Federalism and the Uses and Limits of Law: Printz and Principle?
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*Vicki C. Jackson**

In Printz v. United States, *a narrow majority of the Supreme Court continued the revival of constitutional federalism as a constraint on national power begun in* New York v. United States. *Professor Jackson concludes that* Printz's *categorical rule prohibiting federal directives to state employees is not well supported by historical or functional considerations but argues that courts should enforce milder federalism-based limits on national legislation. Judicial enforcement serves rule of law purposes, insisting that Congress recognize that it is constrained by law, and reinforces the constitutional role of the states. Although values such as liberty, participation, competition, and choice can be promoted at different times by different levels of government, securing the constitutional position of states helps preserve their governments as alternative locations of power and politics in which members of different groups can participate, crossing over otherwise important cleavages. The Article argues that judicial enforcement of two kinds of requirements is appropriate: first, with respect to federal regulation of private activity as in* Lopez v. United States, *that there be a considered connection, consistent with the Necessary and Proper Clause, between the legislation and an enumerated power; second, that the federal government not interfere with the states' constitutionally required legislative, executive, and judicial functions, an understanding that supports a strong presumption against legislative commandeering, and calls for a more nuanced approach to executive commandeering than in* Printz. *Finally, the Article argues that stability in sustaining a sufficiently principled law of federalism-based limits on national power can be better achieved with more flexible (rather than categorical) standards, given the dynamic and pragmatic character of successful federalism.*

The constitutional law of federalism-based constraints on the federal government has risen phoenix-like from the ashes of post-New Deal enthusiasm for the exercise of national power. In the last five years, the Supreme Court has invalidated at least four federal statutes principally on grounds related to federalism.[1] The Court's recent fed-

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* Professor of Law, Georgetown University Law Center. With special gratitude to Theodore R. Jackson for his insight on "Matters of Printziple," and with thanks to Evan Caminker, Richard Diamond, Bill Eskridge, Malcolm Feeley, Jim Feinerman, Barry Friedman, Dan Meltzer, Bill Marshall, Judith Resnik, Ed Rubin, David Shapiro, Roy Schotland, David Strauss, Bob Taylor, Mark Tushnet, Carlos Vázquez, and the Georgetown University Law Center Summer Research Workshop for helpful comments, and to Elaine Combs, John Cuddihy, and J.C. Scott for able research assistance.

[1] *See* Printz v. United States, 117 S. Ct. 2365 (1997) (declaring unconstitutional a requirement that local law enforcement officers perform background checks on gun purchasers); Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (holding that the extension of federal jurisdiction to suits against states to enforce negotiating duties under Indian gaming law violates the Eleventh Amendment); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (holding a federal criminal statute prohibiting gun possession near schools to be an unconstitutional regulation of activity insufficiently connected to interstate commerce); New York v. United States, 505 U.S. 144 (1992) (holding a federal hazardous waste law imposing obligations on states unconstitutional as prohibited commandeering of state government). For other evidence of the revival of federalism-based limits on national power, see *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997), holding that the Eleventh Amendment prohibits federal jurisdiction over tribal action for declaratory and injunctive relief against state officials interfering with the tribe's asserted property interests in submerged lands, and *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), referring to principles of feder-

eralist revival brings into focus a recurring question:[2] are the demands of federalism consistent with the demand for principle in constitutional adjudication?

Printz v. United States[3] appears to offer a relatively clear line that Congress may not transgress — requiring (rather than inducing) state officials to be the enforcement agents of federal laws. This line, although offering some benefits of clarity, is not well grounded in history and does not necessarily inhere in the pragmatics of a workable federalism. *Printz* thus offers a vehicle for exploring the broader question identified above — that is, the tension between constitutional principle and the demands of workable federalism.

In Part I, I describe and analyze the majority opinion in *Printz*, largely on its own terms. The particular rule drawn by *Printz*, I show, is not well supported in constitutional history and is both underinclusive and overinclusive toward legitimate goals of protecting state governments and promoting political accountability. In Part II, I briefly try to identify *Printz*'s effects on future litigation involving other federal statutes. Although *Printz*'s categorical approach is in tension with the flexibility of the Court's attempts at enforcing federalism constraints in the 1970s, it may nonetheless reinvigorate those earlier efforts to define core government functions in order to balance state and federal interests in determining whether laws applicable to private entities can also be applied to states.

In Parts III and IV, I explore arguments supporting judicial enforcement of federalism-based limits on national power, and sketch the outlines of doctrine that could better serve the goals of such judicial review. Considering an important argument against federalism recently advanced by Professors Rubin and Feeley,[4] I argue in Part III that they undervalue the role that the constitutional status of states may play in maintaining political stability. Within the framework of U.S. constitutionalism, moreover, the rule of law requires some judicial enforcement of federalism constraints on national power. But the rule of law does not point in only one direction: the demand for consistency in adjudication is in tension with the need for pragmatic workability entailed in a federal system, and helps account for the difficulty the Court has had in developing useable and stable doctrine.

Appropriately deferential judicial review can help reinforce the political branches' roles in considering the interests of state governments with the other interests the national government must advance, while

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alism in holding the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994), unconstitutional.

[2] *See, e.g.*, H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 664–81 (1993).

[3] 117 S. Ct. 2365 (1997).

[4] *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

maintaining the principled flexibility federalism requires. Rejecting the assumption that the Constitution must be read to reserve areas for only the states to regulate, I argue in Part IV in favor of process-based, clear evidence requirements designed to demonstrate the source of federal power and the need for federal action. Because the Constitution requires that states exist and that state governments perform legislative, executive, and judicial functions, courts should also enforce substantive limits on Congress's ability to burden the organs of state government, possibly by prohibiting federal commandeering of state legislative functions. Despite the conventional association of the rule of law with more categorical approaches, finally, I suggest that a multifactored flexible standard is likely to provide more stability than the categorical (but insufficiently supported) rule of *Printz*, and better accords with both rule of law and federalism values.

I. *PRINTZ* AND THE DEVELOPMENT OF THE ANTICOMMANDEERING RULE

By a 5–4 vote, *Printz* held unconstitutional the Brady Act's requirement that local law enforcement officers perform background checks on would-be purchasers of handguns. The requirement was found to contravene a constitutional rule prohibiting Congress from issuing commands to the states' executives to administer or enforce federal programs.[5]

Printz is no bolt from the blue. After intimations in the prior decade, particularly by Justice O'Connor, that the Constitution might prohibit certain forms of federal directives to states,[6] in *New York v.*

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[5] The Court did not address whether the statute's waiting period provision for purchasing handguns was severable and thus survived because no purchaser or dealer to whom that requirement applied was before the Court. *See Printz*, 117 S. Ct. at 2383; *id.* at 2384 (refusing to invalidate other provisions of the Brady Act that would come into play only if local law enforcers voluntarily undertook responsibilities of background checking). Justice O'Connor wrote separately, emphasizing the possibility of voluntary participation in the federal program, and perhaps implying the survival of the waiting period. *See id.* at 2385 (O'Connor, J., concurring). Justice Thomas also wrote separately, clarifying his "revisionist" view of the scope of the federal commerce power as not applying to wholly intrastate, "point-of-sale" transactions and identifying Second Amendment objections to the federal statute. *Id.* at 2385–86 (Thomas, J., concurring) (internal quotation marks omitted).

[6] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 457–64 (1991) (developing the idea of dual sovereignty to support the "plain statement" rule not to intrude on fundamental state government functions absent clear intent to do so); FERC v. Mississippi, 456 U.S. 742, 765 (1982) (upholding the Public Utility Regulatory Policies Act of 1978 (PURPA)'s requirement that state public utility commissions consider certain federal standards, noting that there "is nothing in PURPA 'directly compelling' the States to enact a legislative program"); *id.* at 775 (O'Connor, J., concurring in the judgment in part and dissenting in part) (condemning the statute as "conscript[ing] state utility commissions into the national bureaucratic army"); *see also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981) (upholding a federal law allowing but not compelling states to regulate surface mining in accord with federal standards); Brown v. EPA, 521 F.2d 827

United States,[7] the Court, by a 6–3 vote, held unconstitutional a portion of a federal statute designed to promote self-sufficiency in the disposal of low-level nuclear waste. The invalidated portion required states either to choose by a fixed date a site for waste disposal or, failing that, to assume the private liabilities of all producers of low level radioactive waste within their state.

The Court saw this requirement as an impermissible form of federal coercion, giving states a "choice" between two forms of commands the national government lacked power to impose,[8] and declared it invalid for two reasons. First, as a matter of constitutional history, the majority asserted that the plan of the 1789 Constitution did not contemplate that Congress would have power (at least under the Commerce Clause) to require states in their governmental capacities to enact laws and regulate at the behest of the federal government.[9] Second, as a matter of constitutional structure, the Court argued that the statutory scheme was inconsistent with the values of federalism and unacceptably blurred lines of political accountability: federal politicians could take credit for solving the low-level radioactive waste problem by enacting the statute, although state officials, acting pursuant to federal mandate, were required to bear the brunt of dismay at the sacrifices required of particular "sited" communities.[10] Although the political accountability argument attracted support,[11] the Court's historical argument — that the federal government designed in 1787 was given the power directly to regulate individuals as a *replacement* for any power to direct the states to do so[12] — attracted considerable

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(9th Cir. 1975) (invalidating regulations that would require states to prescribe, inter alia, auto emissions testing), *vacated as moot*, EPA v. Brown, 431 U.S. 99 (1977).

7 505 U.S. 144 (1992).

8 The choices, as the Court saw them, were either a "congressionally compelled subsidy from state governments" or a requirement to "regulat[e] pursuant to Congress' direction." *Id.* at 175–76.

9 *See id.* at 180.

10 *See id.* at 181–83. The Court found Congress to have constitutional authority to encourage states to address the national problem involving disposal of this hazardous waste, and upheld other parts of the statute involving conditional spending and authorization for complying states to close their borders to noncomplying states. *See id.* at 171–74.

11 *See, e.g.*, Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1583 (1994) (approving the result in *New York* as consistent with the republican principle of electoral accountability embodied in the Guarantee Clause).

12 *See New York*, 505 U.S. at 163–66.

academic criticism,[13] even from those who may have been sympathetic to its result.[14]

Because the scope of *New York*'s holding was unclear, the issue as it came before the Court in *Printz* was at least fairly debatable. Although much of the reasoning of *New York* suggested that any commandeering of state officials (other than judges) to enforce federal law was prohibited,[15] other language referring to the quasi-legislative nature of the action required from state officers (and the concerns for political accountability this engendered) could legitimately be argued to narrow its holding.[16] Despite this, the *Printz* Court read *New York* expansively.

A. Printz: *The Majority Opinion*

In his opinion for the Court, Justice Scalia read *New York* in accord with its broader reasoning to identify a clear-cut rule against federal

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[13] *See, e.g.*, Evan Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1042–59 (1995) (suggesting that although historical evidence demonstrates concern with Congress's lack of success in requisitioning the states under the Articles of Confederation, it does not follow that the federal government was *relinquishing* that power by adding new powers to legislate directly for citizens); Powell, *supra* note 2, at 652–64, 681–89; Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1996–97 (1993) (concluding that history supported a rule against commandeering state legislatures for, inter alia, taxes, but did not support a rule against commandeering state executive officers). The *New York* Court's distinction of the obligations of state court judges (to entertain federal claims) under the Supremacy Clause, *see* Testa v. Katt, 330 U.S. 386, 389 (1947), from those of state executive or legislative officials, *see New York*, 505 U.S. at 178–79, left many unconvinced, *see* Caminker, *supra*, at 1034–39. Similarly unconvincing to many was the Court's effort to distinguish the established powers of federal courts to issue orders to state officials from the powers of Congress. *See New York*, 505 U.S. at 179 (arguing that court orders were authorized by the judicial power over cases "arising under" federal law, but not explaining why Congress's power to make laws was more limited).

[14] *See, e.g.*, Prakash, *supra* note 13, at 1996–97, 2036.

[15] *See New York*, 505 U.S. at 187–88. *New York*'s language prohibiting Congress from compelling states "to enact or administer a federal regulatory program," *id.* at 188, in literal terms, would appear to prohibit Congress from mandating the background check by local sheriffs as a compelled "administration" of a federal regulatory program. But elsewhere the *New York* Court suggested that the statute before it had "commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)) (internal quotation marks omitted); *see also* Printz v. United States, 177 S. Ct. 2365, 2373 (1997) ("We have held . . . that state legislatures are *not* subject to federal direction.").

[16] Some passages in *New York* suggested that it was the legislative character of the compelled action that was most problematic. *See, e.g.*, *New York*, 505 U.S. at 178 (noting that when a federal interest is strong enough to "cause Congress to legislate, it must do so directly and not conscript state governments as its agents"). This reading is not implausible. The federal law (as the Court construed it) required state governments to resolve a complex policy matter or accept liabilities resembling a direct federal raid on state treasuries. *Cf.* Edelman v. Jordan, 415 U.S. 651, 663–65 (1974) (holding that the Eleventh Amendment prohibits retroactive relief against state treasuries while permitting prospective injunctive relief). *See generally* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L. J. 1, 82–88 (1988) (noting the view that allocation of state funds is for state legislatures to control).

"commandeering" of state legislative or executive officials. Finding that there was "no constitutional text speaking to this precise question," Justice Scalia wrote that the Court therefore needed to consult historic understanding and practice, the structure of the Constitution, and the Court's past decisions.[17] Under this approach, the decision in *New York* played a dominant role.

1. The Early History, the Anticommandeering Rule, and the Supremacy Clause. — The Court began by distinguishing several early statutes that showed a course of federal imposition of duties on state courts, on the grounds that state judges differ from state executive employees.[18] First, because of the Madisonian compromise on Article III, state courts might be the only courts available for the initial determination of federal issues.[19] Second, the Supremacy Clause's specific references to state court judges' being bound by the *laws* of the United States contemplates their enforcing federal laws under conflict of laws principles.[20]

That Congress might choose not to create lower federal courts, leaving the states to provide the only trial courts for enforcement of federal and state law, however, does not sufficiently distinguish executive power. With the exception of the President and Vice-President, the number and character of inferior federal officials were left largely to Congress's discretion.[21] Moreover, the Supremacy Clause's admoni-

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17 *Printz*, 117 S. Ct. at 2370. The Court, interestingly, did not focus on the Guarantee Clause in discussing the Constitution's text despite having done so in *New York*. *See New York*, 505 U.S. at 180–84 (citing the Guarantee Clause as a possible source of justiciable limits on federal government's dealings with states). *Printz* does include the Guarantee Clause in a list of parts of the Constitution that assume the continued existence of the states and their governments, in a later discussion of constitutional "structure." *See Printz*, 117 S. Ct. at 2376.

18 *See Printz*, 117 S. Ct. at 2370–71. With respect to some of the statutes, the Court suggested, the state courts were not in fact compelled but only authorized to take jurisdiction if otherwise permitted to do so. *See id.* at 2370 (suggesting that naturalization statutes of the 1790s, although seemingly mandatory in requiring state courts to record documents in naturalization proceedings, perhaps "applied only in States that authorized their courts to conduct naturalization proceedings," and citing dicta from 1883 and 1910 cases so suggesting). Regarding other laws requiring state courts to perform arguably executive functions (such as resolving disputes about the seaworthiness of vessels), the Court found that the laws "establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Id.* at 2371.

19 *See id.* at 2371 (noting that the "Madisonian compromise" gave Congress the power to decide whether to ordain and establish inferior federal courts).

20 *See id.* at 2371, 2379 (implying that state judges' obligation to be "bound" by federal "Laws" extends further than the oath required of all federal and state officials to support the Constitution).

21 *See* U.S. CONST. art. II, § 2 (referring to Congress's power to vest appointments of "such inferior officers, as they think proper," in the President, courts, or department heads). It assumes the very point in controversy to proceed on the assumption that Congress lacks power to decide to rely primarily on state officials to execute federal laws, just as it could rely primarily on state courts to adjudicate federal issues. *But see* Caminker, *supra* note 13, at 1041–42 (agreeing that federal judicial power is unlike federal executive or legislative power, because its full effectuation

tion to "Judges in every State" might have been intended alternatively, to emphasize that "Law," as that term is used in the first part of the Supremacy Clause,[22] requires a judicial sanction.[23] Although the Supremacy Clause's directive to the "Judges in every State" may "say[] nothing about whether state executive officers must administer federal law,"[24] it certainly does not obviously support the conclusion that they need not administer federal law.

The Court found notable the relative paucity of federal laws' imposing obligations on state executives, distinguishing one instance of such an early federal law as an implementation of the Extradition Clause of the Constitution.[25] Thus, the Court concluded, the early statutory history does not support "an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization."[26] To the contrary, the Court suggested, another early statute that simply recommended to state legislatures passage of laws imposing duties on jailkeepers to house federal prisoners, followed by Congress's enactment of a law authorizing U.S. marshals to rent jail space if the state provided none, suggests that Congress did not have a power to command the state executive.[27] As the dissent noted, the majority did not point to any considered discussion of the question in the early Congresses. Although Congress may have been disinclined to issue direct orders to state ex-

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might depend on state court assistance in contrast to the "fully self-executing" Article I and Article II powers).

[22] U.S. CONST. art. VI, § 2.

[23] *See* Carlos Manuel Vázquez, The Constitution as Law of the Land: The Supremacy Clause and Constitutional Remedies (March 1998) (unpublished manuscript at 47–55, on file with author) (arguing that "Law" as used in the Supremacy Clause contemplates that sanctions are necessary to give efficacy to legal norms that ordinarily are available from courts). For other explanations of the "judges clause" that do not support the *New York* majority's view, see Caminker, cited above in note 13, at 1040–42, arguing that the Supremacy Clause establishes a "default rule" in favor of concurrent state court jurisdiction over federal law issues, and Articles I and II are consistent with a default rule that nonjudicial state officers do not carry out federal laws, and both default rules are subject to change by Congress. In either case, the Supremacy Clause's direction to state judges may be accounted for without supporting the majority's position in *Printz* that state courts were distinguished from other branches of state government in being subject to the commands of federal law.

[24] *Printz*, 117 S. Ct. at 2381.

[25] *See id.* at 2371–72.

[26] *Id.* at 2372. Query whether, under the majority opinion, the Brady Act would have been constitutional had the state courts been required to use court-affiliated probation and pretrial service agencies to perform the background checks. *See, e.g., id.* at 2371 n.2 (noting the appropriateness of giving courts duties involving recordkeeping and certification, which are ancillary to adjudication).

[27] *See id.* at 2371–72 (arguing that Congress's failure to use a technique that would have been so easy implies that it did not do so because of a constitutional constraint).

ecutives, the record does not reflect whether this reluctance was from political prudence or constitutional inhibition.[28]

2. Federalist Papers. — The government in *Printz* relied on the *Federalist Papers*, notably *The Federalist No. 36*, which states that the federal government would "probably make use of the State officers and State regulations for collecting federal taxes."[29] Despite the "make use of" language, the majority dismissed this statement as "rest[ing] on the natural assumption that the States would consent to allowing their officials to assist the Federal Government."[30]

Justice Souter's dissent relied heavily on *The Federalist No. 27*'s statement that, presumably in light of the Supremacy Clause:

> [T]he laws of the Confederacy . . . will become the *supreme law* of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath. Thus, the legislatures, courts, and magistrates [of the states] will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws.[31]

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[28] *See also id.* at 2391 (Stevens, J., dissenting) (noting that an early Congress's failure to address the scope of federal power in a particular area is not an argument against its existence); *cf.* James E. Pfander, *Environmental Federalism in Europe and the United States: A Comparative Assessment of Regulation Through the Agency of Member States*, *in* ENVIRONMENTAL POLICY WITH POLITICAL AND ECONOMIC INTEGRATION 79 & n.194 (John Braden, Henk Folmer & Thomas S. Ulen eds., 1993) (arguing that the Supremacy Clause requirement for state legislative, executive, and judicial officers' taking an oath to support the Constitution "not only operates as a directive itself . . . but also provides the foundation for the efficacy of future directives to state legislative and executive officials."). Pfander noted the "position that Elbridge Gerry, a committed anti-federalist from Massachusetts," took in Congress, favoring its power to call on state officers to execute federal law. *Id.* at 79 n.194.

A reading of the entire reported colloquy in which Gerry's comments are found reveals the difficulty of making definitive statements about history. *See* 2 ANNALS OF CONG. 578–80 (1792) (considering amendments reported by the Committee of the Whole on the bill to provide for calling forth the Militia). The committee had apparently proposed that local justices of the peace be required to read federal proclamations concerning the militia. Two members, Clark and White, questioned whether state officers could be called on to "execute the laws of Congress," without arguing that they could not; Gerry strongly argued that "nothing could be plainer than" that they could; and Kittera opposed the particular imposition on grounds of policy. *Id.* at 579. This part of the amendment was then voted down. *See id.* At that time, Congress had already enacted at least one law that imposed a duty on state justices of the peace to determine the seaworthiness of a ship on complaint, and a year later required both federal judges and state magistrates to grant warrants for the removal of recaptured fugitive slaves. For a description of action by early Congresses' imposing duties on state officers, see David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 NW U. L. REV. 606, 618, 640–44, 656–67 (1996); and David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 792 n.93, 820 n.267 (1994).

[29] *Printz*, 117 S. Ct. at 2372 (quoting THE FEDERALIST NO. 36, at 221 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[30] *Id.*

[31] *Id.* at 2373 (quoting THE FEDERALIST NO. 27, at 177 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); *see id.* at 2402 (Souter, J., dissenting). *See also* Prakash, *supra* note 13, at 1999–2000 (making the same argument and highlighting *The Federalist No. 27*).

The majority disagreed. The quotation, Justice Scalia suggested, proved too much as construed by the dissent,[32] whose interpretation would subject state legislatures to federal direction despite the Court's determination to the contrary in *New York*.[33] The majority construed the language of *The Federalist No. 27* to mean simply that state officials have a duty "to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law."[34]

The majority and dissent also disagreed on the meaning of *The Federalist No. 44* in which Madison wrote that the oath taken by all state officials is justified because they "*will have an essential agency in giving effect to the Constitution.*"[35] Justice Souter's dissent suggests that this passage contemplates a responsibility to execute federal laws.[36] The majority, however, construes it to refer only to those responsibilities assigned by the Constitution to state governments, such as election of the President.[37] The majority, thus, appears to argue that unless a constitutional provision itself imposes a specific duty on a branch of state government, the federal government lacks power to impose governmental duties on the states even when Congress is acting under its enumerated powers. I discuss the plausibility of this argument below.

3. Later History of Federal Statutes. — The majority "complete[d] the historical record" by noting "not only an absence of executive-commandeering statutes in the early Congresses, but . . . an absence of them in our later history as well."[38] The Court characterized a late nineteenth-century statute on which the government relied as in-

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[32] *See Printz*, 117 S. Ct. at 2373. The majority's first argument is that the quotation implies too much: if the obligation to carry out federal law follows merely from the oath, this interpretation would mean that state officers must take an active role in implementing federal law, an obligation no one has ever thought to exist. *See id.* This argument seems unpersuasive. No one believes that federal officers (other than the President) have to carry out all federal laws without a specific directive from Congress; for instance, Agriculture Department employees do not prosecute federal crimes. Rather, the oath may contemplate that when a law imposes duties, they will be carried out.

[33] *See id.* at 2373. Perhaps anticipating objections that the contemporaneous *Federalist Papers* may be entitled to more weight than the 1992 decision in *New York*, the Court also argued that the broader language in *The Federalist No. 27* reflected a peculiarly nationalistic vision of Alexander Hamilton not shared even by the *Federalist Papers'* other authors. *See id.* at 2375 n.9. The weight placed on evidence from the *Federalist Papers* by both the majority and dissent seems surprising, and it is in any event unclear why a divergence in views among the *Federalist Papers'* authors is relevant to what contemporaneous ratifiers would have understood from the published papers themselves.

[34] *Id.* at 2374.

[35] THE FEDERALIST NO. 44, at 287 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

[36] *See Printz*, 117 S. Ct. at 2403 (Souter, J., dissenting).

[37] *See id.* at 2374–75.

[38] *Id.* at 2375.

volving consensual contracting, rather than commands.[39] With respect to a World War I statute authorizing the President to "utilize the service" of the state governments to assist in the military draft, the Court suggested that it might not have been intended to permit coercion of state officers.[40] The Court did not consider the possibility that its own decisions may have forestalled "executive-commandeering" statutes during this time period.[41] Nor did the Court dwell at length on more contemporary statutes because they were "of such recent vintage that they are no more probative than the statute before us of a constitutional tradition," and "[t]heir persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice."[42] Finally, the Court distinguished regulatory conditions in spending enactments and characterized other federal statutes as "re-

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[39] *See id.* (characterizing an 1882 immigration statute as involving only contracting authority and not federal imposition of duties on state officials). Following the decision in *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875), which held unconstitutional state laws collecting taxes or bonds designed to finance inspection and care of immigrants, the 1882 law was enacted and imposed a 50-cent federal head tax on immigrants, to help "defray the expense of regulating immigration under this act, and for the care of immigrants arriving in the United States." Act of Aug. 3, 1882, § 1, 22 Stat. 214, 214. The contracting language relied on by the Court is found principally in section 2 of the 1882 Act. *See id.* § 2, at 214. But section 4 of the same Act appears to authorize the Secretary of Treasury to "commandeer" state entities or officers. *See id.* § 4, at 214–15. It provided that certain foreign convicts should be returned to the nations whence they came and stated:

> The Secretary of the Treasury may designate the State board of charities of any State in which such board shall exist by law, or any commission in any State, or any person or persons in any State *whose duty it shall be to execute the provisions of this section without compensation.* The Secretary of the Treasury shall prescribe regulations for the return of the aforesaid persons to the countries from whence they came, and shall furnish instructions to the board, commission, or persons charged with the execution of the provisions of this section as to the mode of procedure in respect thereto, and may change such instructions from time to time.

Id. § 4, at 214–15 (emphasis added) (also providing that expenses of return were to be borne by the ship in which they came). Although one might read section 4 to refer back to the section 2 contracting authority, the two sections appear to stand independently, and each uses different language to refer to the state authorities: section 2 authorizes the Secretary to enter contracts with "such State commission, board, or officers as may be designated for that purpose by the governor of any State," *id.* § 2, at 214, and section 4 authorizes the Secretary simply to designate a state board of charities to "execute the provisions of this section without compensation," *id.* § 4, at 214. Without knowing more of the legislative history, or practice of this statute, the language of section 4 appears to support the government's reliance on it in *Printz*, as a statute authorizing the "commandeering" of state executive officers.

[40] *Printz*, 117 S. Ct. at 2375 (quoting Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80, 80–81) (internal quotation marks omitted) (noting that, notwithstanding provisions making it a misdemeanor for persons to refuse to comply with a presidential order, in exercising his authority the President used the language of request in seeking assistance from the governors).

[41] *See* Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861), *overruled by* Puerto Rico v. Branstad, 483 U.S. 219, 224–29, 230 (1987). See generally Caminker, cited above in note 13, at 1046–47, who anticipates and answers this aspect of the Court's argument.

