying text.

Supreme Court’s position: member states would rather be commandeered (they use the term “directives”) than preempted (they refer to “regulations”).¹¹¹ Among other things,¹¹² their judgment is that directives leave them with more regulatory power. In a relatively rare moment of comparative interest on the U.S. Supreme Court, Justice Breyer used his *Printz* dissent to flag that perceived virtue of commandeering on the other side of the Atlantic:

At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central “federal” body. . . . They do so in part because they believe that such a system interferes less, not more, with the independent authority of the “state,” member nation, or other subsidiary government, and helps to safeguard individual liberty as well.¹¹³

¹¹¹ See, e.g., Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 800, 801 (2004) [hereinafter “*Of Power and Responsibility*”] (arguing that the Tenth Amendment decisions “stand in striking contrast to the analogous doctrines of the European Court of Justice,” and exploring some of the “reasons for welcoming ‘commandeering’ in the European Union but not in the United States”); Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (Kalypso Nicolaidis & Robert Howse eds., 2001) [hereinafter “*The Issue of Commandeering*”] (“In the European Union, by contrast [to the United States], the subject of concern is not Union action that ‘commandeers’ Member State legislative or administrative bodies, but EU legislative activity that has direct effect in the legal systems of the Member States. Member States tend not to welcome Community regulations, which have immediate legal force for individuals within a Member State, and instead prefer that the Community pass directives, which command a Member State to regulate in a particular area and thus require further Member State legislative action to become fully effective within that state. So, too, ‘commandeering’ is a basic feature of German federalism”) (footnote omitted). See also COOTER, *supra* note 79, at 236 (discussing the difference between directives and regulations in the law of the European Union).

¹¹² Halberstam stresses that “the United States Supreme Court treats the various levels of government as permanently hostile adversaries that have reached a bargain in a historically situated arms-length deal, whereas the European Court of Justice views the various actors as fundamentally joined in a common enterprise.” Halberstam, *Of Power and Responsibility*, *supra* note 111, at 801.

¹¹³ *Printz*, 521 U.S. at 976-77 (Breyer, J., dissenting).

Writing for the majority, Justice Scalia declined Justice Breyer’s invitation to look abroad, deeming “such comparative analysis inappropriate to the task of interpreting a constitution.”¹¹⁴

To be sure, dabbling in comparative law by contrasting legal regimes briefly and at a very high level of abstraction does not put one in a good position to offer definitive conclusions about the wisdom of current Tenth Amendment doctrine. Justice Breyer rightly recognized that “we are interpreting our own Constitution, and not those of other nations, and there may be relevant political and structural differences between their systems and our own.”¹¹⁵ Indeed, Daniel Halberstam’s searching analysis of the institutional dynamics in the United States and European Union helps to account more fully for their opposite approaches to commandeering:

The US anti-commandeering rule exists in the context of a federal system marked by independently constituted, independently competent levels of governance that coexist . . . with a powerful federal government whose sphere of influence has proven difficult to contain by other means. Here, the anti-commandeering rule may be viewed as a consensus-forcing device by separating independent tiers of governance and requiring federal and State decision makers to reach agreement before working together. [T]he EU and Germany have both preserved . . . limitations on central government expansion and mechanisms of component State control over central government norms. Constitutional provisions and practical realities in both the EU and Germany make the central governing structure in both systems dependent on the component States for administrative services. And in both systems, component States are represented in their corporate capacities in the central governing institutions. Thus, in the EU and in Germany, commandeering is embedded within a system of consensus-forcing governance with structural limitations on the expansion of the central government. . . . [C]ommandeering may be viewed as a further mechanism to maintain the dependence of the central government on the component States and to preserve a sphere for additional component State input while carrying out central commands.¹¹⁶

Professor Halberstam sheds nuanced light on the question of why the governing views of commandeering are so different on each side of the Atlantic. To be sure, the political safeguards

¹¹⁴ *Id.* at 921, n.11.

¹¹⁵ *Id.* at 77 (Breyer, J., dissenting).

¹¹⁶ Halberstam, *The Issue of Commandeering*, *supra* note 111, at 249-50 (footnote omitted).

of federalism exert influence in Europe in ways they do not here.¹¹⁷ For present purposes, however, the critical point is that his analysis supports Justice Breyer’s claim that the European “experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.”¹¹⁸ Justice Breyer’s view, like the position advanced in this inquiry, is that commandeering tends to afford states greater regulatory control than does preemption. That conclusion is corroborated by Halberstam’s comparative exploration of the purposes and effects of commandeering in Europe.

III. NEW YORK AND PRINTZ REVISITED

It is instructive to revisit the Court’s decisions in *New York* and *Printz* and view them through the analytical lens provided by the foregoing analysis of anticommandeering doctrine. Specifically, it is worth asking whether the Court’s holdings make sense from a federalist perspective in light of the probability of federal regulation, implications for regulatory control, political accountability values, and financial costs.

Based upon those criteria, the majority opinion in *New York* was myopic in its exclusive focus on accountability and the case was decided incorrectly even on accountability grounds. Of course, *New York* is a familiar case by now. But Justice White’s revealing dissent warrants extensive quotation, even at this late date, because familiarity sometimes tends to encourage forgetfulness:

¹¹⁷ See Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 ST. LOUIS U. L.J. 671, 677 (2005) (recharacterizing Professor Halberstam’s findings in terms of “the political safeguards of federalism” and suggesting that “Justice Breyer’s comments on German federalism [in *Printz*] can be used to enter a note of caution about relying on bottom-line results without paying attention to the larger institutional surrounding”).

¹¹⁸ *Printz*, 521 U.S. at 977 (Breyer, J., dissenting).

The [1980 Act], and its amendatory 1985 Act, resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal pre-emption or intervention, but rather congressional sanction of interstate compromises they had reached.

. . . . The imminence of a crisis . . . cannot be overstated. In December 1979, the National Governors' Association convened an eight-member task force to coordinate policy proposals on behalf of the States.

. . . . The Governors recognized that the Federal Government could assert its preeminence in achieving a solution to this problem, but requested instead that Congress oversee state-developed regional solutions. . . . [T]he Governors' Task Force "recommend[ed] that Congress defer consideration of sanctions to compel the establishment of new disposal sites Congress should . . . allow the states a reasonable chance to solve the problem themselves."

Such concerns would have been mooted had Congress enacted a "federal" solution, which the Senate considered in July 1980. . . .¹¹⁹

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

[A]ttempts by states to enter into compacts and to gain congressional approval sparked a new round of political squabbling between elected officials from unsited States, who generally opposed ratification of the compacts that were being formed, and their counterparts from the sited States, who insisted that the promises made in the 1980 Act be honored. In its effort to keep the States at the forefront of the policy amendment process, the National Governors' Association organized more than a dozen meetings to achieve a state consensus.