[42] *Printz*, 117 S. Ct. at 2376. *But cf.* City of Boerne v. Flores, 117 S. Ct. 2157, 2174 (1997) (Scalia, J., concurring in part) (disputing Justice O'Connor's similar reliance in her dissent on a history of government accommodation of religious practices showing a constitutional requirement).

quir[ing] only the provision of information to the Federal Government [and thus not presenting] the precise issue before us."[43]

4. Constitutional Structure. — Finding that historical constitutional practice "tends to negate the existence of the congressional power asserted here, but is not conclusive,"[44] the Court went on to consider the "structure of the Constitution" in search of "essential postulates" which control its meaning even if not articulated elsewhere.[45] But Justice Scalia identified nothing new that answers the question of federal power.[46]

The Court began with the proposition that the Constitution establishes a system of "dual sovereignty" in which the states surrendered many powers but retained "a residuary and inviolable sovereignty."[47] The Constitution "presupposes the continued existence of the states."[48] This proposition, however, does not tell us whether states can be required to help carry out federal law.

Justice Scalia then reprised two arguments made by Justice O'Connor in *New York v. United States*. Justice O'Connor had argued first, that the choice of establishing a national government that could operate directly on citizens went hand in hand with a decision to give up those powers the Confederated Government at least formally possessed to require states to act as instruments of governance, and second, that federal commandeering of state governments would interfere with the Constitution's contemplation "that a State's government will represent and remain accountable to its own citizens."[49] As noted above, the historical provenance of the first proposition is doubtful. As for the second proposition, as discussed below, concerns for political accountability do flow from the basic constitutional structure but do not necessarily support such a rigid rule.

Invoking the idea of a balance of power between the spheres of state and federal government,[50] Justice Scalia commented that "[t]he power of the Federal Government would be augmented immeasurably

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[43] *Printz*, 117 S. Ct. at 2376; *see id.* at 2385 (O'Connor, J., concurring).

[44] *Printz*, 117 S. Ct. at 2376.

[45] *Id.* (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934) (discussing nontextual "postulates" of the Eleventh Amendment) (internal quotation marks omitted).

[46] As noted above, the opinion avoided even acknowledging that the relative absence of "executive commandeering" may have been due in part to respect for the Court's 1861 decision in *Kentucky v. Dennison*, which was overruled in 1987. *See supra* p. 2190.

[47] *Printz*, 117 S. Ct. at 2376 (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)) (internal quotation marks omitted).

[48] *Id.* (quoting Helvering v. Gerhardt, 304 U.S. 403, 414 (1938)) (internal quotation marks omitted).

[49] *Id.* at 2377.

[50] *See id.* at 2378 (quoting THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (stating that federalism provides a "double security . . . to the rights of the people")). For similar arguments, see *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 582 (1985) (O'Connor, J., dissenting).

if it were able to impress into its service — at no cost to itself — the police officers of the 50 states."[51] Moreover, he argued, allowing federal laws to commandeer state executive forces would disturb the federal separation of powers by undermining the authority of the unitary President.[52] And, dismissing the Necessary and Proper Clause as the "last, best hope of those who defend *ultra vires* congressional action,"[53] Justice Scalia concluded that commandeering state governments is not a "proper" means.[54]

5. "Jurisprudence," or New York v. United States *(Again).* — Justice Scalia found himself in an odd position.[55] Although he is usually a constitutional originalist, Justice Scalia's discussion of text, history, and structure is largely defensive and at best inconclusive. Justice Scalia treated the Court's own decisions, of more recent vintage, as most dispositive. The majority relied essentially on the evidence of *New York*.[56]

The government had sought to distinguish *New York* on the grounds that the Brady Act did not require legislation or executive policymaking but rather represented a simple directive to state law enforcement agencies, which were required to provide only limited, nonpolicymaking assistance.[57] While acknowledging the government's argument as reminiscent of the distinction between proper and improper delegations, the Court rejected it. First, the Court explained that the

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51 *Printz*, 117 S. Ct. at 2378.

52 *See id.* at 2378 (arguing that presidential "vigor and accountability" would be impaired if Congress could "act as effectively without the President as with him, by simply requiring state officers to execute its laws"). This argument seems flawed. First, it is in tension with the use of state officers to implement federal law when states agree to do so by, for example, accepting federal funds. Second, it is arguably inconsistent with the availability of private rights of action to enforce federal law. Third, the assumption of a unitary executive is in many respects inconsistent with the existence of independent federal administrative agencies. For further discussion, see Evan H. Caminker, *Printz, State Sovereignty and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 223–30 (1997).

53 *Printz*, 117 S. Ct. at 2378; *see infra* pp. 2195–97 (discussing *Printz*'s conflict with McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

54 *See id.* at 2379 (citing Gary Lawson & Patricia B. Granger, *The Proper Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297–326, 330–33 (1993)). Justice Scalia likewise treated the Supremacy Clause as unhelpful, noting that it makes "Law of the Land" only those laws that are constitutional and thus does not answer the question of which laws are constitutional. *See id.*

55 For discussion of Justice Scalia's views on interpretation, see William J. Eskridge, *Textualism: The Unknown Ideal*, 96 MICH. L. REV. (forthcoming 1998) (manuscript at 108–14, on file with author) (reviewing ANTONIN SCALIA, A MATTER OF PRINCIPLE (1997)).

56 The Court noted that in its earlier decisions in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *FERC v. Mississippi*, 456 U.S. 742 (1982), it "sustained statutes against constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law." *Printz*, 117 S. Ct. at 2380. In *FERC*, this finding of noncoercion was based on the remote, theoretical possibility that states could simply withdraw from regulating. *FERC*, 456 U.S. at 764–65; *see infra* note 143.

57 *See* Respondent's Brief at 16–17, *Printz* (Nos. 95-1478, 95-1503), *available in* 1996 WL 595005.

line between policymaking and limited or ministerial decision is too indistinct; even determining what is a "reasonable effort" in making a background check may involve issues of policy.[58] And, the Court concluded, "an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one."[59]

Second, the Court argued, the absence of policymaking authority in the statute may be a worse intrusion because "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."[60] This assertion, though, begs the question of what that proper sphere of authority is. The opinion suggests that it would be as inappropriate for the federal government to compel states to administer federal law as it would be for federal officials to be "impressed into service for the execution of state laws."[61] As I argue below, this reasoning is seriously inconsistent with the explication, in *McCulloch v. Maryland*,[62] of the relationship between federal and state governments.

Third, the more ministerial nature of the task does not diminish the nonaccountability problem, according to the Court.[63] Because the program forces state governments "to absorb the financial burden of implementing a federal regulatory program, . . . Congress can take credit for 'solving' problems without having to ask [its] constituents to pay for the solutions with higher federal taxes."[64] Moreover, even without payment, states "are still put in the position of taking the blame" for the statute's burdens or mistakes made in its administration.[65] Although there are reasonable grounds for argument regarding accountability in *Printz* as discussed below, the majority's concern is probably misplaced because Sheriffs Printz and Mack could effectively communicate to their constituents the source of the burden.

Fourth, the Court rejected the dissent's distinction of the imposition of duties on states, as in *New York*, from duties imposed on local

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58 *Printz*, 117 S. Ct. at 2380–81 (discussing 18 U.S.C. § 922(s)(2) (1994), which states that chief law enforcement officers "shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law").

59 *Id.* at 2381.

60 *Id.* (citing Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869)).

61 *Id.* at 2381. As is argued below, we are not dealing with equal sovereigns, insofar as federal law is concerned, and it is a dangerous path to suggest that we are. *Cf.* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 841 (1995) (Kennedy, J., concurring) (stating "corollary" propositions that the states may not invade the "sphere of federal sovereignty" and the federal government must stay within its own powers "when it intrudes upon matters reserved to the States").

62 17 U.S. (4 Wheat.) 316 (1819).

63 *See Printz*, 117 S. Ct. at 2382. *But see* Caminker, *supra* note 13, at 1010–11 (distinguishing between "ministerial mandates," as in the Brady Act, and "bounded discretion mandates," as in *New York*, and describing their different effects on state autonomy).

64 *Printz*, 117 S. Ct. at 2382.

65 *Id.*

government officers, as in *Printz*.[66] The distinction between a state and its subdivisions, as well as the distinction between a government and its officers, is a staple feature of Eleventh Amendment law.[67] Relying primarily on pure "say so," the Court did not explain why this difference should not be of constitutional significance in analyzing other questions of state sovereignty.[68]

Fifth, the Court rejected the Government's effort to balance the small and temporary burden imposed on the states against the importance of the federal interest. The Court drew a distinction between "incidental application to the States of a federal law of general applicability," to which these factors might be relevant, and a law like this one — "where . . . it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty" — and found balancing to be inappropriate.[69] Instead, the Court claimed that a categorical principle is required. And so, the Court concluded,

> categorically, as [it] concluded categorically in *New York*: 'The Federal Government may not compel the States to enact or administer a federal regulatory program.' . . . Congress cannot circumvent that prohibition by conscripting the State's officers directly. . . . It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or

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[66] *See id.* at 2382 ("That is certainly a difference, but it cannot be a constitutionally significant one."). *Printz* relied on *National League of Cities v. Usery*, 426 U.S. 833, 855 n.20 (1976), *overruled on other grounds by Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985), which asserted, without citation of authority, that local governments are entitled to the same protection as states from federal interference, under the Commerce Clause, with the provision of integral government services. The question has not been the subject of sustained attention by the Court, either in *Printz* or its immediate forebears.

[67] *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 664–67 (1974) (distinguishing suits against state officials for injunctive relief from suits against states under the Eleventh Amendment); Lincoln County v. Luning, 133 U.S. 529, 530–31 (1890) (holding that a county is not a "state" for purposes of the Eleventh Amendment ban on suits against states in federal courts). On the importance of the distinction between states and their officers in enforcing federal law, see Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. REV. 495, 506–17 & n.48 (1997).

[68] *See supra* note 66. On the distinction between officers and the state, the Court suggests that judicial writs issue to state officers only in their "personal capacity," and that to permit orders or laws to direct state officers in their "official capacity" would deprive an anticommandeering rule of effect. The Court misleadingly quotes portions of *Will v. Michigan*, 491 U.S. 58 (1989) (holding that a § 1983 damages claim cannot be brought against state officers in their official capacity): "a suit against a state official in his or her official capacity . . . is no different from a suit against the State itself," *Printz*, 117 S. Ct. at 2382 (quoting *Will*, 491 U.S. at 71) (internal quotation marks omitted). *Printz* ignores *Will*'s assertion that "[o]f course" a state official can be sued under § 1983 "in his or her official capacity, when sued for injunctive relief." *Will*, 491 U.S. at 71 n.10; *cf.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 381 (1816) (Johnson, J., concurring) (distinguishing compulsory process directed at "state tribunals" from compulsory process, including injunctions and habeas corpus writs, against those who "contumaciously persist in infringing the constitutional rights of others," presumably, particular state officials).

[69] *Printz*, 117 S. Ct. at 2383.

benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.[70]

B. Of Dual Sovereignty, Clear Statements, and Political Accountability

At bottom, Justice Scalia's positive argument turns on four basic points:[71] first, a theory of dual sovereignty that is fundamentally at variance with principles of constitutionalism that date at least to *McCulloch v. Maryland*;[72] second, a constitutional "clear statement" requirement that reads state immunity from the exercise of federal power broadly and, concomitantly, reads federal power narrowly, again, in ways inconsistent with founding constitutional caselaw; third, a historical theory, based on an intent to preclude federal commandeering in the Constitution of 1787, that is supported by history only weakly, if at all; and finally, a theory of democratic accountability by both governments to their constituents, which does seem consistent with the Constitution and its development, but which does not fully support the rule articulated.

1. Dual Sovereignty. — The majority's understanding of dual sovereignty is inconsistent with *McCulloch*'s insistence that it was the "people," and not the "states," that formed the Union,[73] and with the political theory of the relationship between federal and state governments that supported its holding. Once the Court in *McCulloch* determined that the federal bank was constitutional, it had to decide whether the state could nonetheless tax the bank. In concluding that it could not, the Court articulated a basic political postulate of the Constitution. Describing the principle of the supremacy of federal law as one that "so entirely pervades the constitution . . . as to be incapable of being separated from it,"[74] Marshall explained its application to acts of taxation:

> The people of all the States created the general government and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But, when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always

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[70] *Id.* at 2383–84 (quoting New York v. United States, 505 U.S. 144, 188 (1992)).

[71] Justice Scalia also made a unitary presidency argument, *see supra* note 52 and accompanying text, which I do not address again here.

[72] 17 U.S. (4 Wheat.) 316 (1819).

[73] *See id.* at 404–05.

[74] *Id.* at 426.

> exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole — between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.[75]

In other words, the state and the federal governments are not intended as "dual" in the sense of "equal" sovereigns — the federal government is supreme in matters of federal law.

Justice Scalia was thus profoundly mistaken when he argued that federal imposition of enforcement duties on state law enforcers is as unsupportable as state imposition of the burdens of enforcing state law on federal agents. The first involves a decision by the "whole" people, in a body in which all of the states are represented; the latter represents a decision by "a part," to impose on the "whole" people without their being represented. Equivalency will not do to describe those relationships.

As Professor Merritt has suggested, the "separate sphere," dual sovereignty imagery depends on an outmoded "territorial" model of federalism that ignores established areas of concurrent federal-state jurisdiction.[76] Moreover, even if there are "separate" but overlapping spheres of activity, there is nothing to suggest that "dual sovereignty" prevents the federal government, when acting "within its sphere," from imposing requirements on state and local governments.[77] The "sepa-

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[75] *Id.* at 435–36.

[76] Merritt, *supra* note 11, at 1564–66; *see* 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, 938 (1998) (referring to "palpably untrue" assertions of mutually exclusive spheres); *cf.* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 646 (1981) (discussing "complex concurrency" of federalism in courts). The revival of the discourse of "dual sovereigns" in "separate spheres" may be easier to understand if one glosses over the substance of the cited cases that rely on these concepts as constraints on federal power. The Court, for example, has cited *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71 (1868), to support its historic claim that the national power to act on citizens was intended generally to supplant the power to act on the states. *See Printz*, 117 S. Ct. at 2376; New York v. United States, 505 U.S. 144, 162 (quoting *Lane County*, 74 U.S. (7 Wall.) at 76 ("The people . . . established a more perfect union by substituting a national government, acting, . . . directly upon citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the states.")). In *Lane County*, local tax authorities tendered payment to the state in U.S. notes, declared by a federal statute to be legal tender, rather than in gold or silver coin as required by Oregon law. The county lost in the state courts, whose judgment was affirmed by the Supreme Court, which construed federal laws *not* to apply to the payment of taxes due states, because a contrary interpretation would be inconsistent with the "necessary existence of the States, and, within their proper spheres, the independent authority of the States." *Lane County*, 74 U.S. (7 Wall.) at 76. It is hard to imagine the Court intended to suggest that states today could interpose their own laws to interfere with the uniform currency of the United States.

[77] *But cf. Printz*, 117 S. Ct. at 2377 ("[L]ocal authorities" are not subject, "within their respective spheres, to the general authority." (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961))).

rate sphere" imagery simply does not get the Court to where it wants to arrive, other than by fiat.

2. Constitutional Clear Statement? — Something like a constitutional clear statement requirement, with respect to burdens on state governments to act affirmatively in carrying out federal law, seems to emerge in the Court's treatment of the *Federalist Papers'* references to the role of the states as auxiliary to or agents of the national government; of specific constitutional provisions imposing duties on states; and of *Puerto Rico v. Branstad*,[78] which upheld the power of federal courts to order state governors to extradite fugitives from justice. The concept of a "constitutional clear statement" requirement is intriguing but ultimately unpersuasive in the context of U.S. constitutional history and caselaw.

As a matter of logic, the Constitution's listing of particular obligations of state governments could be read as exhaustive and thus as excluding others, as the Court implies,[79] or it could be read as a constitutional minimum and as illustrative of the kinds of obligations that Congress in its judgment might impose in enacting the "constitutional laws of the Union."[80] But the argument for the former is ultimately unpersuasive.

On its own terms, the argument for the former reading does not adequately account for the Court's decisions on the Extradition Clauses.[81] The first Extradition Clause articulates a legal rule that, on the request of the executive of a state, a fugitive from that state should be returned — by whom, the Constitution's text does not say. Nor does the Constitution explicitly give Congress power to provide for the

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[78] 483 U.S. 219 (1987), discussed in *Printz*, 117 S. Ct. at 2399–400 (Stevens, J., dissenting); *see also Printz*, 117 S. Ct. at 2371–72 (discussing the statute at issue in *Branstad* as an implementation of Art. IV duties and powers).

[79] *See Printz*, 117 S. Ct. at 2374 n.8. The majority does not discuss in any detail the two Militia Clauses. *See* U.S. CONST. art I, § 8, cls. 15, 16 (authorizing Congress to "provide for calling forth the Militia to execute the Laws of the Union" and to "provide for organizing [and governing] . . . the Militia, . . . reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"). One might invoke *expressio unius* to say that the Constitution explicitly addresses how the states would assist in executing the laws of the land, and provides for use of the militia, precluding other possibilities; or one might say that the clauses recognize that the states and the federal government share an interest in the enforcement of federal law that can, in Congress's judgment, be carried out by state, as well as by federal, officers. Alternative explanations of the Militia Clauses do not support the *expressio unius* inference. *See* Caminker, *supra* note 13, at 1032–34 (arguing that the Militia Clauses were included in order specifically to reserve certain aspects to state control); Caminker, *supra* note 52, at 275 n.42 (same); *cf.* Perpich v. Department of Defense, 496 U.S. 334, 354 (1990) (arguing that the Militia Clause does not impose implicit limits on Congress's power to raise an army).

[80] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425 (1819). For elaboration, see Caminker, cited above in note 13, at 1032–34; and Prakash, cited above in note 13, at 1992–93 (considering the argument that enumeration of certain federal duties of state executives excludes other duties, but concluding that the Constitution sets minimum duties to which Congress could add).

[81] U.S. CONST. art. IV, § 2, cls. 2,3.

enforcement of duties under the Extradition Clause. It was a 1793 statute that explicitly imposed obligations on the states' "executive authority" to return such fugitives,[82] although the caselaw concludes that a duty was imposed directly by the Constitution.[83] Justice Scalia claims that the 1793 extradition statute "was in direct implementation" of the Extradition Clause,[84] and thus did not support any power in Congress to impose other statutory duties on state officials. But why, in principle, should this kind of statute be different from statutes enacted pursuant to Congress's enumerated constitutional powers to enact laws concerning interstate commerce, for example, which are "supreme" over state law under the Supremacy Clause?

One answer would be that the states, or the people, could be deemed to have consented to those specific duties laid on the states by the Constitution, but not to duties created in the future by Congress pursuant to its enumerated powers.[85] But the Court's interpretation of the second Extradition Clause in Article IV, Section 2, relating to fugitive slaves, when read together with the first clause dealing with fugitives from justice, suggests that the duty of delivering fugitives could have been carried out by someone other than a state governor.[86]

Moreover, the argument that Congress's powers are constrained by an unarticulated requirement that limitations on state sovereignty be

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[82] Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat 302, 302; *see* California v. Superior Court, 482 U.S. 400, 406–07 (1987) (noting that because the Extradition Clause was not self-executing, a federal statute was required to provide implementing procedures).

[83] *See* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 102–03 (1860) (interpreting the Extradition Clause itself to contemplate compliance by the state executive in light of practice under the Articles of Confederation); *see also Branstad*, 483 U.S. at 227-28 (indicating that the Extradition Clause itself binds executive officers and courts of the asylum state and overruling *Dennison*'s holding that courts could not compel state officers to perform their duty).

[84] *Printz*, 117 S. Ct. at 2371–72.

[85] That is, if the Court is correct that the Extradition Clause itself contemplated that it was the state governor who was responsible for the return of fugitives, then perhaps that clause can be read as more like the provisions of Article I, section 4, relating to state obligations in establishing the national government, than like Article I, section 8, clause 3, giving Congress power over interstate commerce.

[86] In theory, the Extradition Clause might have been fulfilled by having federal officers, or private persons, return fugitives. *Cf.* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (construing the Fugitive Slave Clause, with similar "shall be delivered up" language to the general Extradition Clause). In *Prigg* the Court upheld Congress's power to enact the Fugitive Slave Law, which authorized *private persons* to seize an escaped slave and, having obtained a certificate of ownership from either a state or federal court, to remove the slave from the state. *See id.* at 614–21. Although *Prigg* held that the state could not interfere with rendition of a slave by making it a crime to remove a fugitive without a state court certificate, in dicta Justice Story suggested that the state could prohibit its executive officials from assisting in rendering a fugitive. *See id.* at 615–16. Justice Story's interpretation suggests that both Extradition Clauses, the first of which survives the abolition of slavery, might be read to impose a duty on the states not to interfere with the delivery of fugitives, but not necessarily an affirmative duty to aid in their delivery. *See id.* at 614–15, 622. If Justice Story's interpretation is correct, then the Court's distinction between the extradition statute upheld in *Branstad* and the Brady Act at issue in *Printz* is substantially undermined.

clearly expressed is in tension with the Tenth Amendment's abandonment of the word "expressly" — a term used in the Articles of Confederation to emphasize that the national government had only those powers set forth explicitly.[87] This reading of Congress's powers is also inconsistent with the conclusion reached in *McCulloch* and its progeny that the powers granted to the federal government must be given a liberal, not narrow, construction.[88] And finally, such a narrow reading of congressional powers is at least arguably inconsistent with the powers of federal courts to issue injunctions and other forms of writs against state officers to vindicate federal law.[89]

3. History. — The Court's historical argument has been substantially addressed by earlier scholarship responding to *New York*. This work is quite divided on whether there is a basis for concluding that the Constitution prohibits commandeering of state legislatures, but is more in agreement that Founding history can better be read to contemplate federal commandeering of state executive officials than to prohibit it.[90] The Court's suggestion that the Founders' reference to

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[87] *Compare* ARTICLES OF CONFEDERATION art. II, *with* U.S. CONST. amend. X. The *Federalist Papers* in places could be read to require an explicit prohibition to divest states of preexisting powers, *see* THE FEDERALIST NO. 32, at 201 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[A]ll authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor."), but elsewhere contemplate that state "right[s] of sovereignty" can be divested by implication, *id.* at 198–99 (explaining that alienation of state sovereignty could occur by grant of power to federal government, such as over uniform naturalization rules, contradictory to similar power in states). These passages address the states' retained powers to tax, and it is not clear how, if at all, the discussion would bear on whether the federal government could impose duties on state officers under federal law.

[88] Indeed, the Court's "clear statement" argument is mildly reminiscent of the argument made by counsel for Maryland in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *See id.* at 427 (describing counsel's argument that "all the powers which are not expressly relinquished" are reserved to the states, and that in executing its powers the national government "must confine itself to the means specifically enumerated" in the Constitution or closely related "auxiliary means"). This argument for a narrow interpretation of Congress's powers was rejected in *McCulloch*, and Chief Justice Marshall concluded that the enumerated powers called for a broad and flexible interpretation. *See id.* at 407–24.

[89] In *New York v. United States*, 505 U.S. 144 (1992), the Court distinguished the many cases upholding federal injunctions against state officers on the ground that the courts had expressly been given jurisdiction over cases arising under federal law. *See id.* at 179. Whatever else might be said about the grant of jurisdiction in Article III, how can one say that those grants of jurisdiction to the courts any more, or less, clearly embrace a power to impose obligations on state governments than do the enumerations of powers to the Congress?

[90] *Compare, e.g.*, Caminker, *supra* note 13, at 1059–61, 1087–88 (rejecting a constitutional anticommandeering rule), *with* Prakash, *supra* note 13, at 2033 (concluding that the Constitution should be read to prohibit legislative, but not executive, commandeering). *But cf.* Hills, *supra* note 76, at 831–47 (reading ambiguous historical evidence to provide support for an anticommandeering rule for executive officers to serve nationalistic goals). Prakash's most persuasive evidence in support of the antilegislative commandeering rule — that the Constitution, although including many powers listed in the Articles of Confederation, omitted the power to requisition taxes or men from the states, *see* Prakash, *supra* note 13, at 1971–72 — might be read to express a decision only with respect to the requisition of men or taxes and not to preclude directives to legislatures on other matters. Although many framers felt that requisitioning was ineffective and

the use of state officers to collect federal taxes rested on the consent of the states is strained at best.[91] Indeed, although many raised objections to the federal government's purported powers over the states, their suggestions that the federal government could not operate on the states in their "corporate capacity" was early on firmly rejected.[92] The distinction between impositions on state executive officials and on state courts is novel, emerging for the first time in *New York*.[93] Thus, history does not adequately account for the categorical, bright-line rule laid down in *Printz*.

4. Political Accountability. — The Court's final argument, that the political accountability of state and federal representatives is inconsistent with federal commandeering, is grounded in legitimate considerations of constitutional history and structure. I agree with Justice

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wanted the federal government to have direct powers, *see id.* at 1976–77, the conclusion that the Constitution *substituted* federal power to raise armies and taxes for any power to requisition the states does not necessarily follow. Indeed, portions of the *Federalist Papers* suggest that under the new Constitution the federal government would *retain* power to requisition:

> It has been very properly observed by different speakers and writers on the side of the Constitution that if the exercise of the power of internal taxation by the Union . . . should be discovered on experiment to be really inconvenient, the federal government may forbear the use of it, and have recourse to requisitions in its stead. By way of answer to this, it has been triumphantly asked, Why not in the first instance omit that ambiguous power and rely upon the latter resource? . . . The first [answer] is that the actual exercise of the power may be found both convenient and necessary . . . . The second answer is that the existence of such a power in the Constitution will have a strong influence in giving efficacy to requisitions. When the States know that the Union can apply itself without their agency, it will be a powerful motive for exertion on their part.

THE FEDERALIST NO. 36, at 220–21 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Recognizing the implication of this and other passages that the federal government retains the power of requisitioning states for taxes, Prakash concludes that it must not have meant what it said because elsewhere Madison and Hamilton so vociferously condemned the system of direct requisitions. *See* Prakash, *supra* note 13, at 1980.

91 *Compare* Printz v. United States, 117 S. Ct. 2365, 2372–73 (1997), *with* Caminker, *supra* note 13, at 1044 & nn.167–69 (gathering some of the evidence), *and* Prakash, *supra* note 13, at 1999 (stating that when Madison and Hamilton discussed the use of state officers, "they contemplated a system in which the federal government has a 'right' to compel state officers to enforce federal law"). *But cf.* Hills, *supra* note 76, at 836–38 (suggesting that discussion of state officers contemplated only conditional preemption).

92 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 343 (1816) ("It is a mistake that the constitution was not designed to operate upon states, in their corporate capacities."). Professor Caminker notes that as tensions over slavery increased, "the Supreme Court questioned, and various state courts rejected, the notion that Congress could require state courts to entertain federal claims . . . . [And thus] the early historical acceptance of executive commandeering rose and fell in tandem with judicial commandeering." Caminker, *supra* note 13, at 1046. Caminker's analyses belie the asserted distinction between executive and judicial commandeering.

93 Organic views of the development of constitutional law, with which I am in sympathy, suggest that developments over time must be taken into account in rendering contemporary accounts of the Constitution. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 PENN. L. REV. (forthcoming 1998) (manuscript at 108, on file with author). That organic history does not provide a compelling basis for a bright-line rule against commandeering of state executives.

Scalia that the "Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens."[94]

The Constitution's theory of sovereignty requires accountability — by both federal and state governments — to the people.[95] Its explicit attention to the design of a representative, noncorrupt federal government is substantial. Accountability is designed to be achieved through such requirements as elections held at fixed terms,[96] limits on particular forms of corrupting, self-aggrandizing behavior by public officials,[97] and public voting in the national legislature itself.[98] The fundamentality of the relationship between constituents and their elected representatives is emphasized by the attention that constitutional amendments have given to expanding the electorate.[99]

The "political accountability" argument has several different aspects. 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).[100]

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*. As others have noted, a federal system necessarily results in a more confusing situa-

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[94] *Printz*, 117 S. Ct. at 2377.

[95] For discussion of the ideas of sovereignty in the people that undergird the Constitution, see GORDON S. WOOD, THE CREATION OF THE AMERICAN PEOPLE 1776-87, at 530, 545 (1969).

[96] *See* U.S. CONST. art. I, §§ 2, 3 (providing for the terms of office and the election of representatives and senators); *id.* art. II, § 1 (providing for the terms of office and the election of the President); *id.* amend. XXII (providing the two-term limitation for the President).

[97] *See, e.g.*, *id.* art. I, § 6 (providing for the compensation of representatives to be fixed by law, with no increase in emoluments of offices filled by representatives during their elected term); *id.* amend. XXVII (requiring an intervening election before a congressional pay increase takes effect).

[98] *See id.* art. I, § 5 (requiring each house to keep a journal of proceedings in which the votes of members "on any question" must be recorded at the request of one-fifth of those present); *id.* art. I, § 7, cl. 2 (requiring that "the names of the Persons voting for and against the Bill shall be entered on the Journal of each house" in a veto override).

[99] Five of the seventeen amendments enacted after the Bill of Rights expand the federal electorate. *See id.* amends. XV, XIX, XXIII, XXIV, XXVI.

[100] For examples of early discussion of the accountability problems posed by federal directives, including unfunded mandates, see Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 890 (1979); and D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779, 1034 (1982).

tion for voters than does a unitary, centralized government.[101] 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.[102] Conditional spending regulatory requirements, though nominally involving a state's choice to accept federal funds, can result in a very confusing picture of responsibility for voters. Why, then, would commandeering be different?

One answer might be that compelled state action will be less readily understood as attributable to another than compelled inaction, because action is more likely than inaction to be perceived as a morally responsible cause of injury.[103] Although not necessarily logical, given the persistence of the action-inaction distinction in many realms of law and life, this phenomenon might be correct as a matter of cognitive perception or popular moral intuition. The answer, and the consequences that follow for constitutional law, are not obvious.

A second answer focuses on resources: commandeering "absorbs government resources that the states might direct elsewhere and confuses the lines of political accountability."[104] There may be a difference — in terms of accountability for use of public resources — between Congress requiring the states to do something that costs a lot (in terms of time or money) or something that does not. This concern, however, would not justify a flat anticommandeering rule, but might instead lead to rules that focus on the substantiality of the burdens, or

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101 *See* Caminker, *supra* note 13, at 1061–74 (discussing "blame misallocation" and "coerced state decisionmaking" and arguing that preemption and spending inducements pose similar risks of misunderstanding); Hills, *supra* note 76, at 824–30.

102 *See* Caminker, *supra* note 13, at 1070.

103 The action/inaction distinction runs deep in the legal culture, *see, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195–96 (1989), but can be criticized on many grounds. *See, e.g.*, Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1330 (1982); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53, 53–54. The moral status of acts as compared with omissions has troubled philosophers. *See, e.g.*, JONATHAN GLOVER, CAUSING DEATH AND SAVING LIVES 99–100 (1977) (noting from a utilitarian viewpoint, that "side-effects" of positive acts may be worse than those of omissions because "people resent hostile acts more than equally hostile omissions"); *id.* at 104–05 (noting that "actions take time, while omissions do not," and therefore that the number of omissions one could be faulted for is unlimited); *id.* at 109 (doubting nonetheless that the act/omission distinction is relevant in judging one's own moral obligations).

104 Merritt, *supra* note 11, at 1580 & n.65 (noting that voters may blame state officers for inadequate resources for other priorities and other burdens of federal law), *cited in Printz*, 117 S. Ct. at 2382; *see also* Hills, *supra* note 76, at 855–57 (arguing that federal commandeering leads to "pointless centralization"); D. Bruce La Pierre, *Political Accountability in the National Political Process — The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 661 (1985) (arguing that incentives for responsible federal lawmaking are diminished if the federal government can compel states to pay for what it wants done).

the possibility of federal subsidy[105] or waiver for localities for which a requirement is particularly burdensome.[106]

Particular forms of commandeering may bring into play several kinds of accountability concerns at once. In *New York*, for example, because the state had discretion in how to achieve the federal disposal goals, nearby citizens were likely to perceive the choice of any particular in-state site as a state-imposed burden.[107] And unless New York could reach a deal with another state, its officials had to impose a burden on a discrete geographic area, a readily identifiable subset of its own constituency; such a decision is particularly likely to impose high political costs on the local officials called on to make it. The scheme also involved the possibility of financial drain on state resources. In view of the length of time between enactment and imposition of the most severe penalties, the scheme created a significant risk that federal officials would receive credit for solving a problem while passing the politically unpleasant decisions on to the states.

On this reasoning, 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

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[105] *See Printz*, 117 S. Ct. at 2404 (Souter, J., dissenting) (suggesting that Congress cannot compel states to provide "administrative support without an obligation to pay fair value for it"). *But see* Hills, *supra* note 76, at 935–36 (arguing that such a requirement would be impracticable).

[106] The Court was prepared to accept that the Brady Act would be satisfied by a CLEO directing that no background checks would be conducted that divert time from pending felony investigations and that no more than a half hour be spent on any check, but it also treated decisions about what constituted reasonable efforts as involving some "policymaking" by CLEOs. *See Printz*, 117 S. Ct. at 2381. Clearly for this majority, the insubstantiality of the burden imposed was of little moment.

[107] *See* Caminker, *supra* note 13, at 1010–11 (referring to this as a "bounded discretion mandate[]," as distinct from the more "ministerial mandate" imposed under the Brady Act) (internal quotation marks omitted)).

duties.[108] Although *Printz* discusses and rejects this possibility,[109] the Court's analysis is unconvincing. First, it is considerably easier for a state officer to identify to state voters the federal government's responsibility when decisionmaking involves less rather than more discretion.[110] Second, the line drawing between ministerial and discretionary duties, although difficult, is not impossible,[111] particularly if one recognizes that the differences are largely ones of degree rather than kind.

Moreover, despite the Court's conclusion otherwise, the substantiality of the burden imposed, apart from whether it is ministerial or discretionary, is relevant to constitutional concerns: 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,[112] and the more concern one would have about whether

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[108] *See id.* However, what Caminker calls "bounded discretion" commands allow greater play for the values of experimentation and diversity than do federal commands of a more ministerial nature. Thus, there may be a tension (illustrated in *New York*) between different values of federalism — between fostering experimentation and appropriate local diversity, on the one hand, and, on the other, fostering clearer lines of political accountability to voters. The question of "accountability," and its link to self-governance, is itself more complex than the Court has admitted. Martha Derthick, after explaining that mandates to state governments both diminish opportunities for experimentation and "undermine republican principles by separating responsibility for policy choice from responsibility for revenue raising," observes nonetheless that "[w]e may be better off (that is to say, more democratically governed) if elected governments are saddled with the dilemmas of choice that the federal government's policy decisions create than if the implementation of those decisions were left solely in federal [administrative officials'] hands." Martha Derthick, *The Structural Protections of American Federalism*, *in* NORTH AMERICAN AND COMPARATIVE FEDERALISM: ESSAYS FOR THE 1990S, at 9, 22 (Harry N. Scheiber ed., 1992). *But cf.* JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 205–09 (1997) (presenting a more positive view of the role of federal bureaucracies in promoting accountable government). Derthick's analysis suggests that the formal clarity of accountability lines from federal administrators to federal elected officials may be so attenuated that accountability is better served by having state decisionmakers make choices under "delegations" from federal mandates than by prohibiting compelled delegations to states with ensuing increases of authority to federal agencies. The point made by Derthick is related to the argument made by the *Printz* dissenters that the Court's decision is inconsistent with "federalism" in that it encourages a larger federal workforce and a diminished state role. *See Printz*, 117 S. Ct. at 2396 (Stevens, J., dissenting). Thus, even assuming agreement on the values of political accountability for elected officials at both levels of government, determining how best to implement those values is difficult and raises cautions about efforts to prescribe rigid categorical rules. *See also* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 419–38 (1998) (criticizing *New York* and arguing for more delegations of authority to states in pursuing federal objectives).

[109] *See Printz*, 117 S. Ct. at 2381.

[110] *See id.* at 2395 n.18 (Stevens, J., dissenting) (noting the public attention given to sheriffs' objections to the federal statute and the concomitant ease of informing citizenry).

[111] Indeed, a substantial body of law surrounds precisely this distinction, which underlies the law of mandamus. *See, e.g.*, Work v. United States *ex rel.* Rives, 267 U.S. 175, 177 (1925) (explaining that "[m]andamus issues to compel an officer to perform a purely ministerial duty" and "can not be used to compel or control [discretionary] dut[ies]").

[112] If, for example, the federal law required so many hours of local law enforcement time that it contributed to a slower police response to citizen calls for help, one could imagine local law en-

Congress may have deliberated less fully on the terms of its policy when it did not have to weigh the policy's budgetary impact.

Federal commandeering of states, therefore, 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.

II. Open Questions and Effects

The breadth of *Printz*'s effect on other federal statutes is unclear, although a small number of statutes are clearly invalid under *Printz*.[113] A larger number of statutes raise questions about the stability of the five-Justice majority's reasoning. Justice O'Connor, in particular, reserved the question whether mere information-reporting statutes would be subject to the same rule.[114] And there are a substantial number of federal statutes that require more than the reporting of information already in the hands of the states, but that do not "commandeer" in the sense of requiring state regulation of nongovernmental actors.[115] Although information-reporting requirements might be

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forcement personnel having a more difficult time allocating blame to the federal government in the face of voter unhappiness than they would have explaining to unhappy would-be gun purchasers why they have to wait five days. *But cf.* Respondent's Brief at 36–37, *Printz* (Nos 95-1478, 95-1503), *available in* 1996 WL 595005 (describing the Bureau of Alcohol, Tobacco & Firearms (ATF) guidance that only "minimal effort[s] to check commonly available records" was required and that "when an emergency counsels against diversion of resources away from other law enforcement priorities of the jurisdiction" no check need be made (internal quotation marks omitted)).

113 See, for example, Forest Resources Conservation and Shortage Relief Act, 16 U.S.C. §§ 620–620j (1994), which was held unconstitutional in *Board of Natural Resources v. Brown*, 992 F.2d 937, 947 (9th Cir. 1993), and Merritt, cited above in note 11, at 1578. *See also* Caminker, *supra* note 52, at 200 n.6 (identifying a "handful" of statutes).

114 *See Printz*, 117 S. Ct. at 2385 (O'Connor, J., concurring) (noting that the Court did not decide whether "purely ministerial" reporting requirements imposed on state and local authorities are invalid, and citing 42 U.S.C. § 5779(a) (1994), which requires federal and state law enforcement agencies to "report each case of a missing child" to the Department of Justice); *Printz*, 117 S. Ct. at 2376 (reserving the question). Several other laws appear to impose reporting requirements. *See, e.g.*, 15 U.S.C. § 2645(e) (1994) (requiring governors to issue status reports on schools' compliance with asbestos removal); 20 U.S.C. § 4013 (1994) (requiring governors to keep records on asbestos in schools and report to a federal agency).

115 *See, e.g.*, Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. §§ 2645, 2647 (1994) (requiring governors and local educational agencies to develop management plans for addressing the problem of asbestos in school buildings); 42 U.S.C. § 6991a (1994) (requiring states to maintain inventories of sites with underground storage tanks, based on reports made by owners of those tanks as required by federal law); Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. § 11001 (1994) (mandating the creation of emergency response commissions); *see also* Drivers' Privacy Protection Act of 1994, 18 U.S.C. § 2721 (1994) (limiting and establishing procedures for permitted disclosures of personal information in motor vehicle records). *Compare* Condon v. Reno, 972 F. Supp. 977, 984–85 (D.S.C. 1997) (finding 18 U.S.C. § 2721 unconstitutional and rejecting the argument that its requirement that states protect the confidentiality of

treated as outside the *Printz* rule on the grounds that they involve neither compelled "enactment" nor compelled "enforcement" as against third parties of a federal regulatory scheme, such a distinction, although plausible in light of the articulated holding of *Printz*, does not seem to accord with its deeper vision of state sovereignty.[116] Given the "separate sphere" of "state autonomy" model of sovereignty on which *Printz* is based, the model's logic — that Congress had no power (outside of constitutionally specified exigencies) to compel state or local governments to act — would argue against the constitutionality of many such laws.

Of greater concern are *Printz*'s effects on the constitutionality of those federal statutes that are generally applicable to private persons and states and those laws that are enacted under Fourteenth Amendment powers.[117] These laws include statutes like the Fair Labor Standards Act (FLSA)[118] and the income tax withholding statutes, arguably enacted pursuant to Congress's Article I powers,[119] and Title VII, pro-

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motor vehicle records does not require the state to "regulate" within the meaning of *Printz*), *and* Oklahoma v. United States, No. CIV-97-1423-R, 1997 U.S. Dist. LEXIS 14455, at *20 (W.D. Okla. Sept. 17, 1997) (same), *with* Pryor v. Reno, No. 97-D-1396-N, 1998 U.S. Dist LEXIS 3752 (M.D. Ala. Mar. 13, 1998) (upholding the Act as a valid Commerce Clause regulation of states that does not require states to regulate private parties).

116 *Cf. Printz*, 117 S. Ct. at 2383 n.17 (suggesting that extending reporting obligations to private persons would not cure the constitutional defect in the Brady Act, which requires state officers in their official positions to provide information that belongs to the states and to conduct investigations in their official capacities). Federally mandated information reporting (or the creation of a state office for the purpose of maintaining information) may not, however, engender the same prospects for misdirected hostility by state constituents, or confusion of political accountability lines, as compelled regulation of private behavior. *Cf.* Hills, *supra* note 76, at 934 (suggesting the permissibility of commandeering states to report unique knowledge especially when no state enforcement against third parties is mandated).

117 *See Printz*, 117 S. Ct. at 2383 (explaining that the government's arguments about the importance of the federal law, and the brief and minimal nature of the burden, "might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments," but not when "the whole *object* of the law [is] to direct the function of the state executive"). As examples of cases in which balancing of these factors might be relevant, Justice Scalia provocatively cited *Fry v. United States*, 421 U.S. 542, 548 (1975), upholding emergency spending limits; *National League of Cities v. Usery*, 426 U.S. 833, 853 (1976), holding the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 203–206 (1994), unconstitutional as applied to certain state and local government employees, *overruled by Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985); and *South Carolina v. Baker*, 485 U.S. 505, 529 (1988) (Rehnquist, C.J., concurring in the judgment).

118 29 U.S.C. §§ 203–206 (1994).

119 For tax laws requiring withholding of income taxes for state employees, see 26 U.S.C. §§ 3401(c), (d), 3402 (1994). In enacting income tax laws, Congress presumably acts under Article I, § 8, cl. 1 and Amendment XVI, but the latter has been construed simply "to remove the apportionment requirement for whichever incomes were otherwise taxable." South Carolina v. Baker, 485 U.S. 505, 522 n.13 (1988). Other statutes arguably supported by Article I powers that extend to state and local governments include bankruptcy laws, *see* 11 U.S.C. § 106 (1994); copyright laws, *see* 17 U.S.C. § 501 (1994); the Equal Pay Act, 29 U.S.C. § 206 (1994); the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (1994); and the Americans with Disabilities Act of 1991, 42 U.S.C. §§ 12101–12213 (1994).

hibiting employment discrimination and extending to the states pursuant to Fourteenth Amendment powers.[120] The disruptive effect of invalidating these laws would be substantial.[121]

New York had suggested a distinction between extending generally applicable laws to states, and compelling states either to legislate or to regulate in accordance with federal law.[122] To the extent that the Court's anticommandeering rule is concerned with preventing federal takeover of state government functions, when a state is subject to a statute that applies to many private entities, states are protected in at least two ways. First, such a statute — to the extent that it is directed at some significant amount of private activity — is unlikely to be aimed at uniquely governmental functions of states;[123] states would not be "singled out" for the purpose of federal use of their governmental capacities.[124] Second, statutes that fall on private and public interests may be more likely to be closely politically monitored and contested; the legislative process is "safeguarded" from imprudent decisions not only by the states' representation but also by the general public's representation.[125] Oppressive regulation that would interfere with the states' functioning as sovereigns would thus be unlikely to emerge.

Given the current Court's concern, however, with the instrumentalities of state government as the embodiment of state sovereignty, this rationale alone may not be persuasive. The imagery of "dual sovereigns" might not be fully satisfied by a rule that treats states no dif-

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120 *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (1994).

121 Stare decisis concerns may weigh in the minds of some of the *Printz* majority, *see* Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (plurality opinion), but on this issue, *see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 589 (1985) (O'Connor, J., dissenting), perhaps not very heavily.

122 *See* New York v. United States, 505 U.S. 144, 178 (1992) (distinguishing *Garcia*, 469 U.S. at 556–57, which upheld the application of the FLSA to the states, on the ground that the FLSA applied to most private employers as well).

123 *See* Helvering v. Gerhardt, 304 U.S. 405, 421, 424 (1938) (asserting that the continued existence of states does not ordinarily require that states have a competitive advantage over private entities in carrying out government operations); *see also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 284–85, 287–88 (1981) (limiting the protections of the "traditional governmental function[s]" test to federal laws that regulate states as such and address matters that are indisputably attributes of state sovereignty (internal quotation marks omitted)); National League of Cities v. Usery, 426 U.S. 833, 852 (1976) (noting the need to protect "integral operations in areas of traditional governmental functions").

124 In this respect, the dangers of confusion of political accountability as to decisionmaking responsibility, identified in *New York* and *Printz*, are diminished because the federal government and its officials would not be shielded from public view by the use of state governments as "puppets" for the carrying out of federal regulation of the general citizenry. The dangers, however, are not nonexistent because state government compliance with federal law may require resources that would otherwise be available for other, state-determined priorities.

125 *See* La Pierre, *supra* note 104, at 581 (arguing that political accountability for Congress is present when it either expends federal funds or legislates generally for private as well as government actors).

ferently than regulated private entities, but rather may require some inquiry, along the lines begun in *National League of Cities*, regarding the degree to which application of a statute interferes with core, or important, state governmental functions.[126] The Court's rationale for distinguishing *Garcia v. San Antonio Metropolitan Transit Authority*,[127] then, might lead to a possible reinvigoration of the distinction between traditional governmental functions and other things governments do, giving heightened protection to those activities in which only governments engage. Even were the Court to extend its anti-commandeering rule to some laws of general application, there is a likelihood, based on stare decisis if nothing else,[128] that any such rule would be less categorical in reach. And there are good reasons, developed below in Part III, why a more flexible standard would better serve rule of law interests.

Finally, the time is surely ripe for further scholarly consideration of whether the Fourteenth Amendment does not have a more profound effect than the Court's federalism doctrine has thus far recognized on the entire Constitution, including the Article I powers themselves. "Commandeering" of state governments, in the sense of requiring affirmative state action to comply with federal requirements (for changing voting laws), has already been upheld under the post-Civil War Amendments.[129] And the Court's reasoning in *Seminole Tribe v. Flor-*

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126 *See* Printz v. United States, 117 S. Ct. 2365, 2383 (1997) (stating that the degree of the burden on states as well as the importance of federal interest may be relevant to the constitutionality of extending generally applicable laws to states). To the extent that sovereignty concerns are implicated, states might also argue that they are entitled to protection from the application of generally applicable laws equivalent to that of the federal government. *See* LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 101 (2d ed. 1996) (reprinting Solicitor General Bork's argument in support of the FLSA in *National League of Cities*, which suggested that Congress was constrained by a requirement for such equivalency); *cf.* South Carolina v. Baker, 485 U.S. 505, 523 (1988) (noting that the federal government imposed the same restrictions on its own bonds as on state bonds in rejecting the State's constitutional challenge); Congressional Accountability Act of 1995, Pub. L. No. 104-1 (codified at 2 U.S.C. §§ 1301–1438 (West Supp. 1995)) (extending to the federal legislative branch a host of statutes, some of which had previously extended to other federal offices and to state governments).

127 469 U.S. 528 (1985).

128 For an example of the Court's willingness to adjust federalism doctrine to avoid substantial disruption of existing legal frameworks, see *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 206–07 (1991). It is possible that the Court, in evaluating the validity of applying general laws to the states, would consider something like the centrality of the state governmental function at issue to the Court's conception of the state as a sovereign entity. *See* Gregory v. Ashcroft, 501 U.S. 452, 460–63 (1991) (asserting that the question of qualifications of state judges "goes beyond an area traditionally regulated by the States [and] is a decision of the most fundamental sort for a sovereign entity").

129 *See* City of Rome v. United States, 446 U.S. 156, 172–80 (1980) (upholding pre-clearance requirements for changing local election laws under the Fifteenth Amendment and rejecting a federalism challenge); South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966) (upholding the pre-clearance requirements for changes in state voting rules); *cf. Gregory*, 501 U.S. at 464 (distinguishing "inviolate" rules against congressional imposition on state officers under the Commerce

ida[130] suggests that it is likely to distinguish, and uphold against at least some "commandeering" claims, statutes enacted pursuant to those provisions. The Court in *Seminole Tribe* held that Congress lacked power under Article I to subject states to suits by private individuals in federal courts, but explicitly distinguished its holding in *Fitzpatrick v. Bitzer*,[131] which held that Congress could abrogate states' immunity from suit in federal court when acting under its Section 5 powers because the Fourteenth Amendment was enacted after the Eleventh and was an explicit limitation on state power.[132] Likewise, to the extent that the anticommandeering rule derives from a historic bargain in the 1787 Constitution, it could be found superseded by later-enacted amendments.[133]

While *Seminole Tribe* has already created incentives to litigate whether Congress has acted under Article I or under the Fourteenth Amendment, and more precisely to determine the scope of the Section 5 powers and the substantive reach of Section 1 of the Fourteenth Amendment,[134] *City of Boerne v. Flores*[135] indicates that the Court will not simply defer to such congressional determinations.[136] Yet

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Clause from Congress's possibly greater power under the Fourteenth Amendment to proscribe qualifications for state office).

130 116 S. Ct. 1114 (1996).

131 427 U.S. 445 (1976).

132 *See Seminole Tribe*, 116 S. Ct. at 1125, 1128; *Fitzpatrick*, 427 U.S. at 453–56.

133 On the likelihood that "commandeering" under Congress's Fourteenth or Fifteenth Amendment powers would be treated differently than under Article I powers, see, for example, Caminker, cited above in note 13, at 1006; and Merritt, cited above in note 11, at 1577. For recent examples of the vast literature on the history of the Fourteenth Amendment, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 228–80 (1988), Robert I. Kaczorowski, *Revolutionary Constitutionalism in the Era of Civil War and Reconstruction*, 62 N.Y.U. L. REV. 864 (1986), and Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

134 *See* Jackson, *supra* note 67, at 507–10; Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 49–50.

135 117 S. Ct. 2157 (1997). For a thoughtful critique of *Boerne*'s federalism rationale, see David Cole, *The Value of Seeing Things Differently: Boerne v Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31.

136 To find abrogation of Eleventh Amendment immunity, both a clear statement and a valid use of federal power must exist. Lower courts have been reluctant to defer to a purported Fourteenth Amendment justification if one is not a plausible inference from the statute itself or identified by Congress as a basis for action. *See, e.g.*, Schlossberg v. Maryland, 119 F.3d 1140, 1149–50 (4th Cir. 1997) (rejecting the argument that the Bankruptcy Reform Act's abrogation of immunity could be upheld as an exercise of Fourteenth Amendment powers because there was no evidence that Congress acted on this basis); Wilson-Jones v. Caviness, 99 F.3d 203, 210–11 (6th Cir. 1996) (finding the FLSA's authorization of suit against states in federal court to be an unconstitutional exercise of the commerce power because there was no strong logical connection between the FLSA's goals and those of the Fourteenth Amendment). Lower courts have been more likely to find statutes addressing equality issues to have been validly enacted pursuant to the Fourteenth Amendment. *See, e.g.*, Hoshtasby v. Board of Trustees, No. 97-2297, 1998 U.S. App. LEXIS 7386 (7th Cir. Apr. 13, 1998) (upholding the Age Discrimination in Employment Act's abrogation of immunity); Short Line R.R. v. Department of Revenue, Nos. 97-35025, 97-35089, 97-35113, 97-35181 to 97-35186, 1998 U.S. App. LEXIS 5607, at *14–*22 (9th Cir. Mar. 23, 1998) (upholding

Boerne notwithstanding, the Fourteenth Amendment retains important possibilities as part of the post-Civil War constitutional order for authorizing federal compulsion of states across a wide array of issues and substantive areas.[137]

The text of the post-Civil War Amendments, as well as the Court's decisions upholding federal voting rights statutes mandating affirma-

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the abrogation provision of a law prohibiting discriminatory taxation of railroads notwithstanding explicit reference to commerce power, not the Fourteenth Amendment); Timmer v. Michigan Dep't of Commerce, 104 F.3d 833, 842–45 (6th Cir. 1997) (holding that the Equal Pay Act provisions may be upheld as an exercise of power under the Fourteenth Amendment). *But cf.* Kimel v. Florida Bd. of Regents, Nos. 96-2788, 96-3773, 96-6947, 1998 U.S. App. LEXIS 8338, at *19–*20 (11th Cir. Apr. 30, 1998) (holding "that the ADEA does not abrogate States' Eleventh Amendment immunity but that the [Americans with Disabilities Act] does").