. . . . The sited States grew increasingly and justifiably frustrated by the seeming inaction of unsited States in meeting the projected actions called for in the 1980 Act. Thus, as the end of 1985 approached, the sited States viewed the January 1, 1986, deadline established in the 1980 Act as a "drop-dead" date, on which the regional compacts could begin excluding the entry of out-of-region waste. Since by this time the three disposal facilities operating in 1980 were still the only such plants accepting low-level radioactive waste, the unsited States perceived a very serious danger if the three existing facilities actually carried out their threat to restrict access to the waste generated solely within their respective compact regions.

A movement thus arose to achieve a compromise between the sited and the unsited states, in which the sited States agreed to continue accepting waste in exchange for the imposition of stronger measures to guarantee compliance with the unsited States' assurances that they would develop alternative disposal facilities. . . . In sum, the 1985 Act was very much the product of cooperative

¹¹⁹ *New York*, 505 U.S. at 189-92 (White, J., dissenting) (internal citations omitted).

federalism, in which the States bargained among themselves to achieve compromises for Congress to sanction.¹²⁰

As Justice White went on to discuss, New York was an unsited state that exported a significant amount of low-level radioactive waste to sited states. It took various actions that both signified its approval of the interstate negotiations resulting in the federal legislation and allowed it to reap substantial benefits from the interstate bargain.¹²¹

Despite the substantial empirical problems that tend to impede a satisfactory cost-benefit inquiry in this area of the law,¹²² the facts of *New York* dissolve those problems in that case. To begin with, it is clear that the probability of federal regulation was not sensitive to the issue of commandeering versus preemption. The problem was pressing, and Congress was going to act one way or the other. Indeed, the states had to persuade Congress not to engage in preemption and instead to impose a commandeering sanction in the 1985 Act (among other measures) as a way of disciplining unsited states, which to that point had not lived up to their promises.

Although *ex post* New York's strategic situation changed and the state thought it was no longer in its interests to approve the commandeering lever, it bears repeating that *ex ante* New York was on board with the commandeering approach.¹²³

¹²⁰ *Id.* at 192-94 (internal citations omitted). See Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 541-42 (1997) ("In *New York* . . . , the record of state participation in resolving an ongoing problem at a national level through legislation to which states as such significantly contributed is clear. There can be little doubt that the 'safeguards of the federal structure' were in play there, if they ever can be said to be in play.") (footnotes omitted). See also generally Deborah M. Mostaghel, *The Low-Level Radioactive Waste Policy Amendments Act: An Overview*, 43 DEPAUL L. REV. 379 (1994) (discussing, *inter alia*, the events and policies that resulted in enactment of the federal law).

¹²¹ *New York*, 505 U.S. at 196-99 (White, J., dissenting) (documenting various statements and actions by New York officials signifying the state's agreement with the efforts of the National Governors' Association and the federal legislation that resulted).

¹²² See *supra* note 100.

¹²³ See *supra* note 121.

Turning from the probability of federal regulation to the various costs imposed on the states by federal regulation, several points are also apparent. First, the states desperately did not want to give up regulatory control. On the contrary, they repeatedly asked Congress to stay its (concededly constitutional) preemptive hand. Second, and relatedly, the states revealed no preference for preemption over commandeering on grounds of relative financial costs. To reiterate, they strongly preferred commandeering. Third, the states were sensibly not the least bit concerned about public confusion or the imposition of undeserved accountability. Instead, they were motivated to retain regulatory control. And absent a threat of federal preemption (the worst possible outcome from the states' point of view), they believed that a congressional commandeering lever was needed to ensure compliance with any interstate agreement – and thus to secure such agreement.

To be sure, one could insist – as this inquiry has stressed – that the actual views of most state officials in the interstate interactions leading up to *New York* are of no consequence because Tenth Amendment doctrine in particular, and federalism limits in general, do not exist for the sake of state officials or even states; rather, the values of federalism serve the long-term liberty and self-government interests of our nation's citizens.¹²⁴ On this view, it simply does not matter that state officials may not care about accountability, and indeed may try to evade accountability.

But that generalization pitched at 30,000 feet seems far removed from the realities on the ground in *New York*. There, the states wanted not only regulatory control, but also the accountability that ought to come with it – and it seems an insuperable task to construct a federalist argument to support the conclusion that removing the states from the regulatory scene through preemption would have been preferable. A citizen of New York who observed that her state was taking title to low-level radioactive waste would not be wrongly inferring that the state

¹²⁴ See *supra* notes 26 and 77 and accompanying text.

was responsible for the regulatory action. New York was author of that regulatory action in the real sense that New York had sought, approved, and reaped the benefits of the interstate negotiation process resulting in the federal commandeering legislation. That is why Justice White thought “[t]he State should be estopped from asserting the unconstitutionality of a provision that seeks merely to ensure that, after deriving substantial advantages from the 1985 Act, New York in fact must live up to its bargain by establishing an in-state low-level radioactive waste facility or assuming liability for its failure to act.”¹²⁵

Writing for the majority, Justice O’Connor believed that accountability concerns cut decisively in the opposite direction.¹²⁶ For the reasons offered immediately above, the level of abstraction at which she cast her accountability analysis renders her conclusion vulnerable. Equally problematic, however, is her failure to recognize all the other considerations of relevance to the scope of state autonomy and thus the Tenth Amendment inquiry: the *ex ante* probability of federal regulation, the federalism costs of foregone state regulatory control, and the financial costs imposed by federal regulation. The Court does not recognize, let alone adequately defend, the apparent constitutional lesson of *New York: Accountability concerns* (as the Court sees them) are so important that they trump not only the states’ own accountability calculus, but also every other determinant of whether a robust anticommandeering rule advances or defeats the values of federalism.

¹²⁵ *New York*, 505 U.S. at 198-99 (White, J., dissenting). By contrast, Professor Jackson argues that, “[i]n view of the length of time between enactment and imposition of the most severe penalties, the scheme [in *New York*] created a significant risk that federal officials would receive credit for solving a problem while passing the politically unpleasant decisions on to the states.” Jackson, *supra* note 7, at 2203. Professor Jackson’s description, like Justice O’Connor’s, proceeds from the assumption that the states, including New York, bore no responsibility for the federal legislation at issue. Because the states shared responsibility with the federal government, it is not clear wherein the accountability problem lay.

¹²⁶ *See supra* text accompanying note 5.