[137] *Compare* Association of Community Orgs. for Reform Now v. Edgar, 880 F. Supp. 1215, 1222 (N.D. Ill. 1995) (upholding the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg–1973gg-10 (1994), under both Article I, Section 4 and the Fourteenth Amendment), *aff'd in part*, 56 F.3d 791 (7th Cir. 1995), *with* Condon v. Reno, 972 F. Supp. 977, 986–92 (D.S.C. 1997) (rejecting a Fourteenth Amendment argument for constitutionality of the Driver Privacy Protection Act, 18 U.S.C. §§ 2721–2725 (1994)). Apart from equality concerns, many interests Congress creates pursuant to Article I powers, for example, in copyright, patent, bankruptcy, or even interstate commerce (such as the minimum wage), can also be understood as forms of "liberty" or "property" protected from infringement by states without the "due process of law" secured by the Fourteenth Amendment. Under this view, Congress could under some circumstances compel states to provide appropriate protections for those rights. *Compare, e.g.*, College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 948 F. Supp. 400, 425–26 (D.N.J. 1996), *aff'd* 131 F.3d 353 (3rd Cir. 1997) (upholding under the Fourteenth Amendment provisions authorizing suit against the state for infringement of patent but not for Lanham Act claims), *with* Chavez v. Arte Publico Press, No. 93-2881, 1998 U.S. App. LEXIS 7748 (5th Cir. Apr. 20, 1998, as modified May 1, 1998) (rejecting the constitutionality of the Copyright Act's abrogation of immunity under the Fourteenth Amendment because the argument would permit an "end run" around *Seminole Tribe*). Similar issues arise under the Privileges and Immunities Clause of the Fourteenth Amendment. *Compare In re Schlossberg*, 119 F.3d at 1146–47 (rejecting a Privileges and Immunities defense of bankruptcy abrogation because the breadth of the rationale would justify every federal enforcement scheme as a Fourteenth Amendment measure), *with In re* Straight, 209 B.R. 540, 554–55 (Bankr. D. Wyo. 1997) (accepting the government's argument based on the Privileges and Immunities Clause). Some federal statutes might be sustainable as congressional enforcement of "equal protection" rights under the Fourteenth Amendment, even in areas where the Court has held that no fundamental right or suspect classification is involved and that government reliance on the classification in question is thus rational and legitimate. For instance, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634 (1994), was upheld as to state employees in *EEOC v. Wyoming*, 460 U.S. 226, 243–44 (1983), under the Commerce Clause (and may still be sustainable on that basis as a generally applicable law), but was also defended under the Fourteenth Amendment. *Compare, e.g.*, Hurd v. Pittsburg State Univ., 109 F.3d 1540, 1548 (10th Cir. 1997) (upholding the ADEA under the Fourteenth Amendment), *with* Kimel v. Florida Bd. of Regents, Nos. 96-2788, 96-3773, 96-6947, 1998 U.S. App. LEXIS 8338, at *13–*16 (11th Cir. Apr. 30, 1998) (refusing to find valid abrogation by the ADEA under the Fourteenth Amendment). *Boerne* could be read to deprive Congress of the power to extend protection to persons discriminated against on the basis of age if the classification were reasonable. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314–17 (1976). Under the reasoning of *Romer v. Evans*, 517 U.S. 620, 635–36 (1996), however, Congress could have a basis for finding that groups (including those based on age or disability) entitled to no more than "rational basis" review nonetheless suffer unreasonable discrimination and thus need protection. *Cf.* Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 68–69 (arguing that *Romer* may embrace certain affirmative obligations of state government).

tive state acts to adopt voting changes,[138] pose formidable barriers to the Court's applying any broad rule against federal compulsion of state governments to legislation enacted pursuant to those amendments. The line apparently drawn in the Eleventh Amendment caselaw, between Article I powers and powers granted by later-enacted amendments,[139] offers a plausible stopping point for the Court's anti-commandeering rule.[140]

At least for the present, Congress still has many tools to pressure state and local governments to go along with national policy. Thus far the Court has left relatively unconstrained Congress's power to attach conditions to federal spending programs. Although states need not, for example, accept federal funding to help fight violent crime, Congress could require states that do accept such funds to perform background checks on purchasers of handguns.[141] Alternatively, it would be constitutionally permissible for Congress to give state and local governments a choice whether to help administer federal law by requiring, for example, firearms dealers to obtain a background check either from the chief law enforcement officer of the local jurisdiction (CLEO) or, if no CLEO is available, from the FBI. The spending power, the power to tax and regulate private activity,[142] and the powers of "condi-

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[138] *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 178–80 n.15 (1980) (reading *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), to stand "for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments," and rejecting the claim that the Voting Rights Act violates principles of *National League of Cities*).

[139] *See* Seminole Tribe v. Florida, 117 S. Ct. 1114, 1129 (1996).

[140] *New York* and *Printz* seem to distinguish between states' being required not to interfere with federal law (constitutionally acceptable preemption doctrine) and states' being required to carry out federal law (constitutionally prohibited "commandeering"). These cases may reflect a broader inclination toward older legal paradigms, based on common law understandings of legal rights and injuries, reviving sharp distinctions between action and inaction. *See also* Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028, 2036 (1997) (opinion of Kennedy, J.) (describing circumstances warranting injunctive relief in federal court to enforce federal law against state officers as analogous to common law torts).

[141] *See, e.g.*, New York v. United States, 505 U.S. 144, 171–73 (1992); South Dakota v. Dole, 483 U.S. 203, 211 (1987). Although this Article does not address the Spending Clause cases, conditions to federal spending statutes raise obviously difficult questions about how to distinguish coercion from inducement to voluntary choices. For thoughtful discussions, see Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85; and Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987). The *South Dakota v. Dole* standard is not necessarily toothless, however, and leaves open the possibility that a condition could be found to be "unrelated" to the federal spending project and thus invalid, or that the spending scheme could be found to be "coercive." *See South Dakota v. Dole*, 483 U.S. at 207, 211.

[142] The federal government induced states to adopt their own unemployment insurance systems through the power to tax individuals. *See* Steward Machine Co. v. Davis, 301 U.S. 548 (1937). For a discussion of various tools available to induce state enforcement of or compliance with federal regulatory programs, see Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L.Q. 489 (1994).

tional preemption" of state regulation[143] still offer Congress a fair amount of latitude to obtain state cooperation with federal policy. If Congress knows and understands the constitutional prohibition, it will often be able to achieve its goals through other means. And one of the benefits the Court presumably sought to achieve in its decision was establishing a clear rule that lawmakers could readily understand.[144]

At the same time, the rigidity of the rule established by the Court may well impair Congress's ability to respond most effectively to emergency situations. The provisions that were invalidated in *Printz* were, by law, in effect only for five years. By the end of 1998 a national instant background check system was to take over the statutory task of performing background checks. Interim use of the state officers was deemed advisable initially because the federal government did not yet have a workable system for quick checks. Although reasonable minds may disagree whether the Brady Act was responding to an emergency, as the dissent points out, emergencies on occasion do arise — in the event of sudden war, for example, the opinion would preclude the mandatory use of state officials to administer a draft law, or in the event of a hazardous waste emergency, to compel the involvement of state officers in response.[145]

The rigidity of the rule stands in marked contrast to the federalism jurisprudence of the 1970s. In *Fry v. United States*,[146] Congress authorized federal wage and salary controls on covered employees, including state and local government employees.[147] These were upheld, in part because they were a response to a perceived emergency whose temporary character the Court stressed in *National League of Cities*.[148] Even *National League of Cities*, which struck down application of the Fair Labor Standards Act to state and local governments "in areas of traditional governmental functions,"[149] acted on a kind of balancing

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143 *New York*, 505 U.S. at 173–74; *see* FERC v. Mississippi, 456 U.S. 742, 764–65 (1982). *Printz*'s inaccurate statement that *FERC* upheld federal procedural requirements as a condition for the state's remaining active in an "otherwise *pre-empted* field," Printz v. United States, 117 S. Ct. 2365, 2381 (1997) (emphasis added), compounds the disingenuousness of *FERC*'s treatment of the requirements as not coercive because the requirements imposed conditions on state regulation of conduct in a "pre-emptible area," *FERC*, 456 U.S. at 769 & n.32. *See* La Pierre, *supra* note 104, at 613–17, 660–62; *cf.* Hills, *supra* note 76, at 921 (noting the tension between *FERC*'s theory of conditional preemption and *Printz*). For discussion of the benefits of "clear statements" in this setting, see note 307 below.

144 In some cases, though, the clarity of the line will be obscured by the difficulty of distinguishing between an unconstitutional "mandate" and constitutional "conditional preemption," particularly if the "conditional" nature of the federal command is only implicit, as in *FERC*. *See FERC*, 456 U.S. at 765–67.

145 *See* Printz v. United States, 117 S. Ct. 2365, 2387 (1997) (Stevens, J., dissenting).

146 421 U.S. 542 (1975).

147 *See id.* at 548 (emphasizing emergency nature of the legislation).

148 *See* National League of Cities v. Usery, 426 U.S. 833, 853 (1976) (distinguishing *Fry*).

149 *Id.* at 852.

test,[150] emphasizing that the Constitution's limits were "not so inflexible as to preclude temporary enactments tailored to combat a national emergency."[151] *Printz*'s far more categorical ban is thus in tension with this earlier, more pragmatic methodology.[152]

III. THE FEDERALIST REVIVAL AND THE RULE OF LAW

What justification is there for this dramatic reinvigoration by the Court of federalism-based limits on national power? The Court's new activism confounds assertions that federalism is dead and, given the renewed claims that the Court should never invalidate national action based on federalism norms,[153] requires continued attention to the foundations for federalism's revival.

In the scholarly literature on constitutional federalism, as well as the revitalized jurisprudence, several potential benefits of federalism have been identified: increasing opportunities for political participation;[154] maximizing choice and utility through state or local government competition and citizens' rights of exit;[155] maintaining opportuni-

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150 *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 562 (1984) (Powell, J., dissenting) (describing the balancing test of *National League of Cities*).

151 *National League of Cities*, 426 U.S. at 853.

152 *Printz* is also in marked contrast to the line of cases upholding non-Article III courts, whose "touchstone," in Justice Harlan's words, "has been the need to exercise the jurisdiction then and there and for a transitory period." Glidden Co. v. Zdanok, 370 U.S. 530, 547 (1962); *see also* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) (embracing an all-things-considered approach that affords great flexibility to Congress).

153 *See* Rubin & Feeley, *supra* note 4, at 909; *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171–259 (1980) (arguing for the nonjusticiability of federalism challenges to national power). Compare the somewhat more restrained debate over the Court's enforcement of federalism norms against the states. *See, e.g.*, Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1460–62, 1487–90 (1995); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986). *Cf.* Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217 (noting widespread endorsement of judicial enforcement of the nondiscrimination principle of the dormant commerce clause, but arguing against it).

154 Formulations vary. Merritt, cited above in note 11, at 1574, emphasizes states' capacity to "help diversify participants in the political process," suggesting that states are better than the national government at "drawing in new" faces of political minorities. This superiority, in turn, may be a function of the degree to which state politics functions as a first step for many in national politics. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1551–52 (1994). For others, meaningful participatory politics exists most strongly at the local level. *See* Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 402–08 (suggesting that federalism calls for protecting space for alternative forms of political participation and decisionmaking, and that the federal government is unlikely sufficiently to protect the "autonomy of the political processes of local governments" without judicial intervention).

155 *Compare* Merritt, *supra* note 11, at 1574 (arguing that despite the universality of cultural and commercial icons like McDonald's, state governments still make and offer different choices), *with* Rubin & Feeley, *supra* note 4, at 922–23, 944–50 (arguing that there is no real social or cultural diversity among the states). The theoretical possibilities for local government competition maximizing satisfaction of a mobile citizenry's preferences, set forth in such works as Charles M.

ties for creation or preservation of diverse cultures;[156] providing opportunities for experiment and beneficial innovation;[157] maintaining the possibility of checks on oppression by the federal government;[158] and enhancing personal and group liberty or empowerment, by providing multiple layers of government to which citizens may appeal.[159] Some of these putative benefits might be best understood as the values of what Briffault has called "localism,"[160] which is not always congruent with interests of states as such; and some of these values, at least some

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Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956), have themselves been challenged. *See, e.g.*, DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 35–43 (1995); Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 415–25 (1990). For a flavor of the debate over whether multistate competition in various regulatory fields is beneficial or feasible, see, for example, SHAPIRO, *supra*, at 42–43, 81–82; Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); and Symposium, *The Allocation of Government Authority*, 83 VA. L. REV. 1275 (1997).

156 Perhaps in light of the close association of this argument in the United States with preservation of the morally reprehensible institutions of slavery and later of segregation, this theme is more pronounced in the literature of comparative constitutional federalism. *See, e.g.*, WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 26–31 (1995) (exploring differnces between the United States and other nations regarding minority groups and self-governance); Alexander Murphy, *Belgium's Regional Divergence: Along the Road to Federation*, *in* FEDERALISM: THE MULTIETHNIC CHALLENGE 73–100 (Graham Smith ed., 1995); Barry L. Strayer, *The Canadian Constitution and Diversity*, *in* FORGING UNITY OUT OF DIVERSITY 157 (Robert A. Goldwin, Art Kaufman & William A. Schambra eds., 1985). The theme of preserving diversity could be viewed as subsumed in the "preference maximizing" possibilities of local competition and exit, but captures more the possibility of group culture and the capacity of legal institutions to form preferences as well as to satisfy existing preferences. *Cf.* Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1345–46 (1994) (noting that states' self-governance in independent, nonoverlapping geographic territories contributed to development of differentiated political cultures).

157 *See, e.g.*, SHAPIRO, *supra* note 155, at 87–90 (noting states' role in developing workers' compensation, welfare, and health care reform); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498 (1987) (book review) (arguing that having a large number of states will produce innovation); Merritt, *supra* note 11, at 1575 (valuing states as long-term sources of regulatory creativity). *But cf.* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 593–94 (1980) (arguing that the desire by politicians to be reelected will discourage risky innovation).

158 *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit to the federalist system is a check on abuses of government power."); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 402–04 (1997); Merritt, *supra* note 11, at 1573–74.

159 *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 538 (1995); Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, *in* COMPARATIVE CONSTITUTIONAL FEDERALISM 77, 96–99 (Mark Tushnet ed., 1990). For discussions of the values of redundancy in government decisionmaking, see Cover, *supra* note 76; Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036 (1977); and Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984). For an excellent treatment of leading arguments for and against a federalist vision of national power, see SHAPIRO, cited above in note 155.

160 *See* Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, (1990); Briffault, *supra* note 156, at 1304, 1315.

of the time, may be better served by federal than by state actions.[161] These "values of federalism" are often urged as the basis for various approaches to judicial enforceability of federalism limits on national action.

Another kind of argument, often buttressed by appeal to original intention, is that constraints of federalism must be enforced because "it" is in the Constitution.[162] Apart from general questions of the role of originalist methodology in constitutional interpretation,[163] defining the "it" of federalism restraints remains acutely difficult. Although the Constitution does provide some quite explicit constitutional protections for the interests of the states,[164] standards limiting national legislation in substantive matters claimed to be "reserved" to the states do not emerge clearly from the naked text of Congress's enumerated powers.[165]

At least two kinds of attacks on the idea of judicial enforcement of federalism limits are made. First, there are arguments that assuming federalism has value, *judicial* enforcement of limits on national power is generally not appropriate. Wechsler, Choper, and others have developed arguments based primarily on understandings of relative institutional competence.[166] Without gainsaying the advantages of federal-

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[161] *See* Briffault, *supra* note 156, at 1304 (noting that some arguments for localism may justify federal intervention at the expense of the states). Certainly the history of southern slavery and segregation, and of the federal government's role in civil rights enforcement, are vivid reminders that state power can disserve and federal power can serve as a powerful protector of individual liberty.

[162] *See e.g.*, *Gregory*, 501 U.S. at 457–58; *see also* Kramer, *supra* note 154, at 1494–95 (arguing that there was wide consensus among the Framers that "the powers of the national government were to be limited and that courts would play a role in policing those limits"); Robert F. Nagel, *Federalism as a Fundamental Value:* National League of Cities *in Perspective*, 1981 SUP. CT. REV. 81, 99–109; John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1357–91 (1997).

[163] For a sampling of the literature on constitutional interpretation and original intention, see Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 471–500 (1981); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1239 (1986); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 902–13 (1985); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989); and Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Intepretivism and Neutral Principles*, 96 HARV. L. REV. 781, 802 (1983).

[164] *See, e.g.*, U.S. CONST. art. IV, § 3, cl. 1 (no state can be created from an existing state without that state's consent); *id.* art. I, § 9, cl. 6 (prohibiting preferences to "Ports of one State over those of another"); *id.* art. V (stating that no state "shall be deprived of its equal Suffrage in the Senate" without its consent); *see also* Briffault, *supra* note 156, at 1305–06 (identifying the importance of territorial safeguards for states, including the concept that only one state governs any particular geographic territory).

[165] *But see* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157, 1161–62 (1991) (suggesting that the First Amendment was intended to protect states' rights to establish religions and also to recognize states' control over education).

[166] *See* CHOPER, *supra* note 153, at 175–258 (arguing that the Court should reserve its political capital for individual rights cases and treat federalism-based challenges to national power as nonjusticiable); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in*

ism, such theories question both the *need* for judicial review of federal legislation, and the (relative) *competence* of the judiciary correctly to discern, articulate, and enforce any such limits. Individual rights, unlike the interests of states, do not have the same "political safeguards" and thus require more judicial protection. As to competence, the absence of standards and the difficulty of drawing clear and consistent lines suggest that the basis for judicial decisionmaking as against congressional judgment is weak. I find much to agree with in these approaches[167] but argue below that deferential judicial review has a role to play, consistent with relative institutional competence, in making constitutional federalism workable and politically accountable.

Second, federalism per se (at least in the United States) is questioned as serving none of the values attributed to it, nor any other significant values. Rubin and Feeley's article, *Federalism: Notes on a National Neurosis*, provides an important statement of this position.[168] For them, "federalism" is a system in which "subordinate units possess prescribed areas of jurisdiction that cannot be invaded by the central authority," and "leaders . . . draw their power from sources independent of that central authority."[169] Most of the asserted benefits of federalism (including increased citizen participation and choice, and state competition and experimentation), they argue, are actually benefits of the "managerial concept" of "decentralization."[170] Although the values of diffusing power and securing "community" might support a truly

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the Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 559–60 (1954) (arguing that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process"); *see also, e.g.*, Kramer, *supra* note 154, at 1500–01 (arguing that courts are poorly situated to second guess political judgments about allocations of power because they lack the flexibility to change quickly).

167 In recent years, the political process has been responsive to concerns that the federal government has imposed too much on states, as the dissent in *Printz* points out. *See* Printz v. United States, 117 S. Ct. 2365, 2395–96 (1997) (Stevens, J., dissenting) (discussing the Unfunded Mandates Reform Act of 1995). Note that growth of the state government workforce in the last 25 years appears to have exceeded that of the federal workforce by a considerable margin. *Compare* THE BOOK OF THE STATES 439 (1994–1995 ed.) (showing that in 1972, there were 2.957 million state government employees and in 1992, 4.595 million, an increase of more than 50%), *with* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 349 (117th ed. 1997) (showing that in 1972, federal civilian employment was at 2.88 million; in 1992, it was 3.1 million, an increase of less than 10%). By 1996, the federal figure fell to 2.88 million. *See id.*; *see also* Kramer, *supra* note 154, at 1504 (noting that both state and federal governments do more now than in the past).

168 *See* Rubin & Feeley, *supra* note 4, at 908–13 (positing a distinction between federalism and administrative decentralization, and arguing that the supposed benefits of federalism either can be achieved by administrative decentralization or are in any event illusory in U.S. culture); *see also* Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009, 1033 (1997) (arguing that federalism, as distinct from territorial decentralization, exists only if subnational units "serve as loci of political loyalty and as possessors of autonomy rights").

169 Rubin & Feeley, *supra* note 4, at 911.

170 *Id.* at 910; *see id.* at 914–15.

federal system elsewhere, the authors contend that these values are meaningless in justifying federalism in the United States today: the former because state political power is not under attack and federal military power is overwhelming,[171] and the latter because the United States does not have political groups closely linked by a common bond of culture, language, race, or religion, identified to the geographic areas that are the states.[172] Although the states can help facilitate decentralization, they conclude, this function is their "only purpose," and the Court "should never invoke federalism as a reason for invalidating a federal statute or as a principle for interpreting it."[173]

This Part identifies some reasons for resisting this conclusion and then revisits the concerns about judicial review raised by Wechsler and Choper.[174]

A. The Values of Federalism? States As Existing Alternative Locations of Power

Rubin and Feeley's analysis fails to appreciate the degree to which decentralization in the United States is a function of, and bound up with, federalism — that is, the existence of the states as quasi-sovereign governmental entities deriving their power not from delegations by a national government but from elections by the people of each state. A priori analysis of the benefits of federalism is not necessarily dispositive on whether courts should enforce federalism-based limits. For present realities are conditioned by the existence of the states,[175] and by a belief, shared by many, that their existence and functioning as governments are constitutionally secured. In this setting, abandoning constitutional federalism has potentially high costs for values Rubin and Feeley attribute to mere "decentralization."[176]

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171 *See id.* at 928–29.

172 *See id.* at 942–46 (identifying Catalonia as the paradigmatic political community with a normatively meaningful claim for autonomy within a larger polity and noting that "[t]here are no regions in our nation with a separate history or culture like Catalonia's").

173 *Id.* at 909.

174 The discussion below focuses on issues most relevant to my differences with Professors Rubin and Feeley; it addresses their claim in the context of an ongoing system with a formally federalist constitution, and thus does not comprehensively consider adoption of federalism as an a priori normative matter.

175 *See* SHAPIRO, *supra* note 155, at 122–23 (noting the importance of the current existence of states and the absence of a "clean slate"); Friedman, *supra* note 158, at 381–83 (arguing that Rubin and Feeley proceed from unrealistic baselines because federalism is the current and historically situated system).

176 *See* Rubin & Feeley, *supra* note 4, at 910–26 (describing public participation, citizen choice, state competition, and experimentation as values of decentralization, not federalism). Experimentation in government may emerge from what are experienced as self-generated decisions within different polities to "try something new." United States federalism secures to the states the right to elect their own officials — a right that states generally pass on to their constituent units. Would members of a centrally controlled administrative bureaucracy yield as much willingness to experiment? Would the rulers of a centralized state be as likely to recognize values of "decentrali-

Rubin and Feeley's analysis also underestimates the value of states as alternative locations of independently derived government power.[177] Were the states not guaranteed existence within defined borders,[178] for

zation" and assure smaller units rights of self governance? *See* Merritt, *supra* note 11, at 1574–75 & n.45; *cf.* Harry N. Scheiber, *Constitutional Structure and the Protection of Rights: Federalism and the Separation of Powers*, *in* THE U.S. CONSTITUTION 192 (A.E. Dick Howard ed., 1992) (indicating that U.S. federalism has had success in promoting diversity of policy approaches). Although constitutional guarantees of self governance at subnational levels may not be necessary to achieve these benefits in theory, it is hard to say whether, in context, they may be. While local governments have prospered without federal constitutional protection from their states, in many states the status of "home rule" local governments is protected by state constitutions and enforced by state courts. *See U.S.* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, LOCAL GOVERNMENT AUTONOMY, 33–35, 41–448, 51–58 (1993); *see also* Briffault, *supra* note 160, at 1–2, 12–18 (arguing that the power of and protection for local governments are underestimated and not necessarily benign). *But see* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1116–17 (1980) (espousing the view that local governments are underprotected in their autonomy). The concept of "institutional isomorphism" might suggest that since federal and state governments function in overlapping systems with substantial interconnections between personnel and offices, predominant modes of discourse, decision, and organization in one may support development of similar modes of the other. For a useful introduction to organizational isomorphism, see Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 63, 63–64 (Paul J. DiMaggio & Walter W. Powell eds., 1991).

177 Rubin and Feeley reject the power-limiting, tyranny-avoiding rationales as plausible bases for supporting federalism. They argue that, militarily, the power of the central government is already overwhelming (and the states are not likely to develop nuclear missles). *See* Rubin & Feeley, *supra* note 4, at 929. As to political power, there is no federal assault on states' powers of self-governance in elections. *See id.* at 930 (noting that the Department of Agriculture was unlikely to cancel rural legislative elections). The argument as to military power is unpersuasive; the history of guerilla insurgency movements in the twentieth century has shown that overwhelming military force will not necessarily assure military victory. *See* 2 ROBERT B. ASPREY, WAR IN THE SHADOWS, THE GUERILLA IN HISTORY 1285–95 (1975). The existence of independent structures of governance creates a mechanism for challenging federal authority in ways not fully captured by comparing the nuclear strength of New Jersey with that of the United States. Rubin and Feeley's argument, moreover, ignores the degree to which the political structures of state and local governments provide organizing points for the development and maintenance of political opposition to the national government. Although individuals or private protest groups could also organize such protests, having duly elected or appointed local officials to organize such confrontation may provide different opportunities for public arousal, intergovernmental resolution, or court decision. *See generally* Rapaczynski, *supra* note 154, at 388–91; *cf.* Tom Kenworthy, *Western Interests Lose Court Battle over Public Lands*, WASH. POST, Mar. 15, 1996, at A27 (describing physical defiance by county officials in Nevada who had bulldozed open a road closed by the U.S. Forest Service).

178 Rubin and Feeley, to be sure, do not propose abandonment of the states or redrawing their borders in order to improve administrative decentralization. *See* Rubin & Feeley, *supra* note 4, at 909 (noting that doing so "would be costly and disruptive"). Yet their claim that there is no attack on the "political power of the states," *id.* at 930, ignores arguments advanced in *New York* and *Printz* that federal directives to state or local governments are indeed inconsistent with the political powers of the states. Rubin and Feeley may not acknowledge this because they treat questions of public resource allocation as "administrative," rather than "political," *see id.* at 931, a questionable judgment in light of the close association of resource allocation to taxation and of taxation to representative democracy. Although they correctly argue that federal intervention has sometimes increased liberty to the people's benefit and that federal law has often supplemented rather than replaced state regulation, their conclusion — that the values of tyranny prevention or diffusion of power never favor limits on federal authority, *see id.* at 927–35, — does not necessarily follow.

example, a national government unhappy with decisionmaking in its centrally defined administrative units could simply reorganize the political boundaries of those units to create more compliant decisionmaking, or to isolate "troublemakers."[179] I do not suggest that this is likely to happen, but rather that the belief that it cannot happen (under the present Constitution) in broad ways frames a host of other understandings.[180] Particularly given judicially enforceable traditions of regular and free voting and of a free press, states need not threaten the use of military force in order to provide structures for development and organized expression of countervailing positions to those of the national government.[181]

Rubin and Feeley's very definition of federalism, which insists that subordinate units enjoy exclusive areas of subject matter jurisdiction, thus ignores the independent value of their other definitional prong of a federal system: the existence of two ongoing levels of government, each with leadership independently chosen by the people. A federal system might simply provide for the existence of two levels of government, with independently elected leaderships, in which the national-level government had plenary legislative jurisdiction and the subnational level had principal administrative responsibilities.[182] Even if no areas of substantive legislative jurisdiction were reserved exclusively for a subnational-level government, it is at least in theory possible that having independently elected and accountable subnational leadership would provide a structural check on the actions and policies of the na-

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The existence of governments not controlled by the central government can help overcome collective action barriers to organized resistance against national abuse. *See* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 787 (1995); *see also* Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 497–503 (1991) (arguing that federalism can provide salutary military and legal checks on central power).

179 For a similar point, see Briffault, cited above in note 160, at 1335–39. The malleability of the organization of local governments is emphasized by the decision in *McMillian v. Monroe County*, 117 S. Ct. 1734, 1740–41 (1997) (noting a "crucial axiom of our government: [that] the States have wide authority to set up their state and local governments as they wish," and the consequent variability in organization of county governments). It is this variability in territorial jurisdiction, which the states possess with respect to their subdivisions, that the federal government does not possess with respect to the states.

180 *Cf.* Friedman, *supra* note 158, at 390 (suggesting that the federal system and democracy in the United States have over time become so embedded together that eliminating state autonomy might weaken U.S. democracy).

181 In this important sense, states are structurally better protected from federal overreaching than any discrete group of individuals, even a political majority, because their existing organization facilitates political action. For examples of state or local governments challenging assertions of federal authority, see SHAPIRO, cited above in note 155, at 98 nn.139–140 and CHOPER, cited above in note 153, at 184–90.

182 Germany's federalism is closer to this model, although the subnational units ("Länder") retain a small area of legislative competence, and in some cases federal officials execute federal law. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 66–74 (1994).

tional government.[183] Rubin and Feeley underestimate the importance of government structure in the federal system.[184]

B. *Federalism, Stability, and Civic Identity: States as Loci of Cross-Cutting Differences*

Rubin and Feeley reject justifications for U.S. federalism that are based on its permitting cohesive groups to exercise important decisional autonomy within a larger polity, because in the United States the group affiliations most important to most people are either small and local (such as family or neighborhood ties) or are not geographically bounded (such as racial or ethnic identity).[185] Although correct in emphasizing the successful development of a strong sense of na-

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[183] *See* Kramer, *supra* note 154, at 1488 n.5 (stating that the critical feature of federalism is that officials of the subordinate unit are not appointed by the national government); *see also* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 798 (1996) (arguing that areas of exclusive state power are not necessary for constitutional federalism); *cf.* SHAPIRO, *supra* note 155, at 115 (stating that whatever regulatory power states have, the ongoing understanding of states' ability to resist national control implies that states "will always have political capacity to function as alternative sources of authority and to resist incursion" by the national government).

[184] *Cf.* Martin Diamond, The Federalist *on Federalism: "Neither a National nor a Federal Constitution, but a Composition of Both"*, 86 YALE L.J. 1273, 1278–79 (1977) (noting that in THE FEDERALIST NO. 39, Madison's reference to the limited enumerated powers of the national government was only one of five features which he identified as constituting the United States as a federal, rather than a national, government).

[185] *See* Rubin & Feeley, *supra* note 4, at 944–45. Rubin and Feeley are skeptical that federalism in a constitutional sense is in any way related to the structures in local government for the formation of "affective communities." *Id.* at 941. They assert that "[a]ffective community, like any other uniform policy, is more likely to be achieved through comprehensive nation-wide action," noting the community action organizations promoted by 1960s federal legislation. *Id.* Although national programs to encourage formation of such groups are possible, these communities have historically grown up in and around the structures of town, village, and city life organized under state governments. State government provides many of the mechanisms, such as home rule, that have facilitated development of these communities. *See generally* SHAPIRO, *supra* note 155, at 93–94 (arguing that state governments are in a better position than the federal government to respond to claims for local self-governance). *But cf.* Briffault, *supra* note 155, at 1330–35, 1341–44 (suggesting that sometimes the federal government better protects local governments). The claimed lack of relationship between constitutional federalism and the structures of local government suffers from an empirical difficulty: had there been no states, what form would these affective communities have taken, and how would they relate to the centralized government and its administrative subsidiaries? Would "town meetings" have continued their development had the aftermath of the American Revolution proceeded in a more centralized direction? *See supra* note 176. Second, even if as an empirical matter they are correct that vibrant local government would prosper without constitutional guarantees of the existence of the states, there is a tension between this argument and the degree to which constitutional adjudication needs to connect with the past. Discounting the historical framework for local community structures based on theoretical speculation that similar communities could develop under a centralized regime may not be appropriate in defining constitutional doctrine that must work with the past, present, and future. One need not be an "originalist" to believe that constitutional adjudication demands some degree of continuity with the past, as well as a capacity for change. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 228–32 (1986); Strauss, *supra* note 93, at 879.

tional identity,[186] in suggesting that the *only* relevant "political community" is the national one Rubin and Feeley may underestimate the positive importance of state or regional identifications felt by some citizens (perhaps not well represented among the ranks of law professors).[187] But assuming, for the moment, that state citizenship and identity are of less self-constituting importance for many people than are their family, religious, racial, class, educational, or employment identities, the constitutional position of the states may nonetheless play a part in promoting a stable, yet flexible polity.

Enforcing federalism may help maintain the significance of state and local governments as organizing features of identity and participation in public life, and thereby promote structures of tolerance, at least given current demographic distributions.[188] In part because state lines do not necessarily correspond to lines of ethnic, racial, or religious identity, which can be more deeply divisive, maintaining the significance of state governments may help foster civic identities that overlap with more deeply felt identities in ways that create cross-cutting allegiances.[189] These allegiances, in turn, could increase the prospects for

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[186] *See* Rubin & Feeley, *supra* note 4, at 948; *see also* Rubin, *supra* note 168, at 1049–57 (arguing that because Americans have developed a unifying, national political identity, the needs that prompted U.S. federalism no longer exist).

[187] Thanks to Lisa Heinzerling for suggesting this possible difference in perspectives. For other views on the existence of regional political cultures, see DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 114–19 (3d ed. 1984), and Calabresi, above in note 178, at 766–69. Although regions are not of constitutional stature (absent a congressionally approved compact among states), regions and regional identities are more closely linked to states than to other levels of governance. For a discussion of the constitutional possibilities for regional or "intermediate federalism," see SHAPIRO, cited above in note 155, at 86–87, 126–27.

[188] Race is a major divide in social, political, and economic life in the United States. Although racial minority groups are not evenly dispersed across all states, neither are such minority groups so concentrated in particular geographic areas that (according to the Census Bureau, and with the exception of Hawaii) they constitute a majority in any one state. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 34 (116th ed. 1996). This point is not, of course, to suggest that states are always more "tolerant" than the federal polity, or to gainsay the continuing need for federal enforcement of constitutional rights requirements as against states. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (invalidating a state constitutional provision as violating constitutional equal protection rights). Rather, my claim is that there are benefits to states having some protection in their functioning as governments because their existence affords opportunities for the development of cross-cutting allegiances on a variety of issues.

[189] Comparative constitutional study suggests the potentially divisive and unstable effects of a federal system in which the geographic lines of political power closely mirror the most important lines of cultural, ethnic, and linguistic divisions in the polity. *See* Murphy, *supra* note 156, at 73–100 (arguing that polarities between French and Flemish communities are reinforced by the territorial structure of Belgian federalism, which has promoted social polarization along ethno-regional lines); Max Nemini, *Ethnic Nationalism and the Destabilization of the Canadian Federation*, *in* EVALUATING FEDERAL SYSTEMS 143 (de Villiers ed., 1995) (demonstrating how ethnic nationalism in Quebec became politicized to the extent of threatening the existence of an otherwise stable and prosperous federation); *see also* SHAPIRO, *supra* note 155, at 123 (developing a similar point with respect to Cyprus); Calabresi, *supra* note 178, at 762–69 (emphasizing the value of having many subnational units by contrasting Canada and Yugoslavia with the United States and Switzerland).

tolerance and accommodation in the face of profound disagreements.[190] In other words, states (and their local governments) may be useful loci toward which to direct political activism and organizing, because their borders differ from other divisions that more profoundly divide.[191] Constitutional doctrine, and even rhetoric, are factors helping to construct the politico-legal realities of society, and doctrine that emphasizes the role of state and local governments thus may help promote a structure that maintains cross-cutting, as well as reinforcing, of differences.[192]

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190 Internal diversity within the subnational units is important to their ability to provide a locus for the development of alternative and thus cross-cutting identities. *Cf.* SHAPIRO, *supra* note 155, at 123 (suggesting that with diverse populations, states can function as intermediate moderators of conflict). Internal diversity is more likely to exist in larger units. In the United States, although small towns or villages may be the only governmental location for affective community, states offer an intermediate alternative to the very small local group, or the very large national identity.

It is the 50 particular states, with defined and fixed boundaries, that are guaranteed constitutional status, *see* Briffault, *supra* note 156, at 1336, and not the shifting array of local government units, some of which may cover large and diverse areas, and some of which may embody quite small and homogeneous communities. Note, however, that exit and mobility rights may lead to greater homogeneity and less diversity within subnational units. The possibly increasing internal migration to create more homogeneous "white" areas is very troubling. *See* William H. Frey, *Immigration, Domestic Migration, and Demographic Balkanization in America: New Evidence for the 1990s*, at 22 POPULATION & DEV. REV. 741, 756–60 (1996) (projecting increased geographic disparities in demographic composition, including race-ethnicity); Paul Starobin, SECTIONAL POL. NAT'L J., Feb. 22, 1997, at 358, 361–62 (describing "white flight" to areas including the Rocky Mountain West); *cf.* Colin Nickerson, *Montreal: A City Splinters*, BOSTON GLOBE MAG., Mar. 16, 1997, at 15 (noting that 200,000 people left the Montreal area after the Parti Québecois came to power in 1976).

191 Rubin and Feeley suggest, using Catalonia by way of example, that only when there is a vibrant and distinctive political community, unified by language, culture, and history, does a normative argument for federalism based on political community make sense, and that in the United States such political community exists only at the national level. *See* Rubin & Feeley, *supra* note 4, at 944–45. They conclude that the normative argument based on valuing community does not justify federalism in the United States. *See id.* at 946. My argument is not directly inconsistent, but depends on the value of establishing multiple communities of identity and allegiance as a healthy feature in a large polity. For a similar argument, see Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing A New Approach to Federalism in Congress and the Court*, YALE L. & POL'Y REV. & YALE J. REG. (Symposium Issue) 187, 217–18 (1996), suggesting that "America has managed to maintain stability even in an era of robust individual rights precisely because the divisions that define our political structure (i.e., states) do not coincide with the divisions that define our social and cultural structure (such as racial and ethnic groups and economic and national interests)"; states should be protected "not because they are more responsive to local preferences or because like-minded people tend to move to the same state but because" neither of these are true presently. *See also* SHAPIRO, *supra* note 155, at 123–24 (noting the benefits of states' lacking ethnic cohesiveness).

192 The literature on race, districting, and proportional representation considers whether minority groups benefit more from, for example, being concentrated in one district and electing a representative from their group, or being dispersed so that representatives from several districts have to bargain with members of the group. *See, e.g.*, GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW 871 (3d ed. 1996). Considerations favoring majority-minority districts may be quite distinct from those that concern whether federalism limits on national government should be judicially enforceable, however; a reasonable

Mark Tushnet has argued that federalism can, in theory, play an important role in retarding a polity's growth towards centralization over time, in order to permit different groups to live together in a setting that permits eventual development of cross-cutting commitments to tolerance necessary for a Rawlsian liberal and just society.[193] The premise of Tushnet's argument is that the original units constitute important locations of difference. On this theory, relatively rigid and formalist judicial enforcement of divisions of power between the central and subsidiary units can play an important role in slowing down centralization to permit the gradual diminishment of difference and the development of commonalities.[194]

If the original units become less important locations of difference, what are the implications for the utility of federalism or for judicial enforcement? Is the argument then for a less formalistic approach, or for not enforcing federalism at all? My suggestion here is for some degree of enforcement (albeit less formalistic), sufficient to maintain historic units that have become the foci less for reinforcing differences than for cross-cutting differences. This may help promote overlapping identities for citizens as members of polities and as members of racial, religious, educational, economic, and ethnic groups. Multiple identities can be a source of stability in a large and heterogeneous polity.[195]

C. *Federalism and Judicial Enforcement: The Rule of Law and Cued Deliberation*

As I will suggest below, the question of enforcing federalism limits need not rise or fall on agreement with the claimed substantive values

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person might favor majority-minority districts while also believing that within-state diversity makes states useful loci for government decisionmaking.

193 *See* Mark Tushnet, *Federalism and Liberalism*, 4 CARDOZO J. INT'L & COMP. L. 329 (1996) (arguing that federalism may help delay the pace of centralization to permit the conversion of a pluralist modus vivendi into a Rawlsian overlapping consensus).

194 *See id.* at 336–37.

195 *Cf.* Sankaran Krishna, *Constitutionalism, Democracy and Political Culture in India*, *in* POLITICAL CULTURE AND CONSTITUTIONALISM 172 (Daniel P. Franklin & Michael J. Baun eds., 1994) (describing Indian democracy and stability as the "product of crosscutting and enduring social cleavages," and explaining that the "diversity and heterogeneous character of society *within* most of the country's electoral constituencies," together with India's federal structure, operate to "penalize political parties that try exclusively to represent a single ethnic or religious group and to reward parties" that are more inclusive (emphasis added)); Bhikhu Parekh, *India's Diversity*, *in* DISSENT, Summer 1996, at 145, 145–48 (noting that "every Indian is the bearer of several identities," ethnic, religious, linguistic, and cultural, and explaining that individuals belong to several different communities which might be a minority within a specific district, a majority within a state, and a minority again nationally). Multiple levels of constitutionally secured governance also provide opportunities for groups that are losers in one polity to try again in another, with potentially healthy effects in providing mechanisms for continued political debate; consider the ongoing debate over euthanasia. *But cf.* Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 271 (1990) (noting the added costs of having to seek legal change at the state and federal levels).

of federalism. Even for those who would argue that a federal system offers no theoretical benefits over a "truly national" system, given that we have an at least nominally federal system, the following points may support a (limited) role for courts in enforcing federalism limits on the national government.

1. *Federalism and the Rule of Law.* — An essential feature of the "rule of law" is the recognition of law's obligations as binding on those, both governmental and private, to whom it purports to apply.[196] The basic mechanism for applying "law" is judicial enforcement.[197] And "neurotic" (as Rubin and Feeley claim) or not, generations of judges, lawyers, and other people have believed that the Constitution contemplates a federal form of government. For the Court to declare, or be understood to declare, that "federalism" limits are not judicially enforceable, creates a serious dissonance with understandings of the rule of law under American constitutionalism.[198]

Garcia was read to mean there would be no judicial enforcement against Congress of the law of federalism.[199] Such a declaration, particularly in a relatively rights-conscious legal culture in which the idea of law is closely bound up with the idea of judicial enforcement,[200] can

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196 *See* Richard H. Fallon, Jr., *The "Rule of Law" As a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8–9 (1997). The rule of law embraces several additional ideas, including clarity, coherence, efficacy, stability, and fair judicial procedures, some of which I will avert to below. For a different invocation of a rule of law argument in favor of judicial enforcement of federalism limits on national power, see A.E. Dick Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789, 791 (1985) (arguing that *Garcia* violates the rule of law requirement that no branch of government be the ultimate judge of the scope of its own power).

197 *See* Fallon, *supra* note 196, at 8–9; Vázquez, *supra* note 23, at 1–2, 8–37. Although one can conceive of constitutional law constraining government officials without being fully judicially enforceable, *see* Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978), my claim is that to declare federalism limits unenforceable is destabilizing and that the possibility of judicial enforcement is conducive to more responsible governance consistent with constitutional traditions and judicial competencies.

198 One scholar has observed that in the decision in *New York* no one doubted that the State would have complied had the Court ruled against it, whereas 200 years ago, the State of New York might not even have bothered challenging a federal waste law but would have simply ignored the law altogether. *See* Prakash, *supra* note 13, at 1988. This comment, though phrased in different terms, illustrates two important features of the rule of law. First, there is the willingness to use courts, not force, to resolve disputes. Second, there is the acceptance by losers, whether in the political arena or in an adjudication, of the need to comply with a decision that is final under the governing rules of the game. In a system in which minorities do not abide by majority decisions, or losers do not accept final judicial resolutions, neither majority rule nor adjudication will conduce to rule of law constitutionalism.

199 *See, e.g.*, William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1720–21 (1985); *cf.* PHIL BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 194 (1982) (suggesting that part of the problem that *National League of Cities* tried to redress was how *Wickard v. Filburn*, 317 U.S. 111 (1942), was read — as imposing no legal limits on the use of the commerce power).

200 *See* Vázquez, *supra* note 23 (manuscript at 8–28, 39–54). To enforce a bargain, it is helpful to know what its terms are. Yet, the dynamism and age of federalism in the United States have made much of the original bargain illusory: the federalist "bargain" now feels to many as if there

be profoundly destabilizing. If states that lose out in the political process of enacting a statute with which compliance is difficult, or with which their citizens strongly disagree, cannot get a "second look" in court, their options are limited to those of political resistance.[201] Although the prospect of such political resistance was, of course, contemplated in the original design,[202] the courts were also intended to enforce the Constitution as law.[203]

An important question, from a "rule of law" perspective, is whether a basis exists for overturning national action on federalism grounds

must be two levels of government, rather than any particular allocation of substantive authority. But even if we do not know what the bargain is, or if the bargain itself is a dynamic one, it is destabilizing to say that there is no bargain and thus nothing to enforce. *See* William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1398 (1994) (discussing federalism as a political deal that requires assurances of mutual commitment through, inter alia, judicial enforcement).

201 Note the increased efforts by state and local governmental organizations to promote constitutional amendments, beginning after the *Garcia* decision. *See, e.g.*, Norman Beckman, *Developments in Federal-State Relations*, *in* THE BOOK OF THE STATES 522, 528–29 (1990–1991 ed.) (describing efforts to draft amendments and have proposed changes made to, inter alia, the Tenth Amendment). State and local government interest in organizing "states' rights" constitutional amendments has continued into the 1990s, together with far more militant and extremist attacks, sometimes clothed in constitutional rhetoric, on the federal government. For a discussion of the latter, see THOMAS HALPERIN & BRIAN LEVIN, THE LIMITS OF DISSENT: THE CONSTITUTIONAL STATUS OF ARMED CIVILIAN MILITIAS (1996).

202 Madison's *The Federalist No. 46* specifically contemplated state resistance to "unwarrantable" and "unpopular" federal laws:

> [T]he means of opposition . . . are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union, the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would [pose], in any State, difficulties not to be despised . . . .

THE FEDERALIST NO. 46, at 297–98 (James Madison) (Clinton Rossiter ed., 1961).

203 *See* Vázquez, *supra* note 22 (discussing the the Supremacy Clause); *cf.* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 73–76 (1992) (arguing, in the context of abortion regulation, that the rule of law and rights-based U.S. legal culture are not compatible with European approaches involving nonenforceable legal norms, compromise, and extralegal accommodation). There is historical evidence that disputes over federalism-based limits on national power were intended to be justiciable. *See* THE FEDERALIST NO. 39, at 245–46 (James Madison) (Clinton Rossiter ed., 1961) (asserting that the federal government cannot control, direct, or abolish all local authorities and that its power "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects," and that "in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government[, b]ut . . . [t]he decision is to be impartially made, according to the rules of the Constitution"); Yoo, *supra* note 162, at 1374–91.

Responding to Justice Powell's assertion in *Garcia* that U.S. constitutionalism requires courts to "stand ready to enforce *all* constitutional principles," Mark Tushnet asserts that Powell's "proposition . . . is inconsistent with . . . the political question doctrine, which identifies constitutional principles the enforcement of which the courts leave to the other branches." Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 VAND. L. REV. 1623, 1635 (1994) (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 565 n.8 (1985) (Powell, J., dissenting)). But the political question doctrine is a rather narrow and jurisprudentially controversial principle that is in tension with broader currents of U.S. constitutionalism and with the legalistic nature of U.S. culture. Its existence thus does not negate the prospect that Powell is, on the whole, correct.

that will appear sufficiently principled to be accepted as based on "law."[204] If no principled basis exists, holding out the prospect of a judicial check that either is never realized, or cannot be articulated in a principled way, may be in effect more destabilizing than the "hands-off" rule that an extreme reading of *Garcia* can generate.[205] In Part IV below, I attempt to sketch a "sufficiently principled" law of federalism to meet this requirement.

2. *Federalism and Process: Cueing Congress.* — Finally, while I agree that the national political process should be the primary mechanism for considering the interests of states, and its judgments should be entitled to substantial deference,[206] the possibility of judicial review

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[204] *Cf.* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 174–76 (describing the "Frankfurter constraint" against adopting a legal rule that will appear to be political in its application and arguing that shifts in federalism doctrine reflect the challenge, when the legal culture's consensus shifts, of articulating rules to meet this requirement).

[205] Consider the possibility that those who believe that there is any "constitutional law" to federalism are simply deluded, and that if the Court were sufficiently consistent in saying, "there is no law here," expectations might change, and refusals to adjudicate such challenges might no longer be destabilizing. But given the large constituencies of state and local office holders who have reason to assert the independence of their offices, this possibility seems more theoretical than real.

[206] Many scholars criticized the Court's adoption of Wechsler's "political safeguards of federalism" approach in *Garcia*, *see Garcia*, 469 U.S. at 551 n.11. Wechsler's failure more fully to address the difference between state legislative selection of senators, and post-Seventeenth Amendment popular election, is perhaps the most heavily criticized aspect of his argument: senators, like their colleagues in the House, are said to represent, not the interests of states as governments, but the interests of people in the states. *See, e.g.*, Kramer, *supra* note 154, at 1508–10. *But cf.* Lynn A. Baker, *Federalism: The Argument from Article V*, 13 GA. ST. U. L. REV. 923, 926–46 (1997) (favoring judicial enforcement of federalism to limit the effects of undue influence of smaller states in Congress). With the advent of modern media and modern financing of campaigns, moreover, the constituency to which representatives and senators must appeal is increasingly national. *See* Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 857–58, 863 (1979); Kramer, *supra* note 154, at 1532–33, 1537. Likewise, Wechsler's emphasis on state control of congressional districting and voting qualifications has been outdistanced by modern apportionment cases, *see, e.g.*, Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Wesberry v. Sanders, 376 U.S. 1 (1964), the Voting Rights Act, 42 U.S.C. §§ 1971, 1973–1973bb-1 (1994), and several franchise-expanding constitutional amendments, *see, e.g.*, U.S. CONST. amends. XV, XIX, and XXIV.

But the continued power of Wechsler's basic point (that the existence of the states and the workings of the national political process tend to take account of interests that are politically important in and to the states, with correspondingly less need for judicial review) is emphasized by a sympathetic contemporary summary of the "structural reasons for the retention of state authority in so many areas of general importance." SHAPIRO, *supra* note 155, at 116–17. Wechsler's arguments did not rest simply on the particular elements of state participation in the formation of the national government, but also on their constitutionally guaranteed existence, *see* Wechsler, *supra* note 166, at 545–46, and on their characteristics as "special centers of political activity," *id.* at 546, because both representatives and senators are elected from the states. Larry Kramer has suggested as a positive matter that among the most important components of the national political process that work to protect state interests are first, political parties and second, the federal bureaucracy's interactions with state counterparts, neither of which are among the constitutionally required features identified by earlier proponents of the "political safeguards of federalism" thesis. *See* Kramer, *supra* note 154, at 1522–46, 1551–59. Both of these features, however, may be related to the constitutional status of the states as "special centers of political activity," Wechsler, *supra*

and disagreement may be necessary (or at least helpful) to promote the likelihood that the political process in fact works in this way. To the extent that the national political process depends on the actions of nationally elected officials, that process may not politically safeguard federalism without occasional prompting from the Court. So many interest groups and messages compete, in the short run, for the time and attention of members of Congress, that it is not implausible to think that Congress may need some added incentives to be attentive to even the middle-run effects of its decisions on the structures of government.[207] Professor Bobbitt's suggestion that *National League of Cities* should be seen as a form of "cueing" from the Court to Congress, and thus should not be understood as a basis for the development of a consistently applied and determinate doctrine,[208] is echoed by Bednar and Eskridge's recent comments that *United States v. Lopez*[209] was a "constitutional wake-up call" to Congress.[210] Although such a position is in some tension with the argument for substantial deference to Congress,[211] given the legalistic nature of U.S. political culture, the shadow of enforcement may prompt more responsible consideration of the need for national action.[212]

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note 166, at 546, because their existence is constitutionally guaranteed and frames the locations for federal elections (and, in presidential politics, under a particular set of voting rules). *See* Wechsler, *supra* note 166, at 557 (discussing the impact of the electoral college on campaigns of political parties); *see also* Kramer, *supra* note 154, at 1520 n.77 (noting that having the same people elect state and federal representatives makes it politically desirable to build connections bridging formal institutional divisions).

207 *See* Powell, *supra* note 2, at 688 (suggesting that given pressures for national action on both Congress and state legislatures, the Court is the best social institution to stop this growth). *But cf.* Macey, *supra* note 195, at 284–85 (noting that Congress will defer to state regulation for which members obtain more support or incur fewer political costs in doing so than they would in enacting federal regulation).

208 *See* BOBBITT, *supra* note 199, at 190–95; *see also* Tushnet, *supra* note 203, at 1652.

209 514 U.S. 549 (1995) (holding that Congress lacked the power under the Commerce Clause to enact a statute prohibiting the possession of a firearm near schools because the regulated conduct did not "substantially affect" interstate commerce).

210 Bednar & Eskridge, *supra* note 153, at 1484. For a similar comment in an earlier time, see Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1270 (1977) (noting that occasional judicial review keeps Congress aware of its responsibility).

211 *See* Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 88 (1990).

212 Tushnet has suggested that there is little need for concern about protecting states from federal legislation because it is so difficult to get Congress to legislate. *See* Tushnet, *supra* note 203, at 1637. In part, I disagree, because of the tendency for irrationality in the momentum of legislation. It may, for example, be very difficult to get a major enactment on a subject like health care, but relatively easy to attach amendments to such bills once they are far enough along in the legislative process so that they are enacted without many members' awareness, or against their preferences on the issue but in order to achieve enactment of the broader legislation. *Cf.* Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, YALE L. & POL'Y REV. & YALE J. ON REG. (Symposium Issue) 429, 447 (1996) (asserting that there is "too much law").

Garcia's mistake, then, was less in its political theory than in its implications for the judicial role. In seeming to withdraw judicial review, *Garcia* changed the effective nature of the "political safeguards" by removing from Congress any sense of looming restraint and by depriving states of one tool in their arsenal. To make political safeguards of federalism work, some sense of enforceable lines must linger.

If one agrees that there is some case for judicial enforcement of federalism limits on Congress, the question is: what are they, and from where do they come? To that I now turn.

IV. THE FEDERALIST REVIVAL AND THE CONSTITUTIONAL STRUCTURE OF STATE GOVERNMENTS

Federal systems can and do employ mechanisms other than judicial review for enforcement of the "federal deal." This Article questions: why judicial review, and if judicial review, on what basis? I have sketched an answer to the "why" of judicial review above — now let me address the "on what basis" question.

I opened by positing a tension between principled constitutional adjudication and federalism. Federalism is, quintessentially, a political deal among different governments. Workability is its core. It is a means to many ends, the most basic of which is the stable survival of the union it creates. To be successful, federalism must be pragmatic and it must be dynamic.

Adjudication is a form of governance as well as a form of principled decisionmaking.[213] Too much attention to pragmatics deprives the Court of its unique basis for legitimacy; too little, and the Court veers into a misguided quest for academic purity at the expense of its governmental function.[214] In a polity that, at different times and for different reasons, values federalism to different degrees, caution is needed in urging any unified theory of federalism on the Court.[215] Al-

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213 *Cf.* Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499, 500 (1928) ("Like all courts, the federal courts are instruments for securing justice through law. But . . . they also serve a far-reaching political function. They are a means, and an essential one, for achieving the adjustments upon which the life of a federated nation rests.").

214 My effort to blend adherence to the rule of law and to principled decisionmaking with the pragmatic functioning of a workable government owes much to such classics in constitutional law as ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

215 I am skeptical of claims that constitutional federalism has failed to develop properly because it lacks an adequate theory, or indeed, that it has failed. *Cf.* Friedman, *supra* note 158, at 379–80, 386 (arguing that federalism needs a theory based on values); Rapaczynski, *supra* note 154, at 342–43 (arguing, inter alia, that constitutional amendments, like the Twenty-Sixth Amendment, that overturn judicial decisions, indicate a lack of success of judicial intervention on federalism issues). Although I agree that many of the Court's decisions constraining federal power on federalism grounds have been unsuccessful, *see infra* note 219, constitutional federalism as expressed by vibrant state governments is still remarkably healthy (in part because of the po-

though I hope to offer a reasonably principled set of proposals, some tension along the margins is inevitable, and doctrine must provide the flexibility needed for workable federalism.[216]

Constitutional adjudication is not only about political governance but also is about principled accountability to law. This function implies that government actors recognize that their authority comes from and is bounded by law. In U.S. legal culture, it further implies that courts monitor the boundaries of that public authority under law. In so doing, courts work within the traditions of constitutional adjudication to provide plausibly principled answers to constitutional questions. Part of the rule of law tradition of adjudication is stare decisis, both in the sense of not unsettling too much of the general statutory framework that has evolved and of evolving law in a way that retains some coherence with the past.[217]

Principled adherence to law requires stability, clarity, and predictability in the development and application of legal norms. Congress, after all, has many different methods available to address national problems, and what political actors need from the Court is (in part) to know what is off-limits.[218] Court decisions like *Lopez*, *New York*, or even *Printz* can to a significant extent be worked around if the matrix is clear. The Court's federalism doctrine should thus also be evaluated in terms of the message it sends to federal lawmakers.