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

[T]he practical effect of New York's position is that because it is unwilling to honor its obligations to provide in-state storage facilities for its low-level radioactive waste, *other* States with such plants *must accept* New York's waste, whether they wish to or not. Otherwise, the many economically and socially beneficial producers of such waste in the State would have to cease their operations. The Court's refusal to force New York to accept responsibility for its own problem inevitably means that some other State's sovereignty will be impinged by its being forced, for public health reasons, to accept New York's low-level radioactive waste. I do not understand the principle of federalism to impede the National Government from acting as referee among the States to prohibit one from bullying another.¹²⁷

It can be oversimplified to conceive constitutional federalism questions as necessarily involving a power struggle between the federal government and "the states." Likewise, it can be oversimplified to ask whether an anticommandeering rule makes "the states" better or worse off in various situations. In *New York*, the unsited states were the immediate beneficiaries of the Court's decision, while the three sited states and Congress were the short-term losers. Yet over the long haul, it is difficult to see how "the states" as a whole and in general were made better off by the decision in *New York*, which likely rendered them less able to make credible commitments to one another in the face of collective action problems, and which probably left Congress less willing to stay its regulatory hand in the future by forgoing preemption.¹²⁸

¹²⁷ *New York*, 505 U.S. at 199 (White, J., dissenting). As of March 2004, New York remained one of only six states (plus the District of Columbia and Puerto Rico) that had not entered into a regional compact. See U.S. Nuclear Regulatory Commission, Low-Level Waste Compacts, at <http://www.nrc.gov/waste/llw-disposal/compacts.html> (last visited Dec. 30, 2005).

¹²⁸ Accord Young, *supra* note 63, at 113 ("The federal law at issue in *New York* . . . reinforced state-level policy efforts to agree on shared responsibilities for radioactive waste disposal by providing a federal enforcement mechanism. In this sense, federal action reduced constraints on state autonomy by removing collective action impediments to state-level policymaking. . . . Recognition of the anticommandeering rule in *New York* thwarted a national effort, supported by most states, to help solve the difficult collective action problem of nuclear waste disposal. . . . [N]ational action can sometimes empower state governments, and federalism doctrine needs to be sufficiently flexible to address that possibility.") (footnote omitted); Caminker, *supra* note 8, at 1013 (In *New York*, "[e]ach state preferred to wait and hope that its neighbor built a disposal site on which it could 'free ride.' To transcend this prisoners' dilemma, the states proposed a cooperative solution and sought congressional enforcement to

Of course, Justice White’s point to the effect that “this is madness; the states wanted this!” is a familiar one by now. The more fundamental objection to the outcome in *New York*, however, is that regardless of whether “the states wanted this,” the commandeering option in *New York* was more protective of the various goals of federalism than was the regulatory alternative that was in play – namely, preemption.¹²⁹ Any accountability argument in favor of the Court’s holding in *New York* has to explain why accountability is so weighty a federalist value that it suffices to trump the core federalist priority of preserving state regulatory autonomy. Without state retention of significant regulatory control, federalism cannot realize its goals of preventing federal tyranny, promoting political participation, encouraging responsiveness, allowing expression of value pluralism, providing state laboratories of experimentation, and facilitating the efficient delivery of local public goods.¹³⁰

New York is arguably an easier Tenth Amendment case than *Printz* from the standpoint of accountability values, at least if one abstracts away from the actual facts of *New York*. Arguably, commandeering state legislatures and forcing them to enact laws constitutes more of an intrusion and infringement on state sovereignty than asking the state’s law enforcement personnel merely to enforce a federal law on an interim basis. In the *New York* scenario, the inquiring citizen would need to determine not only which sovereign was seeking to control her behavior, but also whether one sovereign was forcing the other sovereign to control her behavior through legislation. No such informational complications exist in the *Printz* situation, where it would be

preclude defections. The congressional mandate of state action thus sought merely to empower states to achieve self-generated objectives.”) (footnote omitted).

¹²⁹ See *supra* text accompanying note 119 (discussing Congress’ consideration of a preemptive federal solution to the interstate waste problem).

¹³⁰ See *supra* notes 77-84 and accompanying text.

clear upon inquiry that the governing law is federal.¹³¹ Perhaps that difference helps to explain why Justice Souter joined the majority in *New York* but dissented in *Printz*, and why many lawyers and commentators seem to agree that *New York* involved the stronger Tenth Amendment challenge.¹³²

From the standpoint of regulatory-control considerations examined above, however, *Printz* is on firmer constitutional ground. As noted in Part III, anticommandeering doctrine almost certainly will not impede realization of federalist values on balance when more onerous regulatory alternatives – specifically, preemption – are not reasonably available to the federal

¹³¹ The two cases are more difficult to distinguish on financial grounds, because compelling states to enforce federal laws requires states to expend scarce and potentially significant state resources. On the other hand, state courts are required to hear federal claims, and state executive officers are required to enforce state-court decisions vindicating federal rights. *See Testa v. Katt*, 330 U.S. 386 (1947). Both of those requirements are costly, yet are allowed under the Court’s anticommandeering doctrine.

¹³² When *Printz* was pending before the Supreme Court, for example, the Office of Solicitor General expressed the view that the decisive Tenth Amendment objections to the federal law invalidated in *New York* had no relevance to the Brady Act:

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

Brief for the United States, *Printz v. United States*, Nos. 95-1478, 95-1503 (filed Oct. 10, 1996) at 22, 1996 WL 595005. This history suggests that *ex ante*, the Government viewed *New York* as expressing a smaller principle than did *Printz* as eventually handed down by the Court. What was being asked of the states in *Printz* strikes many constitutional lawyers as less intrusive than what was being asked in *New York* — and thus one might suggest that the result in *New York* was more defensible than the outcome in *Printz*.

government.¹³³ The way preemption would work in *New York* is straightforward: Congress could simply use its commerce power to dictate to owners of the waste how to dispose of the waste. But Congress would have to do more than trump local laws regarding background checks for preemption to succeed in *Printz*. The federal government would likely also have to assume responsibility for issuing firearms permits.¹³⁴ That costly and politically divisive prospect would reduce the probability of mandatory federal regulation being imposed if commandeering were taken off the table.¹³⁵ Moreover, the states in *Printz* were not concerned about losing regulatory control regarding background checks because they had no interest in regulating citizens in that way.

To be clear, the foregoing assessment of *Printz* is a relative one. The suggestion is not that *Printz* was decided correctly, but that it is more defensible than *New York* from a federalist perspective if one accepts anticommandeering, at least in some instances, as sound constitutional doctrine. Whether *Printz* adequately takes into consideration the interests of the national government is a distinct question. It is also not clear in *Printz* how accountability concerns trade off with the probability of federal regulation, loss of regulatory control, and the financial costs imposed by federal regulation. Preemption does not seem to have been a realistic possibility,¹³⁶

¹³³ The lingering uncertainty results from the question whether commandeering or preemption imposes greater financial and temporal costs on the states in a particular situation. A comparative Tenth Amendment analysis of *New York* and *Printz* would also need to account for those costs.