In coming to a judgment on the most appropriate approach to judicial enforcement of federalism limits on federal power,[219] I argue

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litical process), and the Court's task is to articulate a flexible doctrine that helps maintain the pragmatic dynamism of federalism.

216 Although either a "categorical" rule of prohibition, or a "rule" that there is no constitutional constraint on Congress's activities vis-à-vis the states, would offer the benefits of clarity and consistency, neither rule would provide the appropriate balance between workability and principle that I referred to above.

217 Courts have an obligation to account to the past as well as the present and future in carrying out their adjudicatory functions within the broad narrative of constitutional law. *See* DWORKIN, *supra* note 185, at 225, 228–32 (analogizing constitutional adjudication to writing a chain novel); Strauss, *supra* note 93, at 879 (praising the "rational traditionalism" of recognizing the value of conclusions arrived at by evolutionary process).

218 *See* GERALD GUNTHER, CONSTITUTIONAL LAW 111 (11th ed. 1985) (noting "congressional reliance" on the Court in the Packers and Stockyards Act of 1921); *id.* at 115 (noting the "impact on Congress"); *id.* at 121 (arguing that a legislator should examine his own purposes and make sure they are consistent with constitutional allocation).

219 The tension between the demands of flexible federalism and those of principled adjudication is not a simple one; there are competing and overlapping pressures. Bright-line rules, it is said, better advance rule of law interests in certainty and predictability of law at the sacrifice of interests of flexibility, while more flexible, multifactored rules provide less clarity and stability in expectations. *Cf.* Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 649–55 (1996) (describing *Lopez* as using the technique of "successive validation," in which mutually incompatible but competing constitutional propositions are recognized as equivalent). But within the paradigm of principled adjudication, a bright-line rule may in some circumstances be less faithful to the sources of decision and to other features of the legal landscape than a more flexible rule, thus cohering less well. Or a bright-line rule might be sufficiently impracticable to invite

below that the Court should develop doctrine providing a limited, deferential basis on which to review federal regulation of private activity, and a slightly more active basis on which to review regulation directly applicable to state and local governments.[220] Although the "cueing" function described by Bobbitt may not require highly elaborated doctrine capable of consistent judicial application, "rule of law" concerns do require that judicial action appear plausibly based in law — in this setting, in constitutional principle. Rule of law concerns lead me to reject a priori substantive limitations on the scope of federal regulation of private activity in favor of a more process-oriented, deliberation-forcing form of doctrine. But the Constitution's contemplation that states not only exist, but exist with a government of a certain form and with certain functions, provides a foundation in law for the articulation of substantive limits on national power to force change in or action by state governments themselves. The constitutionally mandated role and structure of the states thus supports a somewhat more substantive form of judicial review of Congress's directives for action by state governments.

All review of federal action, however, should be applied with considerable deference. There is significant truth to the *Garcia* theory that the interests of the states (at least to the extent shared by their citizens) are best addressed in the national political process,[221] yet there is a difference between saying that federalism restraints on Congress's powers do not exist or are effectively beyond review,[222] and saying that the Court will review Congress's decisions but with a high degree of deference.[223] I commend the latter. A concern for political

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deviations and thus to subvert rule of law values of stability and predictability. What mix is best is hard to say, and is ultimately a question of judgment. *See* Fallon, *supra* note 196, at 38. The judgment I come to in this part of the Article is influenced not only by my understanding of the values of federalism and the benefits of judicial enforcement, but also by my perception that the history of rigid judicial constraints on federal power based on federalism grounds has had a relatively high number of notable failures. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941); United States v. E.C. Knight Co., 156 U.S. 1 (1895); *cf.* The Civil Rights Cases, 109 U.S. 3 (1883) (construing narrowly Congress's powers under the Thirteenth and Fourteenth Amendments).

220 *See infra* pp. 2231–55.

221 *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985); *see also supra* note 166.

222 In the U.S. political dynamic of federalism, it may be that the distinction between saying there is "no law" and saying that the law is there but is for Congress to decide does not work; the latter is mistaken for the former. This may be suggested by Bobbitt's observation that *National League of Cities* was in some sense a reaction to the "popular conception" of *Wickard v. Fillburn*, 317 U.S. 111 (1942), which had "come to be mentioned and interpreted in Congress as meaning that there are no limitations on the commerce power." BOBBITT, *supra* note 199, at 194.

223 *Cf.* BOBBITT, *supra* note 199, at 194 (describing *National League of Cities* as a "cueing" of Congress — a purpose which would not lead to judicial development of the purported principle). Under a full blown "*Garcia*" regime, in which the limits of federal power are treated as nonexistent or as political questions, appeals to a conscientious lawmaker, *see* Paul Brest, *The Conscien-*

accountability both supports judicial review and cautions that it should be highly deferential to the judgments of the national legislature, which has a greater capacity than the federal courts to behave in a politically accountable way.

A. Federal Regulation of Private Activity

The rule of law requires not merely judicial enforcement of law, but some principled or at least coherent content to what the "law" is. With respect to federal regulation of private activity, I am deeply skeptical that a principled, coherent account, consistent with stare decisis, can be given of substantive areas of life that are reserved to the states to regulate.[224] And I do not believe that the future of U.S. constitutional federalism rises or falls on the ability to identify areas, in keeping with the "enclave theory" of *Lopez*, "that the States may regulate but Congress may not."[225] The *Lopez* Court's conclusion was plainly driven by its unwillingness to accept that there were no judicially enforceable lines "between what is truly national and what is truly local."[226] The vocabulary of the opinion suggests a notion of platonically essential differences between local and national to capture the persistent intuition of several Justices that there must be something that the federal government cannot do. The insistence on an articulable fixed boundary — of some "enclave" for state regulation — and the government's inability to satisfy the Court that its theories provided any boundary between federal and state governmental authority, are central to understanding the *Lopez* turn.[227]

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tious Legislator's Guide to Constitutional Interpretation, 27 STAN. L. REV. 585, 585 (1975), to stay within those unenforced or nonexistent limits may well be unavailing. The possibility of a judicial check may, in a minor way, help to promote more conscientious lawmaking, which may be the only judicially enforceable value.

[224] The argument that the enumeration of federal powers implies that something must be reserved exclusively to the states endures. *See, e.g.*, Bednar & Eskridge, *supra* note 153, at 1449; Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 696–706 (1996). But I do not give this argument dispositive weight here for two reasons. First, on an originalist view, an alternative explanation of assertions of state power over, for example, family or estate law, is that in 1787 the economy was not yet as integrated as it is today, so that connections between spheres of life were drawn less tightly together. *But see* United States v. Lopez, 514 U.S. 549, 590–93 (1995) (Thomas, J., concurring). Those who assumed the federal power could not reach domestic life in 1787 might have a different judgment today. The more powerful motive for the 1787 Constitution was to create a union, with a government powerful enough to govern well. Second, stare decisis — in both judicial decisions and the growth of overlapping governments power — makes it difficult to draw such lines in a principled way, other than through simple chronology (what has happened has happened, but let us go no further).

[225] *Lopez*, 514 U.S. at 564. The Court's purported distinction of "economic" activity from criminal law, *see Lopez*, 514 U.S. at 561–62 & n.3, is suggestive of its effort to describe a sphere, or enclave, for state regulation.

[226] *Id.* at 567–68.

[227] *See Lopez*, 514 U.S. at 564 (criticizing Justice Breyer's dissent for its inability "to identify any activity that the States may regulate but Congress may not"). Reintroducing categorical reasoning reminiscent of the early New Deal Court — and approvingly citing portions of *A.L.A.*

But this Constitution does not explicitly define separate spheres of regulatory authority. Although establishing distinct spheres may have been an intent of enumeration, without written guideposts on the content of the enclaves in the face of changing economies and functions of government, the substantive enclave theory is unworkable.[228] We have lost much of whatever consensus may once have existed to help delineate formal categories of exclusion,[229] and the Court does not have the textual guideposts provided by some other modern constitutions.[230]

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) — the Court, for the first time since the New Deal, invalidated a federal regulation of private activity as beyond the commerce power, indicating that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567. Justice Kennedy's concurrence, joined by Justice O'Connor, was somewhat more flexible in its approach than the majority's opinion, though it too seems motivated by a devotion to enclaves for state regulation. Under Justice Kennedy's opinion, anything in the "commercial sphere" is fair game: Congress is entitled to assume "that we have a single market and a unified purpose to build a stable national economy." *Id.* at 574 (Kennedy, J., concurring). As to the limits of congressional power, the concurrence offered no simple rule, instead emphasizing a "practical conception" of federalism in which a number of factors seem relevant. *Id.* at 573.

228 *Cf.* Ankenbrandt v. Richards, 504 U.S. 689, 706 (1992) (rejecting the claim that the Constitution requires a domestic relations exception to diversity jurisdiction). *But see* Bednar & Eskridge, *supra* note 153, at 1473–74 (arguing that federal aggrandizement of substantive powers is a violation of an implicit deal among the states); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1871–77 (1995) (arguing, based on communitarian values, that family law should be left to states). For an argument, predating *Printz*, that the limits of enumerated powers can be enforced without regard to state "enclaves," see Martin H. Redish, *Doing It With Mirrors:* New York v. United States *and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593, 596–603 (1994). Redish criticizes the *New York* Court for equating the "enclave" theory of state sovereignty with "enumerated powers" of the federal government, *id.* at 596–99; finds no constitutional support for a theory of particular state enclaves, *see id.* at 598–99; and argues that the correct approach is one of enumeration and the only proper question is whether the grant of federal power authorizes Congress's action, *see id.* at 599–600.

229 *See* Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selected Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 241–45 (1995); *cf.* Lessig, *supra* note 204, at 173–80 (arguing that legal rules of federalism changed as social and legal culture changed so that rules appeared "political" in nature, rather than legal).

230 *See* British North America Act, 1867, 30 & 31 Vict., ch. 3, § 91 (Eng.) (enumerating the Canadian national powers and providing for them in residuary clause); British North American Act, § 92 (describing provincial powers, including "Property and Civil Rights" and "[g]enerally all Matters of a merely local or private Nature in the Province"). *But cf.* GERMAN BASIC LAW art. 70 (reserving to the länder the "right to legislate insofar as this Basic Law does not confer legislative powers on the Federation"). Although the Basic Law's enumeration of powers to the national government is extensive, it also provides explicitly for the authority of the länder to enforce most federal law. *See id.* arts. 84, 85.

Nor can one easily deduce substantive enclaves from general practices of federalism. Even among countries influenced by the English legal tradition, there are significantly differing allocations of substantive areas to the central and subnational governments. For example, in Canada, all of criminal law and marriage and divorce law is federal, although labor law is handled by the provinces. *See* Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 LAW & CONTEMP. PROBS. 107, 108 (1992). And, with respect to the areas specifically reserved to the provinces in section 92 of the BNA, Canadian federalism does not depend on a strict separa-

Even assuming the relevance of original understandings, and a theory of interpretation that gives substantial weight to those original understandings, the most profound "original understanding" behind the Constitution of 1787 was that it represented a fundamental change in government structure, one better designed to build a nation.[231] Such a nation-building purpose, properly understood, contemplates that how the country will look in the future is not the same as how it looked then.[232]

Although substantive "enclaves" reserved for state substantive regulation cannot be supported as a source of doctrine today, either from an originalist or structural perspective,[233] it does not therefore follow that federalism has no role in judicial review of congressional action. It is possible to identify greater and lesser degrees of connection between enumerated powers and regulated conduct. The movement of commercial paper across state lines is quite clearly "commerce among the states," in a way that private possession of a handgun is not. Without endorsing an enclave theory, it seems reasonable to expect that, as Congress regulates conduct that lies farther afield from the specifically enumerated subject matters of its grant, the need for an explanation, or justification, of the connection should increase.[234]

This effort to connect up what one has done with the source of legal authority is an aspect of appearing to act in accordance with law,

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tion of the lawmaking powers of the federal and state governments in the same way the United States does, because the Canadian Supreme Court is the final authority on the meaning not only of federal law, but also of provincial law. *See id.* at 113. For a thoughtful argument that areas of exclusive state power are not necessary, see Gardbaum, cited above in note 183, at 799.

231 For an interesting treatment of the nation-building purposes of U.S. federalism, see SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 21–22 (1993).

232 *See* THE FEDERALIST NO. 46, *supra* note 202, at 295 (arguing that people should be able to look to national government if over time, its better administration changes their loyalties). The conditions that induce initial agreement to a federal union by its members may be different from those that conduce to continued cooperation. A formal, rigid interpretation may be more important early on, and more feasible when supported by a shared understanding or knowledge of the basic agreement. *Cf.* Judith Resnik, *Federalism's Options*, YALE L. & POL'Y. REV. & YALE J. ON REG. (Symposium Issue) 465, 473 (1996) (declaring that "the tradition of allocation itself is one constantly being reworked," and urging a noncategorical approach to federalism issues). One might think that the very success of the 1787 Constitution in building an economic union has created the predicate for Justices Kennedy and O'Connor's *Lopez* conclusion that anything of a commercial nature can be regulated. *See supra* note 227. To the extent that Madison's transformative vision is part of the tradition to which "fidelity" may be owed, Professor Lessig's argument in praise of *Lopez* can be challenged on its own terms. *See* Lessig, *supra* note 204, at 130–31.

233 Because it cannot adequately be located in a discernible source of consistent legal principle, moreover, "enclave" doctrine fails to meet one kind of rule of law concern, and the historic expansion of federal regulation suggests that rigid substantive limits on federal authority would prove unstable in the future.

234 Professor Gardbaum has made a similar argument, although not based on the rule of law concerns I identify. *See* Gardbaum, *supra* note 183, at 812–28; *see also* Nagel, *supra* note 162, at 101–02 (noting that the longer an area has been subject to exclusively state regulation, the more symbolically important federal intrusion becomes).

and thus a part of maintaining a rule of law regime.[235] One of the aspects of *Lopez* that may have troubled the Court was Congress's failure to take any step, however small, toward recognizing that it was acting pursuant to an enumerated power — hence the Court's references to the absence of a statutory nexus requirement (such as that the gun have "affected" interstate commerce) or to legislative findings or history showing attention to the effects on interstate commerce from gun use in schools. There is a sense in which Congress's inattention to what might be regarded as merely a matter of "form" or "etiquette" bespoke a more troubling congressional assumption of unlimited "absolute" power.[236]

Insisting on showing a connection between legislative acts and legislative authority may help enhance the legislator's sense of accountability to law and may make more palpable to the electorate the questions of constitutional power (and public policy) at stake. This insistence has the benefit of drawing the attention of the legislative body to the linkages between its everyday decisionmaking and the fundamental law under which it operates. And, if enforced through some form of "clear evidence" or "clear statement" requirement, as proposed below, this approach might also increase deliberative attention to the effects of legislation on the middle-run operation of the governments of the United States.[237]

Although a "clear evidence" or "clear statement" requirement of justification (in some cases) would not necessarily prevent Congress from regulating any particular private activity, it would require a showing that such regulation is sufficiently connected to an enumerated power to make the law "necessary and proper." The more remote the connection, the more reasonable it is to expect some explanation of what the connection is, and of why federal legislation is "necessary."[238]

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235 *See* H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 672 (1995).

236 *Compare* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695 (1996) (advocating that the Court require the congressional record to support a connection between the regulation and interstate commerce), *with* Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757 (1996) (agreeing, but arguing that *Lopez* did not really rest on an absence of findings, but rather on the Court's interest in curtailing use of the commerce power based solely on an item traveling in commerce).

237 The process of congressional self-education in developing the legislative record that a clear evidence approach demands might also change broader public understandings of what is private and public, or of how conduct believed to be "local" or "private" in character is connected to the "public" or "national" — a change that may have occurred in the process of enacting the Violence Against Women Act, 42 U.S.C. §§ 13931–14040 (1994). Scholars have increasingly recognized that the actions of elected officials can have dynamic effects on the public interest in a problem. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 59–60 (2d ed. 1995) (summarizing the literature).

238 Implementation of such an approach would result, in effect, in a referral back to Congress of legislation when the Court found the connection to an enumerated power, or the propriety and

The argument in favor of finding some constraints on national power in the "Necessary and Proper Clause" has begun to seem attractive to many scholars.[239] In *McCulloch v. Maryland*, Justice Marshall explained why a national bank could be regarded as "necessary and proper" to carry out the great powers of Congress.[240] It was obvious to him what the connection was. Although *McCulloch* also says that the "degree of . . . necessity" is for Congress, *McCulloch* should not be read to abandon any requirement that the means be "necessary," "appropriate," and "really calculated" to the end of securing Congress's powers.[241] Even under the liberal approach of *McCulloch*, the Court

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necessity of the law, inadequately established. *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Gardbaum, *supra* note 183, at 799, 813–14 (calling for policing of Congress's deliberative processes and its reasons for acting, and arguing that the Necessary and Proper Clause means "that it is inappropriate for Congress to disrupt the general balance of federal-state powers without deliberating seriously about the need and merits of so doing, and without having reasonable grounds for its decision"). For other recent support of "clear statement" requirements as a judicial limit on the congressional commerce power, see Frickey, cited above in note 236, at 695; and Lessig, cited above in note 204, at 187–88.

In *Lopez*, the connection to interstate commerce was, for the four dissenters, clear. For the majority, however, the fact that the conduct in question was not itself commercial and required no particularized showing of connection to interstate commerce; that the statute related to education, an area regarded as one traditionally for the states; and that no congressional findings directly supported the inference that Congress sought to regulate interstate commerce made the connection less than compellingly clear. I do *not* suggest that the current Court believes that "referring back" is what it does when it invalidates on federalism grounds, *cf.* City of Boerne v. Flores, 117 S. Ct. 2157, 2163–66 (1997) (holding that the Court, not Congress, defines the substantive scope of rights), but only that this is a more defensible form of doctrine, given the nature of our Constitution, and that on such an understanding the result in *Lopez* could be defended.

239 *See, e.g.*, Gardbaum, *supra* note 183, at 832, 836 (arguing that the principle of subsidiarity, requiring that government regulation occur at the smallest unit of government that can accomplish the objective, can be found in the Necessary and Proper Clause); Lawson & Granger, *supra* note 54 (contending that the word "Proper" limits Congress's choice of means); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 570, 583 (1995) (proposing that federal commerce power be limited, inter alia, to matters of general interest to the Union or to situations of state incapacity); *see also* Redish, *supra* note 228, at 600 (questioning overly broad interpretations of the Necessary and Proper Clause).

240 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406–24. Most of this discussion rebuts the argument that the word "necessary" means "absolutely necessary." *Id.* at 413–23.

241 *Id.* at 422–23. For related arguments, see Gardbaum, cited above in note 183, at 814–17, and Lawson & Granger, cited above in note 54, at 288–89. Even John Marshall understood *McCulloch* to recognize some limits on implied powers. *See* GERALD GUNTHER, *Introduction* to JOHN MARSHALL, JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 19–20 (Gerald Gunther ed., 1969). In defending the Court's decision against Hampden's charges of giving Congress an unlimited choice of means, Marshall asserted that the "constitutionality" of the means chosen by Congress "depends on their being the natural, direct, and appropriate means, or the known and usual means, for the execution of the given power." *Id.* at 186. He further rebuts the claim that Congress can adopt *any* means whatsoever and thereby exceed the limits posed by the Constitution: "Not only is the discretion claimed for the legislature in the selection of its means, always limited in terms, to such as are appropriate," but in addition it is limited by the no-pretext requirement. *Id.* at 187. Indeed, Marshall's defense of *McCulloch* could be read to imply that the Court *would* review questions of necessity, leaving to Congress the question of the degree of neces-

must be able to say that Congress could find that the measure was "necessary and proper" to an enumerated end.[242]

Apart from rule of law concerns, the values of federalism — informed by some skepticism about "right answers" and consequent willingness to presume in favor of multiple, decentralized efforts — would support reinvigoration of the Necessary and Proper Clause as a deliberation-forcing check on impetuous federal legislation. Chief Justice Rehnquist's substantive vision of federalism, as he articulated it in his confirmation hearings for elevation to Chief Justice in 1986, reflects the following intuition as to how to decide what level of government responds to a problem:

> [M]y personal preference has always been for the feeling that if it can be done at the local level, do it there. If it cannot be done at the local level, try it at the State level, and if it cannot be done at the State level, then you go to the national level.[243]

Although the Chief Justice's *Lopez* opinion invokes the concept of enclaves reserved to the states, some of the intuition behind his less categorical, nonjudicial description of federalism can be captured through

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sity but not foreclosing judicial review of whether some threshold showing of necessity has been made. *See id.* at 190 (defending *McCulloch* by emphasizing the Court's findings that the bank was "useful" and "essential" to federal fiscal operations and asserting that although reasonable people might disagree with its findings of "propriety and necessity," the opinion could not be read to remove all limits on federal power).

[242] *McCulloch*, 17 U.S. (4 Wheat.) at 353. *McCulloch* also indicated that if Congress acted "pretextually," the Court could invalidate the legislation. *See id.* at 359, 387, 423. I accept Congress's plenary power to regulate interstate commerce itself, which the Court affirmed in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196–97 (1824), and believe that *Hammer v. Dagenhart*, 247 U.S. 251 (1918), was wrongly decided, and thus remain unconvinced, on balance, by Professor Regan's suggestion that congressional power to regulate the interstate movement of goods itself be limited by a form of motive-based inquiry into whether Congress acts because of state incompetence or Congress's own policy preference, *see* Regan, *supra* note 239, at 576–79. Although my proposal that the need for federal legislation and connection to enumerated powers be identified may serve some of the same purposes, I view Congress as having a broader area for legitimate formulation of policy than may be permitted under Professor Regan's approach.

[243] *Hearings Before the Comm. on the Judiciary, U.S. Senate, 99th Cong., 2d Sess. on the Nomination of Justice William Hubbs Rehnquist to Be Chief Justice of the United States*, 99th Cong. 209 (1986) (statement of Justice William H. Rehnquist). Rehnquist's views bear a strong resemblance to the principle of subsidiarity, as defined in the European Union's Maastricht treaty, which authorizes the EU to act, in areas of overlapping authority, "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States." TREATY ESTABLISHING THE EUROPEAN COMMUNITY Feb. 7, 1992, art. 3b, O.J. (C224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) (as amended by Provisions Amending the Treaty Establishing the European Economic Community With a View to Establishing the European Community art. G(5)). *See generally* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994) (discussing subsidiarity in the European Community and the United States). Professor Gardbaum would read something like this principle into the Necessary and Proper Clause and the meaning of the Supremacy Clause insofar as preemption of state regulation is concerned. *See* Gardbaum, *supra* note 183, at 831–37; *see also* Regan, *supra* note 239, at 555 ("[W]e should ask ourselves . . . 'Is there some reason the federal government must be able to do this, some reason why we cannot leave the matter to the states?'").

gentle use of the Necessary and Proper Clause in conducting review of Congress's regulation of private conduct. The Court would look at the challenged statute and, if its relationship to an enumerated power were not obvious,[244] would consider both the record before Congress and any formal legislative findings in order to determine whether the case had been made that the measure was "necessary and proper" to carrying out enumerated powers.[245] Beyond this investigation, however, the Court should not go, or it would exceed its competence. There is no plausible substantive dividing line, capable of principled articulation and consistent with the decisions of the last 60 years, carving out arenas of private activity protected from federal regulation.[246]

Although I agree that the Necessary and Proper Clause provides a textual basis both for understanding Congress's powers as very broad and also for enforcing limits on Congress's exercise of its powers,[247] I think these are likely to be,[248] and should be, relatively weak limits.[249]

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[244] In the Fourteenth Amendment context, *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), insists that Congress's use of its remedial and enforcement powers under Section 5 does not extend to Congress's redefining the substance of the rights protected by Section 1. *See id.* at 2167–68. To the extent that *Boerne* is grounded in the constitutional separation of powers between the Article III judiciary and the Congress, its core conclusion may not be limited to Fourteenth Amendment enforcement powers. Thus, it might be argued that, however broad Congress's powers are to regulate activity based on its connection to interstate commerce, *Boerne* means that the Court must independently determine the scope of that enumerated power. I do not see this as a major impediment to my proposal. Putting aside suggestions of protected enclaves (which I reject for reasons earlier discussed), under *Lopez* whether Congress can regulate a noneconomic activity depends on whether it "substantially affects" interstate commerce. If Congress regulated an activity that the Court believed was not economic in character and that had no obvious connection to interstate commerce, the Court would review the record and findings to determine whether there was a basis for Congress to conclude that the activity "substantially affected" interstate commerce and that the legislation was thus a "necessary and proper" means to carry out that power.

[245] *See* Frickey, *supra* note 236, at 720 (suggesting that formal congressional findings are likely to be of less importance than development of a sound factual basis for congressional power).

[246] *Cf.* Kramer, *supra* note 154, at 1499 (arguing that the lack of a fixed dividing line does not preclude the possibility of a fluid line demarcating federal power). The Necessary and Proper Clause may be an appropriate tool for defining such a fluid line; and if the Court's doctrine is framed as a flexible enough principle, requiring a showing of a connection and a reason for federal legislation, it may be able to meet Professor Kramer's objection that judicial decisionmaking is too inflexible to accommodate federalism-based review of national action. *See id.* at 1500–01.

[247] *See, e.g.*, Gardbaum, *supra* note 183, at 800–01, 818–31 (recommending the reinvigoration of the "Necessary and Proper Clause" as a limit, as well as a grant of power); Lawson & Granger, *supra* note 54, at 297–326; Regan, *supra* note 239. For evidence of the Court's understanding, see *Printz v. United States*, 117 S. Ct. 2365, 2379 (1997), discussing the Necessary and Proper Clause. I may differ from some of these writers in that I do not think there is any substantive area of nongovernmental activity that, a priori, could never be found "necessary and proper" to regulate based on some set of facts.

[248] Experience elsewhere so suggests: the German Basic Law, which was the model for the EU subsidiarity principle, provides that in areas of concurrent federal-state authority, federal legislation is justified only by need. GERMAN BASIC LAW art. 72(2) (authorizing the Federation to legislate in areas of concurrent jurisdiction "to the extent that a need" exists because, inter alia, the matter cannot be effectively regulated by the individual states). But despite its aggressiveness in invalidating federal laws based on other constitutional provisions, the German Constitutional

The enumerated powers of themselves do not provide a sufficiently clear foundation for carving out state enclaves of regulatory activity. And, on the whole, Professor Wechsler's argument that there is the least need for judicial protection of the states from federal action seems to me still to be correct, as recent controversies may illustrate.[250]

Consider both the political climate surrounding the *Lopez* decision, as well as features of the *Lopez* statute's enactment. Following testimony by a city police chief that the proposed legislation ought to have an exception for gun possession by law enforcement officers, the Gun-Free School Zones Act was modified to include such an exception.[251] Shortly before *Lopez* was decided, the 1994 elections appeared to give a mandate to the Republican Contract with America and its promises to return power to the states which, within the next year, resulted in legislation designed to limit perceived federal overreaching.[252] Thus, one might have thought, judicial action is, on the whole, unnecessary to deal with a federal-state power imbalance: the process of regular elections, conducted state by state, and on an allocation principle that provides disproportionate representation to smaller states, assures that "state interests" — or, more precisely, public preferences for retrenchment in the scope or nature of federal activity — are heard and provided for in the national political process.

On the other hand, *Lopez* itself might be thought to demonstrate the need for, or at least a possible benefit of, judicial intervention. Unlike the statutes at issue in *New York* and *Seminole Tribe*, in which Congress clearly sought to take account of the interests of the states,[253]

Court has rarely relied on this provision as a basis for invalidating legislation. *See* CURRIE, *supra* note 182, at 43–46; DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 76 (2d ed. 1997) (noting that the court has left determination of need largely to the legislature).

249 *But cf.* Frickey, *supra* note 236, at 728–29 (suggesting that the Court may be heightening constitutional requirements for legislation in a range of cases involving "personal . . . or structural . . . values" by shifting the burden to the government, even under rationality review, to defend the factual basis for its legislation).

250 *But see* Calabresi, *supra* note 178, at 754–55, 811–26 (arguing that judicial enforcement of federalism limits is as important and manageable as individual rights provisions).

251 *See Gun-Free School Zones Act of 1990: Hearings on H.R. 3757 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong. 32 (1990) [hereinafter *Hearings*] (testimony of Police Chief Edward P. Kovacic). *Compare* H.R. 3757 in *Hearings*, *supra*, at 3–6 (containing no exemption for law enforcement officers), *with* Pub. L. No. 101-647, § 1702 (b)(1), 104 Stat. 4844 (1990) (amending title 18 by adding, inter alia, (q)(1)(B)(vi), which provides that the prohibition on possessing firearms near a school not apply to "a law enforcement officer acting in his or her official capacity").

252 *See, e.g.*, Unfunded Mandates Reform Act of 1995, Pub L. No. 104-4, 109 Stat. 48 (1995); Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (1995).

253 *See* New York v. United States, 505 U.S. 144, at 196–99 (1992) (White, J., concurring in part and dissenting in part) (noting that the statute in question was adopted by Congress at the behest of the National Governors Association and should have been treated as a compact and given effect without regard to New York's objection); Seminole Tribe v. Florida, 116 S. Ct. 1114, 1119 (1996) (explaining that the reason for the federal law was to permit states to participate in regu-

the provision in *Lopez* appears to have been adopted primarily in response to pressures from gun control and education groups.[254] And despite the fact that a question of constitutional power was raised during House hearings on the proposed legislation, neither the committee reports nor the statute itself includes either findings or a jurisdictional nexus to the interstate commerce requirement that made palpable Congress's reliance on its authority under the Commerce Clause.[255] Although Congress need not ordinarily identify the constitutional authority for its action,[256] when it regulates a subject that "seems so removed from commerce,"[257] some articulation of the source of its authority would constitute a salutary recognition that exercises of government power must be justified under law and would alert other legislators that a constitutional judgment must be made.

As I argued above, although Congress should be regarded as the government institution best suited to resolve state and local governments' concerns about the reach of federal legislation, the conclusion that there is no role for the Court does not follow. But that role should be one designed to capitalize on legislative strength in this area and should draw lines that the Court can with some consistency enforce.[258]

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lating gambling on Indian reservations, which Supreme Court decisions had precluded states from doing). Although the *Lopez* statute does have provisions to protect certain state interests, *see, e.g.*, 18 U.S.C. § 922(q)(2)(B) (1994) (exempting certain persons licensed under state and local government law), its enactment was driven by other concerns.

254 *See Hearings*, *supra* note 251, at 37–49, 61–77 (including testimony and statements from representatives of the National Education Association, National PTA, and the Center to Prevent Handgun Violence). The provision was, however, also supported by at least one major city police chief. *See Hearings*, *supra* note 251, at 28 (statement of Edward P. Kovacic, Chief of Police, Cleveland, Ohio). *But cf. id.* at 79 (statement of James Jay Baker, Director, National Rifle Association Institute for Legislative Action) (finding it not surprising that the hearing came shortly before a general election and arguing that the proposed law is a "symbolic gesture" that "will punish no serious criminals").

255 *See* United States v. Lopez, 514 U.S. 549, 561–63 (1995). Only one set of hearings was held on the legislation, and it focused on guns and education. *See* Petitioner's Brief at *5, *Lopez* (93-1260), *available in* 1994 WL 242541 (describing the hearings as addressing the impact of gun violence on education but stating that "witnesses did not specifically discuss the effects upon interstate commerce of firearms possession or near school property"). Questions were raised both by a witness from the federal ATF and by committee members about the basis for exercising federal power in an area traditionally regulated by states. *See Hearings*, *supra* note 251, at 10 (statement of Richard Cook, Chief, Firearms Div., Bureau of Alcohol, Tobacco & Firearms) (testifying that "the source of constitutional authority to enact the legislation is not manifest on the face of the bill"); *id.* at 14 (statement of Rep. William J. Hughes) (commenting that "[t]his would be a major change, would it not, in Federal jurisdiction," a "major departure from a traditional federalism concept," and asking whether there is "original jurisdiction"). Although one witness suggested that some gun violence in schools involved interstate travel and posed law enforcement coordination difficulties warranting federal involvement, *see id.* at 67, 72 (testimony of Police Chief Edward P. Kovacic of Cleveland), these terse comments were not mentioned in the government's briefs before the Court.

256 *See* EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983).

257 *Lopez*, 514 U.S. at 624 (Breyer, J., dissenting).

258 *See* Lessig, *supra* note 204, at 187 (explaining that enforcing a clear statement rule is not an impossible task for the Court).

Federalism interests implicated by substantive regulation of private conduct are best protected through a process-based "clear evidence/clear statement" model,[259] designed to require some evidence (from statutory text, legislative findings, or the nature of the evidence in legislative hearings or discussed in congressional debate) that Congress acted reasonably in concluding that federal legislation was "necessary and proper" to the exercise of one or more of its powers. When would such a requirement come into play? When Congress proposes to regulate private conduct outside of established areas of federal regulation and not obviously within an enumerated power. Would judicial enforcement of such a requirement be inconsistent with the posture of judicial deference to Congress suggested by Wechsler's argument, with which I generally agree? I think not, for several reasons.

First, that Congress is, relatively, most competent at decisionmaking does not mean that it is supercompetent or omniscient. A substantial body of public choice literature has suggested why Congress's agenda and voting may fail to reflect the preferences of constituents.[260] Events in Congress, moreover, may, in some small measure, help shape preferences as well. Requiring Congress to explain itself — to justify the basis for federal regulation in areas not previously regulated at the federal level and not obviously within an enumerated power — may help it do its job better by forcing it to be more thoughtful about whether a national law is the appropriate solution.[261] Second, such a requirement may also provide opportunities for signaling to state or local governments the intended effects of proposed federal legislation, and permit them time to make their case. And third, a "clear evidence/clear statement" requirement is one that can be judicially en-

259 To the extent that a rule is intended to encourage congressional deliberation, or to give notice to states that their interests are at stake, an inquiry that focuses on the clarity (or existence) of evidence that Congress developed to conclude that regulation was necessary is more likely to be meaningful than an inquiry focused purely on the statutory text (which can be added at the last minute). *See* Jackson, *supra* note 211, at 87–88. Professor Merritt argues against a "congressional process"-oriented approach, in part because the cases that come to court are ones in which state governments have failed to achieve their ends. *See* Merritt, *supra* note 11, at 1567–68 & n.18. But the fact that a law is challenged on federalism grounds does not necessarily mean the process failed to consider state interests. Even in *Printz*, support for the federal law was substantial among state and local law enforcers. As Merritt also points out, process may not be a sufficient cure for congressional imposition of financial costs on state and local governments, a problem I address below.

260 *See* KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951) (demonstrating the difficulties in ordering and aggregating preferences of collective bodies); RUSSELL HARDIN, COLLECTIVE ACTION 38–49 (1982) (noting that some groups are better organized than others in expressing preferences); *see also* MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION (1965) (arguing that the rational self-interest of individual members will not necessarily yield rational self-interested group behavior, especially in larger groups).

261 Another effect of clear evidence or clear statement rules, enforced through invalidation and referral back, is that they may lengthen time for deliberation, providing, for those who believe that the quality of decision is improved through deliberation, a further reason to support the process-based approach.

forced without simply substituting judicial policy judgments for congressional ones.[262]

The argument for reinvigorating the Necessary and Proper Clause as a source of judicially enforceable limits on Congress's power is attractive not only because it provides a plausible constitutional location for such limits, but also because of the relationship between such a reading and the principle of political accountability of representatives to their constituents. When Congress acts in an area already addressed by state law, it creates dual government centers of law enforcement. Citizens may benefit as a whole, particularly if one level has been unresponsive to their need for legal protection. But two levels of law enforcement also offer greater potential for tyrannous use of accumulated government power, as well as confusion over responsibility for investigative and prosecutorial decisions.

In these terms, there may be more of a similarity between *Lopez* and *New York* than at first appears. *Lopez*, like *New York*, can be understood as a response to an aspect of the problem of accountability — this time, the problem of federal posturing through the enactment of laws,[263] and the occasional prosecution of local crimes,[264] in an area already well-regulated by states. Enactment of federal criminal stat-

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[262] A demonstration of considered congressional attention to the bases and need for federal action will generally satisfy federalism-based constraints on federal regulation of private conduct. I do not rule out the possibility that the Court could find that the evidence or reasoning fails to establish a sufficiently substantial connection to commerce (or another claimed source of congressional power) or need for a federal law, although this result is unlikely on a deferential standard of review. Constitutional law has a multitude of tools to monitor the claimed connection between government action and its purported justification. My basic point is that the judicial review should focus on the adequacy of congressional consideration and showing of connections, not on a presumption that the Constitution protects particular areas from federal regulation.

[263] "Doing something about crime," or appearing to do something, has fueled a substantial expansion of federal criminal jurisdiction since the 1960s. For discussion, see Symposium, *The Federalization of Crime: The Roles of the Federal and State Governments in the Criminal Justice System*, 46 HAST. L. J. 965 (1995). It has been suggested that there may be a need for judicial enforcement of federalism limits against Congress because neither Congress nor state legislatures have adequate incentives to prevent expansion of national power. *See* Powell, *supra* note 2, at 688; *see also* Sanford Kadish, *Comment: The Folly of Overfederalization*, 46 HAST. L. J. 1247 (1995) (criticizing the federalization of crime). With respect to the federalization of crime, this phenomenon may be particularly acute. Who has incentives to oppose new federal criminal legislation that punishes conduct that is already a crime under state law (other than federal courts who fear a greater workload but do not want more Article III judges and have only limited clout in lobbying on such matters)? As a political matter, can local and state prosecutors oppose the federalization of crimes? *Cf.* Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 812, 818 (1996) (describing federal criminal laws as unthoughtful "politically popular gestures").

[264] Remember that in *Lopez*, Texas had begun prosecution of the offender, which state authorities dropped when the federal prosecutor decided to bring charges. It has been suggested that concurrent jurisdiction over such crimes permits federal prosecutors to pick out "plum cases" for prosecution, possibly depriving state authorities of credit for local law enforcement work and conveying an exaggerated impression of federal crime-fighting efforts. On the other hand, federal enforcement may have a greater deterrent effect on crime than state prosecution, or be beneficial when, for various reasons, local prosecutors "drop the ball."

utes that overlap with existing state laws carries a risk of accountability confusion at both legislative and executive levels. Both *New York* and *Lopez* can thus be understood as the Court's use of available constitutional techniques to address, or limit, a perceived problem of nonaccountability in the political process afforded by a dual-tiered sovereignty. To the extent that the Court keeps its hand in to monitor federal legislation on federalism grounds, an approach that focuses on connections to enumerated powers and on demonstrated need for federal involvement[265] may help advance the political accountability of federal and state decisionmakers, and may thus be more legitimate than an approach tied to presumptions about spheres of exclusively state-ordered activity.[266]

Objections to a jurisprudence based on the Necessary and Proper Clause are that it still permits the courts to meddle in what Congress is better at doing, and there are no further principled standards for determining what is "necessary." As to the first point, the Court could require that Congress actually address the inquiry without substituting its own judgment of the "degree of necessity" once it is clear Congress has made a reasoned and reasonable judgment. As to the second point, it may be right, but it is irrelevant.[267] After all, federalism is at

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265 Proposals differ in identifying the particular kinds of demonstrations needed for concurrent federal criminal jurisdiction. *See, e.g.*, JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 24–25 (1995) (approving federal criminal jurisdiction only if the offense is against the federal government, involves substantial multistate aspects, involves complex enterprises most effectively prosecuted with federal resources or expertise or serious state or local government corruption, or raises highly sensitive local issues, such as civil rights or police abuse); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HAST. L. J. 979, 981 (1995) (suggesting that Congress provide for federal prosecution only when unique resources of the federal judicial system, not federal resources in general, are necessary); Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HAST. L. J. 967, 972 (1995) (finding federalization appropriate when "there is a pressing problem of national concern . . . [and] the federal government . . . is positioned to make a qualitative difference to the solution . . . that could not be produced by the state's dedicating a similar amount of resources to the problem"). Which of these formulations should be followed is largely a matter of policy; assuring that there is some demonstrated need for action in an area substantially affecting enumerated powers is a constitutional requirement.

266 A difficulty with the political accountability argument, as others have shown, is that it is difficult to cabin. Why would voters fail to understand one set of institutional arrangements (such as federally mandated state enforcement of federal law) while appreciating another (such as forcing a state to choose between federal preemption and state regulation per a federal scheme)? Voter confusion may exist as to both, although the latter may give state governments more choice about committing state resources. *See, e.g.*, Caminker, *supra* note 13 at 1070–71; Hills, *supra* note 76 at 824–30; *cf.* Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power and the Constitution*, 39 ARIZ. L. REV. 205, 208–09, 274 (1997) (arguing that federal delegations of power to states pose greater accountability concerns than federal directives). Voter confusion is not the only "political accountability" problem; a second challenge is fostering a sense of legislative accountability at both federal and state levels, particularly in committing public resources.

267 Determining what can reasonably be regarded as "necessary" may indeed be difficult to state in terms of principle, other than some necessity for federal action beyond that of the states. *See infra* p. 2245. The judgment of what is "necessary" is primarily for Congress: it is contextual and can change over time. Judicial enforcement would not necessarily protect specific areas from

bottom a political deal between governmental powers operating within the same territory. Although core principles of individual rights and liberties seem to emerge in a variety of jurisprudential systems, core elements of successful federal systems are harder to identify. One enforceable principle is that Congress acts pursuant to enumerated powers, and that when the subject matter is not obviously embraced in or connected to an enumerated power, Congress should act in such a way that a court can determine that its regulation is "necessary and proper."

How might this kind of approach have applied in *Lopez*? One of the difficulties in *Lopez* was the lack of evidence in the congressional record or before the Court demonstrating any real need for concurrent federal criminal jurisdiction and enforcement. Unlike the multiple hearings on the Violence Against Women Act,[268] the one set of hearings on the 1990 Gun Free School Zones Law, although demonstrating that gun violence in schools was a national problem, did not focus on the particular need for federal action or on the connection to interstate commerce.[269] How, then, could Congress reasonably conclude that a federal gun law was "necessary and proper" to carry out any enumerated power?[270]

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regulation but would be directed at assuring that appropriate attention was given to the need for federal action.

[268] Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.). For discussion of the legislative hearings, and of the reports on gender bias presented to Congress that detailed, state by state, the failures of state prosecutors, police, and judges to respond fairly and effectively to violence against women, see Brief of Amici Law Professors Filed Pursuant to Rule 29 of Federal Rules of Appellate Procedure in Support of the Constitutionality of the Violence Against Women Act at 20–24, Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997) (No. 96-1814), *reh'g en banc granted*, Feb. 5, 1998 (No. 96-1814).

[269] *See Hearings*, *supra* note 251; *cf.* Perez v. United States, 402 U.S. 146, 154–57 (1971) (upholding a federal prohibition of intrastate loansharking when the statute itself contained findings that extortionate credit transactions had a substantial effect on interstate commerce even when the transactions were purely intrastate).

[270] I focus on this question of necessity because, as Justice Breyer's dissent demonstrated, it is not difficult to make a compelling case that violence in schools substantially affects both interstate and foreign commerce. The more difficult question is, why federal law and federal enforcement? *See* Gardbaum, *supra* note 185, at 800–01 (arguing that regulation on the "substantially affecting" commerce rationale is "proper" only if Congress reasonably finds states could not achieve the goal otherwise); Regan, *supra* note 239, at 583 (discussing the need for regulation when states are separately incompetent). Note the limited constraining value of requiring a demonstrated necessity for federal action above and beyond that of the states. On any problem of sufficient magnitude to come to national attention, there is likely to be a plausible argument that things would go better with more law enforcement, money, or other resources the federal government can offer, and that even if such empirical claims cannot be made, the moral authority of the federal government — its symbolic weight — is something available only from federal action. Regardless of what reasons are offered, requiring Congress to address the "necessity" question may restrain the national legislative machine, on the margins, some of the time — which may be all that is appropriate for judicial enforcement in this context.

A host of reasons — some public spirited, some less so — can lead to the passage of such federal laws.[271] The possibility of politically motivated grandstanding in legislation, or law enforcement, is a necessary cost of concurrent federal and state jurisdiction, and one worth incurring when a legitimate case for federal jurisdiction is made. But when the creation of federal criminal jurisdiction seems superfluous, or is justified merely as a "backup" to state authority,[272] the costs loom larger. There may well be reasons — inadequate local resources, different local enforcement priorities, or even local bias or corruption — for such backup authority. But should Congress simply assume they exist?[273] Needless federal legislation not only offers the possibility of no-risk, no-budget political grandstanding, but may also interfere with salutary state programs or allow multiple opportunities for oppressive prosecutions.[274]

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[271] One reason may be for federal lawmakers to take credit for passing legislation. *Cf.* New York v. United States, 505 U.S. 144, 169, 182–83 (1992) (arguing that federal lawmakers may prefer forcing states to regulate to insulate themselves from the political fallout of unpopular decisions). Once passed, concurrent criminal jurisdiction permits federal prosecutors to choose high profile cases to prosecute, in order to garner local support possibly at the epense of the local prosecutor's stature, or to achieve more deterrence through higher profile action, or both. Concurrent criminal jurisdiction provides an opportunity for both kinds of behavior by federal prosecutors.

[272] Consider this testimony in support of a revised version of the federal law struck down by *Lopez*:

> The Gun-Free School Zones Act of 1995 would simply adopt as national policy a prohibition that has already been enacted by the vast majority of States. The Act will neither limit nor preempt state and local legislation forbidding firearms near schools, and the States will continue to play the primary role in this area of law enforcement. S. 890 should properly be viewed in most instances as a "backup" to the State systems.

Guns in Schools: A Federal Role?, Hearings Before the Subcomm. On Youth Violence of the Senate Comm. on the Judiciary, 104th Cong. 17–18 (July 18, 1995) (Statement of Walter Dellinger, Assistant Attorney General) [hereinafter Statement of Walter Dellinger].

[273] Atlhough the Dellinger testimony explained how the revised legislation (which added a requirement that the gun possession have affected interstate commerce) was constitutional under *Lopez*, it did not seek to make the case for why federal, in addition to state, legislation was needed. *Cf. infra* note 274 (discussing new legislative findings of need). And even though the prospects for misallocating blame to state officials may be less of a factor here than in the *New York* situation, the absence of any meaningful threshold for federal action may increase opportunities for irresponsible political behavior.

[274] As Justice Kennedy's *Lopez* concurrence suggests, federal prosecution has the capacity to undermine state efforts to handle problems in different ways. *See* United States v. Lopez, 514 U.S. 549, 581–82 (1995) (Kennedy, J., concurring) (identifying a range of approaches "to deter students from carrying guns," including criminal punishments, inducements to inform, voluntary surrender with amnesty, penalties on parents, academic expulsion, and assignment to special facilities). Sound federal prosecutorial discretion, *see, e.g.*, Gorelick & Litman, *supra* note 265, at 976, is only a partial response, because the possibility would still exist for disrupting possibly salutary and diverse local responses such as amnesty or rehabilitation.

The Gun Free School Zones Law was amended after *Lopez*. *See* 18 U.S.C.A. § 922(q) (West Supp. 1997). As amended, the statute better links the regulatory action with an enumerated power and explains the need for federal in addition to state action: it requires proof of a nexus between the gun possession and interstate commerce in each prosecution, and it makes detailed findings regarding the adverse affects of gun use on foreign and domestic tourism and about the

Thus, I suggest that when a federal law regulating private conduct is challenged as beyond federal power and appears to be an extension of an area of regulation not obviously within an enumerated power, inquiry should focus on, and thus direct lawmakers in Congress to focus on, both how the measure is connected to a federal power and whether some necessity for federal regulation (above and beyond what the states can do or are doing) has been identified.[275] This is a question that federal lawmakers are well situated to answer (perhaps better so than parsing whether an activity "affects" or instead "substantially affects" commerce). It is a question amenable to judicial review; however, once the standard is articulated, it is unlikely that federal laws would be passed for which a "need" for federal (beyond state) action was not established. And while it would not avoid the problems of political and prosecutorial grandstanding that may be fueling some federalization of crime and other areas, it would at least focus inquiry on constitutionally sensible questions.

Moreover, this standard would not involve the Court in substituting its judgment of what is "truly federal" and what is "truly local" for that of Congress. The Court's task would be to make sure Congress takes a serious look when Congress acts to extend the existing exercise of its implied powers, and that it has a reasonable basis for concluding that a federal law is needed to address conduct substantially affecting interstate commerce. But this inquiry — on the reason and need for federal regulation — would proceed unencumbered by a need to dis-

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hampering of state enforcement efforts by the unwillingness or inability of some localities to control the gun market. *See id.* Once a need for federal action to support an enumerated power is demonstrated, the federal system requires that we live with the costs, as well as benefits, of concurrent jurisdictions. Depending on how one views Congress's response, though, another "rule of law" problem is raised by the proposal to insist on evidence of congressional consideration or findings: the possibility that cynically fictitious findings, or findings perceived as such, can themselves undermine the moral authority of the rule of law. To the extent that findings are not simply recited, but are grounded in legislative hearings or discussions, however, this problem may be at least partially mitigated: people, including members of Congress, are not immune to learning through exposure to new information. *See supra* note 237.

275 *See* Regan, *supra* note 239, at 555, 557. Professor Regan argues for a narrower view of the commerce power, based in part on one of the Virginia Resolutions approved at the Constitutional Convention in 1787, authorizing Congress to legislate for the Union's "general interests" or when the "States are separately incompetent." *Id.* at 555–56 (quoting NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 380 (W.W. Norton & Co. ed. 1966)) (internal quotation marks omitted). Although I am not sure I agree with Regan that the question is whether the federal government can do a better job of dealing with a problem than the states, *see id.* at 569, I do think a reasonable question is whether there is some reason why federal regulation is necessary to supplement or to supplant state regulation. For example, when criminals cross one state's jurisdiction to another to carry out their criminal activities, the basis and need for federal intervention seems obvious. But criminal activity involving guns near schools does not necessarily entail the frequent crossing of state lines or interferences with ongoing federal projects, and such crimes typically gather significant attention from local authorities as citizens demand vigorous protection. Thus, the connections to federal power are less obvious, and require explanation.

tinguish, in a categorical and a priori way, activity Congress can reach from that which it cannot.

B. Federal Regulation of State and Local Governments

Although the Constitution is silent on enclaves for state regulation, the Constitution is explicit on state governments: first, that they exist;[276] second, that they exist in the form of a legislature,[277] an "executive authority,"[278] and courts;[279] and third, that they have affirmative responsibilities (1) to participate in the selection of federal officials, (2) at least as to courts, to "be bound []by" valid federal laws,[280] and (3) as to all state officials, to be bound by oath to support the Constitution.[281]

So, the Constitution clearly does contemplate and require two levels of sovereign government — joined in acting under the Constitution, but with separate sources of sovereignty arising from different, though overlapping, constituencies.[282] This structure suggests a commitment to the viability of those governments, and hence a constitutional basis[283] for special rules concerning federal interferences with the func-

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276 *See* U.S. CONST. art. IV (protecting territorial boundaries of states); *see also* Briffault, *supra* note 156, at 1335–38 (explaining the significance of Article IV's provision that no state may be created "within the Jurisdiction" of another state).

277 *See* U.S. CONST. art. I, § 2, cl. 1 (linking qualifications for voters for representatives to those for members of the most numerous branch of the state legislature); *id.* amend. XVII (requiring popular election of senators by voters having the same "qualifications requisite for electors of the most numerous branch of the State legislatures"); *id.* art. I, § 8, cl. 17 (referring to the "Consent of the [state] Legislature" for federal purchases of property); *id.* art. II, § 1, cl. 2 (directing each state to appoint presidential electors "in such Manner as the Legislature thereof may direct"); *id.* art. IV, § 3, cl. 1 (forbidding states to be formed out of the territory of existing states without the consent of legislatures of the affected states); *id.* art. V (specifying state legislatures' involvement in amending the Constitution).

278 *Id.* art. I, § 2, cl. 4 (requiring the "Executive Authority" of the state to call an election to fill House vacancies); *id.* art. IV, § 2, cl. 2 (requiring fugitives from justice to be returned on demand of "executive authority,"); *id.* art. IV, § 4 (providing protection against "domestic violence" on the application of state legislature or, if necessary, "of the Executive"); *id.* amend. XVII (requiring the "executive authority" of the state to call a special election for Senate vacancies, unless empowered by the state legislature to make temporary appointments).

279 *See id.* art. VI, § 2; *id.* art. VI, § 3 (requiring state judicial and executive officers and state legislators to take an oath to support the Constitution); *see also* Prakash, *supra* note 13, at 2012–13 (arguing that a state could not do away with its courts or its executives).

280 U.S. CONST. art. VI, § 2.

281 *See id.* art. VI, § 3.

282 *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838–40 (1995) (Kennedy, J., concurring) (explaining that "[the Constitution] split the atom of sovereignty," based on people having citizenship in two governments, state and federal).

283 Deborah Merritt makes a similar argument based on the Guarantee Clause, U.S. CONST. art. IV, § 4. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988); Merritt, *supra* note 11, at 1571. She argues that courts should intervene to protect the independence of state governments from federal tampering with the state's independent relationship with its voters in three circumstances: "when the federal government dictates the structure of state governments, commandeers the energy of state administrators, or forces state enactment of particular laws — all without the . . . option of nonparticipation." Merritt, *supra*, at 96. I am not sure the Guarantee Clause is the best, or only

tioning of state governments and their constitutionally contemplated legislative, executive, and judicial branches.[284]

The majority and dissenters in *Printz*, perhaps contrary to conventional wisdom,[285] seemed to agree that the Constitution is not indifferent to the forms and functions of state governments. For the majority, state judiciaries stand in a constitutionally distinct position because the Supremacy Clause singles out their judges.[286] The concept of what a state "judge" is, moreover, does not necessarily depend on how the state describes its employees but on how the Court views their function. For the majority, distinctively adjudicatory functions, even when performed by state administrative agencies, can be treated as if they were being performed by state courts for the purpose of understanding the Supremacy Clause's reference to "Judges in every State."[287] The opinion thus displays a constitutional conception of what state courts are, and of what they can and cannot do,[288] that is central to the majority's effort to reconcile its decision concerning coercion of state executive officers with the line of cases holding that state courts are required by the federal constitution to entertain certain forms of action.[289]

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source, for the argument. At the same time, my argument is not inconsistent with Merritt's, in that one could view the specific references to the state governments as illustrative of what the guarantee of a "Republican Form of Government" means.