¹³⁴ See *supra* text following note 75. Under current law, Congress could also assert exclusive control over the issuance of gun permits and then specify that a state wanting to issue gun permits within its borders instead of the federal government could do so by meeting certain requirements. States cannot be made worse off if they are given the choice between preemption and commandeering than if their authority is simply preempted. See *infra* Part IV.C (discussing “conditional non-preemption”).

¹³⁵ Congressional use of the conditional federal spending power would remain an option. See *supra* notes 1 and 43 and accompanying text; *infra* Part II.D (analyzing the conditional spending power from a federalism perspective).

¹³⁶ See *infra* text accompanying note 66 and text following note 75.

and the expense borne by the states in carrying out the federal mandate seemed modest.¹³⁷ Yet the upshot of the constitutional balancing analysis depends on how much one values political accountability as a constitutional value in this setting, and the extent to which one believes the Brady Act compromised political accountability, even though local law enforcement officers could have simply informed would-be firearms purchasers that the federal government was requiring them to conduct the background checks. But at the very least, the Court should have considered and rejected the other arguments in federalism's expected utility function before laying down such a broad and deep anticommandeering rule in the name of the Constitution's commitment to federalism.¹³⁸

¹³⁷ In *Printz*, the Solicitor General underscored the minimal nature of the burden imposed by the Brady Act on the states:

The text of the Brady Act requires only that CLEOs [Chief Law Enforcement Officers] make a "reasonable effort" to conduct the record check, and the Act affords CLEOs broad discretion to determine the scope of that "reasonable effort," in light of their own resources and law enforcement priorities. The Bureau of Alcohol, Tobacco and Firearms, which administers the Brady Act, has made clear in its guidance interpreting the Act that it is generally "reasonable" for CLEOs to choose to fulfill their duties by consulting readily accessible criminal records. Thus, in light of their limited resources and competing obligations, CLEOs can and do meet their obligations by having clerical personnel perform checks of criminal records to the extent possible given the circumstances. The other requirements imposed on CLEOs under the Act are even more clearly de minimis.

Brief for the United States, *Printz v. United States*, Nos. 95-1478, 95-1503 (filed Oct. 10, 1996) at 12, 1996 WL 595005. That said, the federal government would have been on stronger ground if it had paid for the background checks of potential firearms purchasers. As noted above, *see supra* note 57 and accompanying text, an unfunded mandate compromises federalism values to a greater extent than a funded mandate of conduct by states.

¹³⁸ *See supra* note 101 (discussing "breadth" and "depth" as characteristics of judicial decision making).

IV. ANTICIPATING OBJECTIONS

This Part formulates and assesses various potential objections to the argument advanced in this inquiry. First, one might respond that if the foregoing analysis is correct, then we should not see anticommandeering litigation being teed up to the Supreme Court because the states would perform the cost-benefit tradeoff themselves, and they would have no interest in shooting themselves in the foot. Second, a critic could object that the real problem here is not anticommandeering doctrine, but the Supreme Court's failure to limit preemption as an alternative to commandeering. Third, one might insist this inquiry has in fact shown that the Court has gotten the doctrine exactly right since Congress may lawfully give states the choice between preemption and commandeering. Fourth, a defender of anticommandeering doctrine could argue that accountability concerns, by themselves, are sufficient to render commandeering unconstitutional. Fifth and finally, a proponent of the Court's categorical anticommandeering principle might submit that this investigation ignores the trade-off between rules and standards, falsely assuming that the commandeering issue should be settled by a standard but neglecting the virtues of rules in federalist systems that lack extensive state involvement in the national legislative process.

A. *Why the Litigation?*

The first objection seems straightforward: If this inquiry is correct, then no one's interests are advanced by having the courts get involved in Tenth Amendment litigation. Specifically, the claim is that to the extent anticommandeering doctrine makes both the federal government and the states worse off, the states should be able to figure out those perverse consequences on their

own, and no one should rationally want to press the Justices to take the commandeering power away from the federal government.

There is a basic problem with this counter argument. It overlooks the critical distinction between the values of federalism and the political self-interest of state officials at a particular place and time.¹³⁹ This analysis has been concerned with the former, not the latter. State officials may have an interest in challenging a particular instance of commandeering if they do not (or no longer) want to be bound by the federal regulation at issue. And they may have such an interest regardless of the long-run federalism costs or the costs to other states,¹⁴⁰ not to mention the state's own expressed preferences before the federal regulation went into effect. Indeed, that is exactly what happened in *New York*.¹⁴¹ The petitioner state internalized much more of the benefits of its successful constitutional challenge than it did the costs. Under those circumstances, it is wholly unsurprising that New York brought suit.

B. Preemption's the Thing, Not Commandeering

The core of this inquiry's argument comes down to the choice between commandeering and preemption from a federalism perspective. That is, the central claim is that the Rehnquist Court's anticommandeering rule does not serve the values of federalism in circumstances where the Court's application of the rule ultimately results in a greater number of congressional

¹³⁹ See *supra* note 87 and accompanying text.

¹⁴⁰ Notably, some states sided with the federal government in *Printz* and *New York*. See Brief of the States of Maryland, Connecticut, Florida, Hawaii, Iowa, Michigan, Minnesota, Mississippi, Nevada, North Carolina, Oregon, Rhode Island, and Wisconsin as *Amici Curiae* in Support of Respondent, *Printz v. United States*, Nos. 95-1478, 95-1503, 1996 WL 590921 (filed Oct. 10, 1996); Brief of Respondents, States of Washington, Nevada and South Carolina, *New York v. United States*, Nos. 91-543, 91-558 and 90-563, 1992 WL 526133 (filed March 4, 1992).

¹⁴¹ See *supra* Parts I and III.

responses sounding in preemption, which causes a greater compromise of federalism values than does commandeering. Critical to this argument is the reality that the Rehnquist Court has left preemption wide open as an alternative to commandeering.¹⁴² But what if that Court had not, or what if the Roberts Court changes course at some point in the future? In other words, what if someone responded to this article by suggesting, “You know, you’re right. That’s why the Court should strictly limit preemption in addition to maintaining the anticommandeering rule in its current, categorical form.”

There is some force to this argument, but much less than might at first appear. If preemption is “taken off the table,” so to speak, then so is the foregoing critique of anticommandeering doctrine. But it is not clear how the Court could remove preemption as a viable alternative in many instances without radically transforming the constitutional regime in which we live. For example, the scope of Congress’ power under the Commerce Clause would have to be greatly restricted, or the Supremacy Clause would have to be fundamentally reinterpreted, to compel the conclusion that the Court erred in *New York* in noting that preemption remained available in the face of a serious, interstate nuclear waste problem generated by commercial activity.¹⁴³

To be sure, there is room for the Court to hold state and local laws preempted less often than the Rehnquist Court did; after all, that Court’s most aggressive defenders of broad federal power were generally the Justices most likely to reject preemption arguments.¹⁴⁴ That point,

¹⁴² See *supra* notes 92-96 and accompanying text.

¹⁴³ See *supra* text accompanying note 5.

¹⁴⁴ See *supra* note 94.

however implicates questions of federal statutory construction, not constitutional law.¹⁴⁵ Where Congress makes clear its desire to preempt certain state and local laws, and where such preemptive federal action would otherwise fall within Congress' commerce power, removing preemption as an option would be too bitter a pill to swallow for even most of the federalist Justices.¹⁴⁶ It would also be hard to justify normatively in many instances because federalism values, properly conceived, do not disable Congress from attacking interstate commercial problems regarding which the states themselves are individually incompetent in light of negative externalities (for example, pollution spillovers) and collective action problems.¹⁴⁷

C. *Conditional Non-Preemption*

Another objection focuses on the potentially attenuated nature of the link between the application of anticommandeering doctrine in a particular case and future instances of preemption. This criticism argues that if the concern with *New York* sounds in possible preemption going forward, then current doctrine is exactly right because the Court has banned commandeering while allowing Congress to offer states a choice between commandeering and

¹⁴⁵ See *supra* note 10.

¹⁴⁶ That said, if one accepts the view that the Tenth Amendment imposes independent limits on congressional power (akin to other parts of the Bill of Rights), then certain hard-to-specify constitutional limits on preemption would seem to follow, at least in circumstances where preemption imposes an extreme burden on the states. See *supra* notes 16-20, 27 and 83 and accompanying text (discussing *National League of Cities* and *Garcia*). See also *supra* notes 88-89 and accompanying text (discussing the potentially onerous burden that federal preemption imposes on states).

¹⁴⁷ See, e.g., *New York*, 505 U.S. at 159-60 ("Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste. Space in radioactive waste disposal sites is frequently sold by residents of one State to residents of another. Regulation of the resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause. . . . Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, preempt state radioactive waste regulation."); see also COOTER, *supra* note 79, at 103-07 (analyzing public goods and spillovers from a law and economics perspective).

preemption.¹⁴⁸ Such a scheme can be denoted “conditional non-preemption” because Congress is conditioning its decision not to preempt state and local laws in a certain area upon the states’ agreement to be commandeered, which Congress lacks the power to do directly.¹⁴⁹ With conditional non-preemption, preemption is certain to occur if commandeering does not.

For example, statutes such as the Clean Air Act¹⁵⁰ avoid the commandeering problem because they give states a choice. If states want to administer the clean air program in their states, they can prepare state implementation plans (SIPs) that meet federal minimum criteria. But if they do not, then the Act empowers the Environmental Protection Agency (EPA) to write a federal implementation plan (FIP) for such states. The EPA has written several FIPs over the years, but none has gone into effect because the states ultimately have preferred to retain control over implementation of the national standards.¹⁵¹

Thus, instead of allowing commandeering because of the mere possibility of subsequent preemption in various circumstances if commandeering were prohibited, the Court has permitted commandeering only after Congress commits to preemptive action if the states decline to be commandeered. The challenge for the thesis advanced in this inquiry is to explain why the

¹⁴⁸ See, e.g., *New York*, 505 U.S. at 167 (“[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. This arrangement, which has been termed ‘a program of cooperative federalism,’ is replicated in numerous federal statutory schemes.”) (internal citations omitted).

¹⁴⁹ One can think of conditional non-preemption as structurally analogous to conditional federal expenditures under the Spending Clause, Art. I, § 8, cl. 1, where Congress conditions federal dollars on the states’ taking (or not taking) certain actions that Congress could not directly compel. See *supra* notes 1, 43 and accompanying text; *supra* Part II.D (analyzing the conditional spending power from a federalism perspective).

¹⁵⁰ 42 U.S.C. §§ 7401 *et seq.*

¹⁵¹ For an able discussion of the “federal-state partnership” structure of the CAA, see *Virginia v. EPA*, 108 F.3d 1397, 1406-11 (D.C. Cir. 1997).

continuing availability of conditional non-preemption does not suffice to address concerns about the implications of commandeering for state regulatory control. With simple commandeering, preemption is merely possible if commandeering is banned; with conditional non-preemption, preemption is assured if commandeering does not take place.

Though seemingly persuasive, this objection amounts to a non sequitur because it implicitly proceeds from a false premise – namely, that the Court must choose between allowing commandeering and permitting conditional non-preemption. If those options were mutually exclusive, then a strong federalist argument could be made in favor of the proposition that federalism values are better advanced when states are given the choice between commandeering and preemption than when they are commandeered. Having fewer options typically makes an agent worse off.¹⁵²

But of course, the Court faces no such choice; it could allow both conditional non-preemption and commandeering. And with the false choice exposed, the non sequitur is apparent: whether conditional non-preemption is preferable to commandeering from a federalism perspective is a distinct question from whether commandeering under certain circumstances is preferable to commandeering under no circumstances. In other words, the availability of conditional non-preemption does not suggest – let alone compel – the conclusion that federalism values are better secured through a categorical ban on commandeering than through allowing commandeering when not allowing it could result in more preemption going forward.

¹⁵² Recall, however, that there is cause to question whether allowing state officials to perform the cost-benefit calculation according to their own self-perceived political interests will best safeguard federalism values. The political calculus of state officials, which may be animated in part by a desire to secure federal “goodies” or the evasion of political responsibility, may not ensure vindication of federalism values as a general matter. *See supra* note 87 and accompanying text.

If anything, the availability of conditional non-preemption suggests that the Court should allow commandeering because there is not much difference between the two in practice. Consider the states' experience with the Clean Air Act. As noted above,¹⁵³ the states have always chosen commandeering over preemption, suggesting that they do not perceive the situation as entailing much of a choice. Indeed, there arguably exists even less choice in this setting than in the context of the conditional spending power. States could choose to give up federal dollars to avoid being subject to federal regulation, putting themselves in the same situation they would be in if the federal funding program did not exist. But when states are forced by Congress to enact regulations or face preemption, they decline to act at their peril because Congress can always impose truly onerous regulations via preemption – as evidenced by the fact that states always choose to act.¹⁵⁴ Declining funds, in other words, keeps states in the status quo *ex ante*. With conditional non-preemption, by contrast, there is no going back. The availability of putting the states to a choice between commandeering and preemption underscores the formalism of the Court's anticommandeering rule. The same "take title" provision in *New*

¹⁵³ See *supra* notes 150-151 and accompanying text.

¹⁵⁴ In *New York*, Justice O'Connor did not pause to consider a possible difference in the degree of coercion that may exist between conditional federal expenditures and conditional non-preemption:

By either of these methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

505 U.S. at 168.

York would have been upheld had Congress added a provision declaring “or else we will preempt, and here’s how.”¹⁵⁵

In sum, the permissibility of Congress’ giving states a choice between commandeering and preemption does not suggest that simple commandeering is constitutionally problematic. Those are separate issues. If conditional non-preemption has any relevance here, moreover, it raises questions about the extent to which current Tenth Amendment doctrine draws arbitrary doctrinal lines, as opposed to safeguarding federalist substantive values in practice.

D. *The Accountability Trump*

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

First, as discussed in the Introduction and extensively by other commentators,¹⁵⁶ it is not apparent that political accountability is a constitutional value that the Justices are supposed to police. The Tenth Amendment says no such thing.¹⁵⁷ Nor is it clear generally that commandeering ineluctably generates accountability concerns, or that preemption alleviates

¹⁵⁵ The Clean Air Act (CAA) experience strengthens the point that *Printz* is actually – and perhaps counter intuitively – the stronger case from an anticommandeering perspective. *See supra* Part III. When the federal government is merely trying to get the states to do the leg work, a rule against commandeering might actually make the states better off. When a significant amount of discretion exists in executing a regulatory action (as there is under the CAA), by contrast, federalism values likely are better advanced through commandeering than through preemption.

¹⁵⁶ *See supra* notes 7-9 and accompanying text.

¹⁵⁷ *See supra* note 2 and accompanying text.

those concerns to an appreciable degree.¹⁵⁸ Second, no single constitutional value is absolute in a constitutional area implicating inherent value pluralism as long as most members of our interpretive community¹⁵⁹ – particularly, the Justices – continue to take consequences seriously.¹⁶⁰ And if a particular federalism doctrine makes states worse off in terms of forgone regulatory power, the question arises whether the game is worth the candle. Even staunch federalists, in other words, have an interest in considering whether the proffered accountability benefits generated by current Tenth Amendment doctrine are cost-justified by exceeding the damage to state regulatory control caused by preemption. The relative financial and temporal costs to the states of preemption and commandeering should also be considered.

The answer to the cost-benefit question is ultimately context-sensitive, largely empirical, relatively unexamined, and therefore currently uncertain. But it is the most relevant inquiry to make if one is interested in more than a judicially administrable but largely symbolic gesture in the direction of federalism.¹⁶¹ That is, the cost-benefit issue is the question to pose if one wants

¹⁵⁸ See *supra* notes 7-9 and accompanying text.

¹⁵⁹ For work clarifying the idea of communities of shared meaning in law, see, for example, ROBERT H. BORK, *THE TEMPTING OF AMERICA* 139-60 (1990), and Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 *CASE W. RES. L. REV.* 179, 186-94 (1986-87). For relevant philosophical background, see generally 1 JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* (T. McCarthy trans., 1984), and LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 1958).

¹⁶⁰ See COOTER, *supra* note 79, at 3 (“From the viewpoint of a person who takes consequences seriously, constitutional theorists look too hard for the right words and not hard enough for the real causes. Constitutional theory needs more models and less meaning.”) (footnote omitted). There is some truth in Professor Cooter’s assertions, but he overclaims. It is one thing to take consequences seriously; it is quite another to take *only* consequences seriously. It is also unclear what a constitutional theorist would be modeling without a theory of meaning to guide the analysis, whether explicitly or implicitly. Surely consequentialism in the form of preference satisfaction, Professor Cooter’s chosen approach, *see id.* at 5-6, is not value-neutral in that regard.

¹⁶¹ See, e.g., Caminker, *supra* note 8, at 1007 (“*New York* ultimately seems driven less by careful analysis than by the attitudes of individual justices about the federal government’s overexercise of

to determine the contemporary value of anticommandeering doctrine to the project of constitutional federalism.¹⁶² And lest that objection to anticommandeering doctrine be deemed uncharitable or overstated, recall Justice Scalia’s chilling rigidity on behalf of the Court in *Printz*: “It is the very *principle* of separate state sovereignty that [commandeering] offends, and no comparative assessment of the various interests can overcome that fundamental defect.”¹⁶³

lawmaking power relative to the states. . . . But it is symbolism, nothing more; a line drawn in the sand for the sake of drawing a line.”); *id.* at 1088, 1089 (“The Court’s anti-commandeering rule [is] best understood as a symbolic gesture—waving the banner of state sovereignty whether victory was here deserved or not. . . . In a world of real value conflict, simple symbolism disserves all concerned.”); Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 200 (noting that “while [*Printz*] represents a decisive symbolic victory for state sovereignty, some would characterize its immediate practical impact as relatively minor”). The anticommandeering principle articulated in *New York* and *Printz* was relatively broad and deep, but its real-world effects have been quite modest because the federal government engaged in little commandeering even before 1992, let alone after. *See supra* note 98; *see also* Caminker, *supra* note 161, at 200, n. 6 (noting that “there are only a handful of other recent commandeering statutes that clearly fall within the [*Printz*] decision’s ambit”); *id.* at 243 (“*Printz* does not appear to curtail prior nationalist assertions of power in a significant manner, as Congress has heretofore enacted only a handful of statutes that require state executive officials to implement federal programs in the same direct manner as does the Brady Act. And we can only conjecture whether, but for *Printz*, Congress would have increasingly turned to commandeering in the years ahead, or whether the political safeguards of federalism would have continued to hold commandeering to a minimum.”). Regarding *Printz* in particular, moreover, the Brady Act’s interim provisions for background checks on firearm purchasers were intended to be replaced by a federal computer database as soon as it was ready to go online. That database is up and running. *See* Federal Bureau of Investigation, National Instant Criminal Background Check System (“NICS”), at <http://foia.fbi.gov/nics552g.htm> (last visited Nov. 5, 2005) (“The purpose of NICS, which was established pursuant to the Brady Handgun Violence Prevention Act (Brady Act), is to provide a means of checking available information to determine whether a person is disqualified from possessing a firearm under federal or state law.”).

None of this, however, is to suggest that the present is prelude to the future. The Roberts Court could use the Rehnquist Court’s categorical anticommandeering rule to invalidate other federal laws or executive actions, including those imposing reporting requirements that do not now clearly fall within the scope of the rule. *See* Caminker, *supra* note 161, at 200, n.6 (collecting various federal laws that require state officials to gather and report information to federal authorities). The *Printz* Court stated that it was not deciding whether reporting requirements fall within its anticommandeering rule. *See* 521 U.S. at 917-18; *see also id.* at 936 (O’Connor, J., concurring). In a post-9/11 world, moreover, it is uncertain what the future may bring in the realm of commandeering. *See infra* Part V.

¹⁶² *Cf.* Caminker, *supra* note 8, at 1007 (calling for the Court to “engage in a more serious and sophisticated inquiry into the role that federalism values ought to play in our polity today”).

¹⁶³ *Printz*, 521 U.S. at 932. *See also* Young, *supra* note 63, at 127 (“The anticommandeering doctrine is . . . the hardest of rules, apparently recognizing no exceptions for even the clearest of

While it is blackletter law that the Constitution allows purposeful government discrimination on the basis of race if the state interest is sufficiently weighty,¹⁶⁴ the Rehnquist Court allowed no such balancing in the context of commandeering.

E. Rules versus Standards

One might agree with the theoretical suggestion that the values animating anticommandeering doctrine need not have uniform bite in all contexts, yet conclude as a practical matter that the Court's categorical rule is sound. On that view, much of the difference between this inquiry's balancing argument and the holding in *New York* concerns the distinction between a rule and a standard. In the particular circumstances of *New York*, perhaps federalism values would have been better served by allowing commandeering. But that just assumes the conclusion that the question should be settled by a legal standard requiring case-by-case application. The choice between bright-line rules and flexible standards implicates a famously

statements or the weightiest of federal interests."); Caminker, *supra* note 161, at 200 ("The Court [in *Printz*] announced a categorical anti-commandeering rule, one not subject to any case-by-case balancing of interests or measurement of burden.").

¹⁶⁴ See, e.g., *Johnson v. California*, 125 S. Ct. 1141, 1146 (2005) ("We have held that 'all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.' *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis added). Under strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.' *Ibid.* We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, see *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), race-based preferences in government contracts, see *Adarand*, *supra*, at 226, and race-based districting intended to improve minority representation, see *Shaw v. Reno*, 509 U.S. 630, 650 (1993). The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, '[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.' *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). We therefore apply strict scrutiny to *all* racial classifications to "smoke out" illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.' *Ibid.*").

complicated jurisprudential and ideological controversy, one that is closely related to the debate in constitutional law between categorization and balancing.¹⁶⁵ In the particular context of commandeering, the clarity of rules may be especially protective of federalism values when, in contrast to Europe, states tend to be less involved in the formulation of the federal rule that would commandeer.¹⁶⁶

Putting aside the questionable assumption in the above argument that greater state involvement in the formulation of regulatory policy means greater protection of federalism values,¹⁶⁷ the problem with this defense of anticommandeering doctrine is that the Court's rule is so vastly over- and underinclusive with respect to its proffered purpose of safeguarding federalism values as to be vulnerable to the charge of arbitrariness. The anticommandeering rule is overinclusive because one can readily imagine many instances of commandeering that advance, rather than thwart, federalism values – for example, the facts of *New York*. At the same time, the rule is underinclusive because preemption can impose truly awful consequences from a federalism perspective by stripping states of regulatory control. It is one thing to argue for a rule over a standard; it is quite another to suggest that any rule will do. More aggressive congressional use of preemption after *New York* would illustrate the more general phenomenon

¹⁶⁵ See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15–63 (1987); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1991). Cf. Neil S. Siegel, *A Prescription for Perilous Times*, 93 GEORGETOWN L.J. 1645, 1663–66 (2005) (discussing the rules-versus-standards debate in the context of wartime threats to civil liberties).

¹⁶⁶ See *supra* notes 111–118 and accompanying text.

¹⁶⁷ See *supra* notes 87 and 91 and accompanying text.

that rules, which lack the chilling effect imposed by standards, may free strategic actors to pursue counter-purposive advantage right up to the line demarcated by the rule.¹⁶⁸

Indeed, perhaps the most important lesson yielded by this inquiry is that the Court's decisive classification of a federal regulation as "commandeering" or "preemption" is, in fact, substantively empty. In general, federal laws falling into either category can seriously help or hurt the cause of federalism. Sound legal doctrine requires a functional analysis of the impact of a given federal statute on federalism values, not a bright-line, indefensible distinction that rules harmless instances of commandeering out of bounds but interprets highly invasive federal regulations to have broad preemptive effect.

V. A TIMELY EXAMPLE

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

The Posse Comitatus Act of 1878 generally prohibits U.S. military personnel from directly participating in law enforcement activities within the United States – for example, interdictions, surveillance, searches, seizures, and arrests on behalf of civilian law enforcement authorities – except where expressly authorized by the Constitution or Congress.¹⁶⁹ Congress has provided for several exceptions to the Act.¹⁷⁰

¹⁶⁸ See KELMAN, *supra* note 119, at 41; Kennedy, *supra* note 119, at 1773–74; Sullivan, *supra* note 119, at 63.

¹⁶⁹ 18 U.S.C. § 1385 (2000) ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more

Presumably, Congress could amend the Posse Comitatus Act to specify that under defined conditions in the wake of an external terrorist attack, the United States military would have exclusive authority to maintain law and order within the affected area.¹⁷¹ There might need to be other limits (time, for example) to make the law clearly constitutional, but that is just fine tuning. So, what if Congress decides not to replace state and local law enforcement personnel with the military, but instead chooses to put state and local law enforcement officers under federal command (and federal pay) for the duration of the emergency conditions?

than two years, or both.”). The original 1878 Posse Comitatus Act (PCA or Act) referred only to the United States Army. The Air Force was added in 1956. The Act’s prohibitions were extended to all the services with the enactment of 10 U.S.C. § 375, which directed the Secretary of Defense to

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

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

¹⁷⁰ These include statutes that: (1) authorize U.S. military personnel to provide counterdrug assistance, 10 U.S.C. § 371-381; (2) allow the President to use U.S. military personnel at the request of a state legislature or governor to suppress insurrections, 10 U.S.C. §§ 331-335; (3) permit Department of Defense personnel to assist the Department of Justice in enforcing prohibitions regarding nuclear materials, when the Attorney General and the Secretary of Defense jointly determine that an “emergency situation” exists posing a serious threat to U.S. interests beyond the capability of civilian law enforcement agencies, 18 U.S.C. § 831; and (4) allow Department of Defense personnel to assist the Department of Justice in enforcing prohibitions regarding biological or chemical weapons of mass destruction, when the Attorney General and the Secretary of Defense jointly determine that an “emergency situation” exists posing a serious threat to U.S. interests beyond the capability of civilian law enforcement agencies, 10 U.S.C. § 382.

¹⁷¹ Note that the President likely possesses Article II authority to use the military in such situations.

If *New York* and *Printz* mean what they say, Congress would not have the option of placing state and local law enforcement under federal control; the authorizing legislation would clearly fall within the anticommandeering rule.¹⁷² Under current Tenth Amendment jurisprudence, however, and putting aside other constitutional considerations and the wisdom of the policy decision, there would be no constitutional impediment to Congress' authorizing the military to maintain law and order within the area targeted by the terrorist attack until the emergency has passed.¹⁷³

¹⁷² See, e.g., Caminker, *supra* note 161, at 243 (“... Justice Stevens is surely correct to observe that a commandeering power might still be extremely important to protect national interests in an emergency.”) (citing *Printz*, 521 U.S. at 940 (Stevens, J., dissenting)). Justice Stevens authored these “prescient” words, Althouse, *supra* note 67, at 1233, more than four years before September 11, 2001:

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

Printz, 521 U.S. at 940 (Stevens, J., dissenting). See Althouse, *supra* note 67, at 1235, 1266-68 (raising the question whether the federal government's needs in fighting the war on terrorism may cause the Court to articulate a national-security exception to its anticommandeering principle, but concluding that “the anti-commandeering doctrine should be preserved in its absolute form not only in spite of the war on terrorism, but precisely because it can protect individual rights that the exigencies of war may lead courts to narrowly construe”).

¹⁷³ Congress' power to enact legislation dealing with external threats to national security finds several textual justifications in Article I, § 8 of the Constitution, which contains a number of military-related powers. They include the spending power in clause 1, which expressly refers to “the common Defence,” and the necessary and proper power in clause 18, which grants Congress the authority to carry into effect the President's powers in this area as well. That said, the Constitution's limitations of the “trumping” kind apply generally to those congressional powers, though not necessarily in the same way. Accordingly, if *National League of Cities* were revived, see *supra* notes 16-20, 27 and 83 and accompanying text, its holding might create serious problems for a preemption statute of the sort hypothesized in the text.

Query whether this constitutional delineation of Congress' freedom of action is sound from a federalism perspective. According to the Rehnquist Court, criminal law enforcement is a traditional subject of state concern,¹⁷⁴ an area in which our federal system has always been concerned to maintain state regulatory control. Yet the impermissible, commandeering option is the one that leaves room for state regulatory control if Congress allows deputized state officers to exercise discretion. By contrast, the permissible, preemptive alternative allows no room for a state role in maintaining law and order. Moreover, financial considerations do not weigh against the commandeering option because the commandeering legislation specifies that the mandate would be funded entirely by the federal government. Finally, accountability values do not seem sufficient to justify what would otherwise be a perverse situation from a federalist point of view. If anything can capture most Americans' attention and impress upon them who is in charge, it is

¹⁷⁴ See *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacked authority under either the Commerce Clause or § 5 of the Fourteenth Amendment to enact a provision of the Violence Against Women Act of 1994 (VAWA) creating a private civil remedy for victims of gender-motivated violence); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (invalidating, for the first time since the New Deal, a federal statute regulating private conduct — the Gun Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) — as beyond Congress' commerce power in part because it was “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”). The *Morrison* Court identified criminal law enforcement as a traditional subject of state regulation:

[T]he concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. See *Lopez*, *supra*, at 564, 115 S.Ct. 1624. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

529 U.S. at 615. The *Lopez* Court had stated that “[u]nder the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.” 514 U.S. at 564.

a national tragedy like the attacks of September 11, 2001. State and local law enforcement personnel could also make it clear to citizens on the ground that they are acting in a federal capacity.

One could formulate other examples to make the same point. Various possible federal responses to a natural disaster come to mind, particularly in light of the inadequate federal, state, and local responses to the impact of Hurricane Katrina.¹⁷⁵ If constitutional doctrine is supposed to vindicate federalism values in reality and not just symbolically, then the Court must think beyond attenuated notions of political accountability and train its attention on state retention of regulatory control, as well as the financial impact on the states of different regulatory regimes. A federalism jurisprudence that does so will judge the Court's categorical ban on commandeering to be so radically over and under inclusive with respect to its animating values that it will seek to reformulate the doctrine along the lines of an *ex ante* standard enforced through case-by-case balancing. The result will be a functional analysis of different instances of commandeering, with particular attention placed on the likelihood of preemption in various future situations if commandeering is prohibited.

CONCLUSION

The Rehnquist Court's anticommandeering doctrine is seriously over- and underinclusive, whether considered in light of federalism values as a whole or in light of the

¹⁷⁵ See, e.g., Eric Lipton *et al.*, *Breakdowns Marked Path From Hurricane to Anarchy*, N.Y. TIMES, Sept 11, 2005, § 1, at 1 ("Federal Emergency Management Agency officials expected the state and city to direct their own efforts and ask for help as needed. Leaders in Louisiana and New Orleans, though, were so overwhelmed by the scale of the storm that they were not only unable to manage the crisis, but they were not always exactly sure what they needed. While local officials assumed that Washington would provide rapid and considerable aid, federal officials, weighing legalities and logistics, proceeded at a deliberate pace.").

accountability concerns on which the Court inappropriately fixated. That disconnect between legal doctrine and animating values, as well as the Court's apparent lack of concern to limit or overrule *Garcia* and rehabilitate *National League of Cities*,¹⁷⁶ suggests that the Rehnquist Court's Tenth Amendment legacy has more to do with judicially manageable symbolism than with the substance of federalism.

The reality, however, is that the legal universe is in flux and the Rehnquist Court is no more. The Roberts Court will decide over the coming years and decades whether the Constitution is concerned primarily with the symbolism of federalism or with its substance as well. The answer to that question will determine, among other things, whether the Court will insist on applying the anticommandeering rule of *New York* and *Printz* no matter what – that is, even when there exists a serious threat to national security or other critical national interest are at stake; Congress is determined to regulate one way or another; the states have an abiding interest in maintaining regulatory control; there exists no genuine possibility of voter confusion implicating accountability concerns; and the financial costs to the states involved are trivial. If the Roberts Court applies the anticommandeering principle even in those circumstances – which the Rehnquist Court insisted is the Constitution's command – then defenders of state autonomy should join advocates of national power in dissent and emphatically reject the flattery.

¹⁷⁶ See *supra* Part I (discussing *National League of Cities* and *Garcia*).