[284] Preemption of state regulatory power, of course, interferes with what state governments can do but is an unavoidable consequence of a system granting the national government the power to legislate over an area under the legal hierarchy of the Supremacy Clause. *Cf.* Gardbaum, *supra* note 183, at 804 n.31, 819 (arguing that "field preemption," as distinguished from true conflict situations, is justified only when there is a demonstrated need not only for a national law, but also for national uniformity). *But cf.* Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295, 1319 n.107 (1997) (disagreeing with efforts to distinguish federal supremacy from preemption).

[285] *See, e.g.*, SHAPIRO, *supra* note 155, at 61.

[286] *See* Printz v. United States, 117 S. Ct. 2365, 2371 (1997).

[287] *See id.* at 2381 (citing FERC v. Mississippi, 456 U.S. 742, 760 & n.24 (1982) (upholding the imposition of federal standards on state administrative ratemaking proceedings on the ground that the state decisionmakers were functioning in an adjudicatory capacity)). For the *Printz* majority, this adjudicatory capacity was key in distinguishing (and provisionally preserving) *FERC v. Mississippi* from *Printz*. *See id.* at 2381 n.14; *see also id.* at 2370, 2371 n.2 (suggesting that state courts can, consistent with being courts, carry out duties relating to naturalization proceedings, which are described as "quintessentially adjudicative"). *But cf.* Tutun v. United States, 270 U.S. 568, 576 (1926) (noting that Congress could have provided only an "administrative remedy" for naturalization petitions, though finding that such petitions could also be entertained as "cases or controversies" within Article III judicial power).

[288] *See Printz*, 117 S. Ct. at 2371 (discussing "matters appropriate for the judicial power" of state judges).

[289] Although at times the majority treated the obligations of state courts under the Supremacy Clause as no more than a conflicts rule, the relevant cases go beyond merely prescribing federal law as a rule of decision in cases within the courts' existing jurisdiction, and require state courts to entertain cases over which they would not otherwise exercise jurisdiction. *See, e.g.*, Testa v. Katt, 330 U.S. 386, 392–94 (1947); *see also* Prakash, *supra* note 13, at 2007 (arguing that the Framers envisioned commandeering state courts through both the Supremacy Clause and Congress's power to constitute state courts as inferior federal courts).

For the dissenters, as well, the different parts of the state governments referred to in the Constitution have a federal constitutional status and function. Justice Stevens's lead dissent opened with the declaration that "[w]hen 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," and characterized as a "more difficult question[]" congressional coercion of state legislatures, noting that "[w]hen legislative action, or even administrative rule-making is at issue," the constitutional rule may be different.[290] Justice Stevens went on, in distinguishing *New York*, to assert that the compelled assumption of liabilities was "almost certainly a legislative act," analogous to a "congressionally compelled subsidy from state governments to radioactive waste producers."[291] Note that in asserting that a compelled subsidy is "legislative" in character, Justice Stevens's dissent did not resort to state law, but rather appealed to an almost definitional understanding of what a state legislature does.[292]

Under either the majority's or the dissenters' view of the Constitution, then, which part of state government is affected by an obligation under federal law matters as to the constitutionality of the federal imposition. The majority preserved the authority of Congress to create federal causes of action that state courts must entertain (at least when they have otherwise appropriate jurisdiction).[293] The dissenters sought

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290 *Printz*, 117 S. Ct. at 2397 (Stevens, J., dissenting); *see id.* at 2386. Justice Souter's separate dissent makes clear that he believes state legislatures are distinct from state judges and executives and cannot be compelled to legislate. *See id.* at 2403–04 (Souter, J., dissenting); *see also* Prakash, *supra* note 13, at 1961 (identifying the Framers' intent to uphold such a distinction). Prakash argues that the Continental Congress could only requisition the state legislatures for taxes and for soldiers, and that omission of this grant of power in the new Constitution was deliberate, especially because other powers of Congress under the Articles were repeated in the new Constitution (such as coining money). *See id.* at 1971–73. As he acknowledges, the evidence even as to legislative commandeering is in some conflict. *See id.* at 1979–80. But he concludes that with respect to commandeering executive officers, Stevens's view of history is better than O'Connor's view in *New York* and that the federal government can commandeer state executives. *See id.* at 1995. Professor Caminker suggests that the Supremacy Clause may set a floor, or a default rule, that state judges ordinarily have to carry out federal law and that executive branch employees have to do so only if Congress so commands. *See* Caminker, *supra* note 13, at 1039–41. Although not fully persuaded that the Constitution's Framers intended to give up any of Congress's power to requisition state legislatures, I am persuaded that there is a stronger historical case for finding a deliberate omission of power in the national government to requisition from state legislatures than there is for not having state executive officers available to enforce federal laws.

291 *Printz*, 117 S. Ct. at 2398 (Stevens, J., dissenting) (quoting New York v. United States, 505 U.S. 144, 175 (1992)) (internal quotation marks omitted).

292 *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952) (suggesting that authorizing a taking of private property is essentially legislative in character).

293 *See Printz*, 117 S. Ct. at 2381 (discussing *Testa*); *see also Testa*, 330 U.S. at 389, 394 (holding that state courts could not refuse to entertain a federal claim when similar state law claims would have been enforced, because the courts had "jurisdiction adequate and appropriate under established local law to adjudicate this action"). On my view of the Constitution, a state could not validly abolish its courts, its legislature, or its executive authority. Although the state's authority

to preserve, or at least to distinguish, that aspect of *New York*'s rule that would treat directives to the states to legislate (or to adopt quasi-legislative rules) differently from other directives either to state judicial or executive officers. Both the majority and dissenters, moreover, arguably treated the question of what constitutes a state legislature, a state judiciary, or a legislative or judicial act, as a question of federal, rather than state, law.

In so doing, the Court drew on constitutional traditions, less of federalism than of the separation of powers at the state, as well as the federal, level. This not-fully-recognized constitutional tradition is seen in the line of cases recognizing immunities for state and local officials in § 1983 actions. These immunities have been variously characterized either as common law immunities preserved by Congress or as "federal common law" immunities developed by courts (and thus, presumably, based on but not necessarily compelled by federal law).[294]

This "federal common law" of immunity from civil relief provides especially high levels of protection to legislators in connection with their legislative acts. Unlike judges, who are absolutely immune from damages but may be sued for injunctions,[295] or executive officials, who have less immunity than judges in that they are only qualifiedly immune from damages,[296] legislators acting in their traditional legislative role cannot be sued civilly for either damages or injunctions.[297] Notably, executive or administrative action in enforcing the laws outside of the adjudicatory context is afforded the least protection from civil remedies.[298] Indeed, the availability of judicial relief against those

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to do so may not be justiciable in federal court, *see* Pacific States Tel. & Telegraph Co. v. Oregon, 223 U.S. 118, 150 (1912), the Constitution is clear in contemplating that states maintain these authorities, both to perform identified federal functions and to provide a "republican" form of government.

[294] *See, e.g.*, United States v. Gillock, 445 U.S. 360, 372 n.10 (1980). *See generally* Jackson, *supra* note 16, at 82–88 (discussing the federal common law of governmental immunities).

[295] *See* Supreme Court of Va. v. Consumers Union of the United States, Inc., 446 U.S. 719, 735–37 (1980).

[296] *Compare* Stump v. Sparkman, 435 U.S. 349 (1978) (declaring absolute immunity from civil liability for judges performing judicial functions), *with* Anderson v. Creighton, 483 U.S. 635 (1987) (discussing the qualified immunity standard for law enforcement officers), *and* Scheuer v. Rhodes, 416 U.S. 232 (1974) (recognizing only qualified immunity for state governors). Judges are protected from personal liability in damages (though not necessarily from prospective relief) because of the high likelihood of suits for damages by disappointed parties, coupled with the existing remedies for abuse provided by the judicial appeals process. Judges' nonadjudicatory decisions (such as on court employees) are protected by only a qualified immunity. *See* Forrester v. White, 484 U.S. 219, 227–30 (1988).

[297] *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975); Tenney v. Brandhove, 341 U.S. 367 (1951); *see also Consumers Union*, 446 U.S. at 731–34 (holding that when a state court exercises delegated legislative power, it is immune from civil damages or prospective injunctions).

[298] *See, e.g.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (permitting a damages action for an unconstitutional search); *Ex parte* Young, 209 U.S. 123, 149–68 (1908) (permitting injunction against prosecution). *New York*'s and *Printz*'s distinc-

who carry out the judgments of legislative bodies should be regarded as reconciling the existence of legislative immunity with the rule of law.[299]

Legislators are protected both from damages liability and from suits for injunctive relief because of the need to "[e]nsure that the legislative function may be performed independently without fear of outside interference."[300] The peculiar protection of traditional legislative acts from "outside interferences," even those arising from judicial enforcement of the demands of federal law, is echoed by Eleventh Amendment law, which has most closely identified the "state" with direct demands on state property, budgets, and appropriations functions.[301]

Although official immunity has been referred to as a form of federal common law (rather than as constitutionally required),[302] legislative immunity cases have long linked common law immunity concerns with the "origin and rationale" of the Speech and Debate Clause.[303]

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tion between permissible preemption of state law and impermissible requirements that states affirmatively carry out federal law may affect the availability of *Ex parte Young* relief in connection with federal statutory duties. *See* Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk, 91 F.3d 1240, 1256–57 (9th Cir. 1996) (Reinhardt, J., dissenting).

299 *Cf.* Powell v. McCormack, 395 U.S. 486, 501–06, 550 (1969) (dismissing claims against defendant members of Congress, but not claims against other employees of Congress); Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) (stating that immunity doctrines apply with less force to officers or employees of a legislative body than to legislators themselves); Kilbourn v. Thompson, 103 U.S. 168, 201 (1880) (deciding that the Sergeant-at-arms of the House of Representatives could be held liable for executing an arrest warrant reflecting the House of Representatives' finding that the plaintiff was in contempt).

300 *Consumers Union*, 446 U.S. at 731 (citing *Eastland*, 421 U.S. at 502–03); *see id.* at 732–33 (holding that state legislators are immune from suit "'in a field' where legislators traditionally have power to act" (quoting Tenney, 341 U.S. at 379)).

301 *See* Edelman v. Jordan, 415 U.S. 651, 663–71 (1974); *see also* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48–51 (1994) (emphasizing financial liability as a factor determining whether an entity established by an interstate compact is a "state" for purposes of Eleventh Amendment immunity); Jackson, *supra* note 16, at 88–89 (stating that *Edelman*'s distinction between prospective injunctive relief that can be issued against state officers and retroactive monetary relief against the state treasury draws support from "legislative primacy over the taxing and spending powers"); *cf.* Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028 (1997) (holding that the Eleventh Amendment protects state interests in submerged lands from federal court adjudication even if a state officer is named as a defendant).

302 Immunities that have been developed in the context of § 1983 litigation may not be constitutionally required with respect to violations of the Fourteenth Amendment, even if they are so regarded with respect to violations of Article I statutes. *Cf.* Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996) (describing an earlier decision that characterized the Fourteenth Amendment as extending "federal power . . . to intrude upon the province of the Eleventh Amendment" and permitting abrogation of states' immunity from suit).

303 *Consumers Union*, 446 U.S. at 732; *see* Tenney v. Brandhove, 341 U.S. 367, 372–75 (1951) (finding that the traditional privilege of legislators from arrest for legislative actions was preserved in the formation of the state and national governments). Justice Frankfurter, writing for the Court in *Tenney*, said, "Let us assume . . . that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption." *Id.* at 376. He went on to conclude that Congress, in enacting § 1983, had not "impinge[d] on a tradition so well grounded in history and reason." *Id.*; *see also* Bogan v. Scott-Harris, 118 S.

But whether immunity from damages (or other civil process) is or is not constitutionally required, what is most important here is the sense of institutional function and purpose that underlies development of these immunities in actions against state officers. This sense of institutional function and purpose suggests that there are distinctions in the functions of courts, executives, and legislators that make federal direction of the latter more problematic than federal direction of either of the former.

Three features of legislative action may justify treating it as peculiarly protected from "outside" mandates for action — whether by federal courts or by federal legislative mandates for positive legislation. First, the front-line enforcement mechanisms for "law" in our legal system and culture are courts, and judicial enforcement of judgments against collective bodies like legislatures poses difficulties less likely to be present in the enforcement of orders against the executive or judicial officials.[304] Second, there is a close association in our legal culture between voting and speech; compelled voting by legislative representatives thus bears a disquieting similarity to governmentally compelled speech, a constitutional anathema.[305] Finally, and returning to the idea of accountability, legislatures are more closely bound up with public understandings of self-governance than either executive officers or courts. Compelled legislation may therefore have greater potential for voter confusion than mandates directed to other branches of state government.[306] Although both courts and executive officials are com-

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Ct. 966, 971 (1998) (stating that history and reason support absolute immunity for local government legislators). *But cf.* United States v. Gillock, 445 U.S. 360, 374 (1980) (holding that state legislators have less immunity than members of Congress from criminal prosecution).

[304] It is easier to hold an individual in contempt than a group. When legislative acts are considered violations of law, it can be difficult to formulate relief against the legislature that takes into account those who voted differently or for reasons that would cast the legislation in a more permissible light. *Cf.* Spallone v. United States, 493 U.S. 265, 280 (1990) (reversing sanctions levied against individual city council members for failing to take directed action). Issuing relief against a legislative body is not impossible, but it is difficult. *See* Virginia v. West Virginia, 246 U.S. 565, 567, 590 n.1, 601–05 (1918) (postponing decision and directing argument about why it should not require West Virginia, and its legislators, to levy taxes to satisfy a debt owed to Virginia, in the ninth decision concerning that dispute). *But see* Caminker, *supra* note 13, at 1057 (arguing that because it is not impossible to issue relief against a state legislature, concerns over difficulty are not a basis for decisions about constitutional power).

[305] *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714–17 (1977) (holding that the First Amendment prohibits a state from compelling motorists to display the state motto, "Live Free or Die," on license plates). For a thoughtful discussion, see Louis Michael Seidman, *The Preconditions for Home Rule*, 39 CATH. U. L. REV. 373, 379–86 (1990), arguing that the Constitution condemns deliberate efforts to degrade individuals, including legislators, by compelling them to recognize the correctness of views they do not share. *See also* Hills, *supra* note 76, at 907–14 (discussing commandeering as forced speech). When such compulsion is not necessary because the commanding government's legitimate purposes could be achieved through other means, the concomitant sense of affront to those so commanded may be heightened. *Cf. infra* p. 2253 (discussing the possible application of compelling interest tests to legislative commandeering).

monly understood to carry out or apply laws or mandates given by others, legislatures are understood to behave (and to be authorized to behave), to a larger extent than courts or executives, as creators and initiators of law. When another body requires the legislature to act, the requirement may contradict widely held assumptions about the legislature's generative role and create uncertainty as to the source of the action in question.

Would these three characteristics support a bright-line rule against federal "commandeering" of state legislative bodies? I am not sure. But a strong presumption against interpreting federal laws enacted under Article I to so require would clearly be justified as a matter of federal common law, and a reasonable case can be made against the constitutionality of such laws.

However, historical evidence and other aspects of our constitutional tradition do not support the line drawn in *Printz*, extending as it does to all executive action. As discussed earlier, some kinds of federal "commandeering" of state executive functions may have higher potential than others for politically irresponsible and unaccountable behavior, confusing the relationships between state and federal representatives and their constituents. Although the Constitution might reasonably be construed to prohibit such acts, it cannot bear the construction presented in *Printz*.

Given the constitutional status of states and state governments, there is some basis for a more substantive form of review when a federal statute imposes duties or obligations on state governments in their governmental capacities.[307] If such a statute is challenged as unconsti-

306 As noted earlier, confusion about which level of government is responsible for what is an unavoidable aspect of any federal system. *See supra* p. 2202. Overlapping, concurrent competences can be of real value in a federal system by offering voters multiple levels of government from which to seek redress. But overlapping jurisdiction can be exercised in ways that make confusion more likely. *Cf.* Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1017–19 (1993) (suggesting that commandeering may be designed to insulate both state and federal officials from "voter wrath"). And confusion of accountability lines matters to fulfilling bedrock principles of "republican" governance in the federal system such as voting, majority rule, and elections at fixed intervals, as well as the exercise of distinctively legislative, executive, and judicial powers.

307 Plain statement rules would also continue to play a role in judicial review of laws imposing burdens on state governments. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 467–70 (1991). For a case illustrating the relationship between the coerciveness of a statute and the clarity with which it presents choices, see *FERC v. Mississippi*, 456 U.S. 742 (1982), which upheld a federal statute on grounds that its provisions "simply condition[ed] continued state involvement in a pre-emptible area," *id.* at 765, even though Congress had not explicitly preempted the field or provided a federal regulatory scheme as an alternative to state regulation. There are significant differences between a field being (in the Court's view) "pre-emptible" (or that is, within Congress's power to preempt) and actually "pre-empted" by Congress. *See supra* note 143. First, if the terms of the federal statute do not appear to present a choice between regulating according to federal standards or withdrawing from the field, state decisionmakers may perceive no choice but to comply under a rule of law regime; if the federal statute provides no alternative to regulation by the state, it may be less likely to be understood as only a "conditional" set of requirements. Second, if Con-

tutional, it would be proper for a court to examine whether the statute is inconsistent with the constitutionally contemplated functions of state governments and with their constitutionally independent relationships with their own constituents. Such review could take a number of doctrinal forms.

Instead of a bright-line rule against "legislative commandeering,"[308] courts could adopt a presumption that federal directives to state legislatures are not "Necessary and Proper" if the same goal can be accomplished through other means, such as direct federal regulation.[309] It is hard to imagine circumstances in which national purposes could be served only by requiring state legislatures to adopt federally mandated legislation, and thus such an approach would be similar in effect to a flat prohibition on legislative commandeering.[310]

It is less difficult to imagine circumstances in which a national purpose could be well served only by utilizing available state or local law enforcement officers — for example, the need quickly to implement a federal draft, or to combat a health emergency. Yet it is not clear that the best approach is one that simply permits such executive commandeering whenever Congress wants. Rather, an important or legitimate government interest test might be imposed, or an inquiry under the Necessary and Proper Clause that focuses both on the reasons for the federal action and the degree of interference with the performance of duties under state law might be imposed. Under either formulation, constitutional inquiry might consider the size of the burden or amount of state time and resources needed to perform the federally mandated tasks — thereby permitting distinctions between relatively minor recordkeeping, record-checking, or information-providing

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gress understands that a statute's validity depends on whether states have the choice of discontinuing regulation in a field, Congress could decide to modify the particular requirements at issue or provide for a backup federal regulator if a state should choose to withdraw.

308 Query how "bright" the line is: short of a federal statute that requires a "state legislature" as such to take certain action, whether federal law requires state legislative action is not always clear, *see, e.g.*, New York v. United States, 505 U.S. 144, 170, 174–75 (1992), and may raise complex questions whether state or federal law would control whether state legislative action was required. *Cf.* Seminole Tribe v. Florida, 116 S. Ct. 1114, 1133 n.17 (1996) (noting state caselaw on the governor's authority to negotiate, but not enter into, compacts without state legislative authorization).

309 This approach could draw on versions of a "compelling," or "legitimate," government interest test articulated in other areas of constitutional law. *See, e.g.*, Adarand Contractors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that the Constitution prohibits government use of race to award contracts unless measures are "narrowly tailored . . . [to] further compelling governmental interests"); Maine v. Taylor, 477 U.S. 131, 151 (1986) (rejecting a dormant commerce clause challenge to a state law that discriminated against an out-of-state product because the law met "legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives").

310 Importantly, however, there may be circumstances involving enforcement of the post-Civil War Amendments, which were intended as limitations upon state government power, that would justify direct federal mandates to state legislatures.

and more substantial impositions on state resources involving matters that (even if directed at executive officials) come close to the core of legislative responsibilities.[311]

As suggested earlier, a focus on whether a federal statute interferes with constitutionally contemplated functions of state governments may require developing a theory of core state government functions,[312] an enterprise begun in *National League of Cities* and abandoned in *Garcia*. Professor Merritt has argued that certain state governmental functions should be protected from federal regulation, even if the regulation is identical to that of private activities. Such functions include setting voter qualifications, organizing the internal structure of state government, and determining qualifications and wages for state office when the employee performs "executive, judicial, or legislative tasks essential to a republican government."[313] These latter categories correspond to what I claim are constitutionally contemplated structures and functions of state governance under the federal Constitution.

Yet the demands of federalism do not lend themselves to decontextualized, formalist rulemaking by courts. For example, despite Merritt's powerful arguments that police forces should be treated as core

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[311] *See supra* pp. 2212–13; *cf.* Merritt, *supra* note 283, at 66–67 (stating that federal compulsion of state executive or legislative power violates the Guarantee Clause by undermining republican government, but that the federal government "may require state executive employees to enforce federal laws when that enforcement is ancillary to state-created tasks," as well as when necessary to fulfill states' constitutional obligations). Compensation for federal use of state employees might also mitigate threats to state governments and their functions. *See* Printz v. United States, 117 S. Ct. 2365, 2404 (1997) (Souter, J., dissenting) (suggesting that if Congress requires state "administrative support," Congress must "pay fair value for it"). *But see Printz*, 117 S. Ct. at 2374 n.7 (describing Souter's view as a "mighty leap" that would present practical valuation difficulties).

[312] *See* Martha Field, *The Supreme Court, 1984 Term — Comment,* Garcia v. San Antonio Metropolitan Transit Authority*: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 105 (1985) (approving *Garcia*'s abandonment of *National League of Cities* but suggesting that the Court could have developed a "core governmental functions" test to protect internal state governance).

[313] Merritt, *supra* note 283, at 53. Professor Merritt argues that her definition elides the difficulties in distinguishing between governmental and proprietary, or traditional and nontraditional, functions, but her proposed distinction may present its own difficulties. She asserts, for example, that a municipal waterworks plant, school teachers, bus drivers, and air traffic controllers are not carrying out these three state governmental functions, but police officers are. *See id.* at 53, 56–57. Yet any public employee carrying out functions under a law could be deemed to be serving an "executive" function. What Merritt means by the executive function is "enforcement" of laws against those to whom it applies. *See id.* at 56; *cf.* Buckley v. Valeo, 424 U.S. 1, 135–41 (1976) (defining the power to enforce laws as a power that cannot be regarded as legislative but must be performed by "persons who are 'officers of the United States'" under the Appointments Clause of the Constitution, U.S. CONST. art. II, § 2, cl. 2). Explaining why enforcement of state water laws is a core function, but carrying them out is not, may turn on whether the coercive power of the state is being deployed against the citizenry. The legitimacy of state coercion may be what most clearly distinguishes state from private power. Theories that rely on a distinction between law enforcement and other forms of law-execution may, in turn, ultimately relate to differences between functions that are inherently governmental and functions that can be performed either by governments or private entities — a distinction that "privatization" of government functions problematizes.

aspects of the state's constitutionally protected executive function, courts should not absolutely protect state or local police from being required to carry out federal duties if the need is sufficiently urgent, or the duties are small and similar enough in character to duties imposed under state law, or the duration of the imposition is sufficiently limited. Conversely, I would not suggest that all "generally applicable" laws necessarily could be applied to state governments just as they are to private employers. As discussed above, there are persuasive bases to distinguish the question of compelling state governments to carry out uniquely governmental functions, as in *Printz* or *New York*, from that of extending laws like the Fair Labor Standards Act to the states. But at the same time, state governments are not fully situated like private employers. States should thus be permitted to challenge particular applications of generally applicable laws in order to avoid undue interference with state constitutional functions.

My goal here is not to articulate a fully developed doctrine, but rather to suggest that federal regulation of state governments can threaten constitutional values related to maintaining the states as independent sources and locations of government authority. Although the political process may be able to correct itself on these issues as well, under whatever test is developed there are substantive acts that one could fairly say are inconsistent with the Constitution — for example, congressional abolition of state legislatures (or, possibly, preemption of all state law enforcement).[314] In this respect (unlike congressional regulation of private activity), the Constitution itself imposes some barriers intended to be firm and capable of judicial enforcement, should the political process spin far enough out of control.

C. *Principled Federalism: Does It Have A Future?*

There is a tension between the adjudicatory model of *Lopez*, which can be understood (apart from its attraction to an "enclave" theory) as reflecting an "all-things-considered" approach,[315] and that of *Printz*, which quite explicitly adopts a categorical bright line. Bright line rules correspond to the notion of the Constitution as clear principle and serve rule of law purposes of promoting accessibility to and notice of the law, and, arguably, greater consistency in its application.

Another conception of law in adjudication is less concerned with the articulation of clear, bright-line rules, than with *judgment* — that

[314] For an important caveat, see above, note 310. Professor Gardbaum's argument that the Constitution requires a separate standard for preemption than for concurrent federal legislation might imply that the federal government's power to enact concurrent legislation is broader than its power of exclusive legislation. *See* Gardbaum, *supra* note 183, at 818–19. Because preemption threatens the constitutional legislative function of state governments more than does concurrent authority, my claim that states have constitutionally identified and protected forms of government may support his argument.

[315] *See* Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 690–712, 738–48 (1995).

is to say, the law's power to bring a fair decisionmaker's reasoned judgment to bear in particular cases that exist at the edges of or between competing principles of importance.[316] There is a real tension between these two conceptions of adjudication in resolving federalism challenges, particularly given the necessary primacy of political processes to produce workable federalism. And the tensions in truth go deeper — for tensions exist not only between the "rule of law" and "federalism" concepts, but within each as well.[317]

Bright-line rules may permit Congress to do its work better; once Congress knows what it can and cannot do, it can use the permissible tools to achieve its regulatory ends. From this perspective, the Court's apparently bright-line rule in *Printz* — do not command state or local governments or their officials (other than courts) to execute federal law — has something important to commend it.[318] In addition, bright-line, formalistic rules may be easier for lower courts to administer and hence have an advantage over more nuanced tests.[319] Finally, as noted earlier, bright-line rules may correspond more obviously to rule of law concerns for the accessibility and certainty of law, which may affect how easily other legal actors — including state and local governments — can structure their decisions.

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316 For a useful discussion of the distinction between "rules" and "standards," their correspondence to "categories" and "balancing," respectively, and a suggestion that these distinctions mirror differences between pragmatic common law models of adjudication (which favor standards) and the more "rationalist and positivist spirit of the codifiers" (which favors rules), see Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 27 (1992). The approach I urge involves more of a balance of factors than a categorical command — more of a standard than a rule. For a classic critique of "balancing" in constitutional law, see T. Alex Aleinikoff, *Constitutional Law in The Age of Balancing*, 96 YALE L.J. 943 (1987). The body of literature on the comparative advantages of rules and standards (and the relationship of both to the rule of law) is large; a helpful treatment is found in Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

317 On the rule of law, see Fallon, cited above in note 196, at 10–24, which describes four "ideal types" or models of the rule of law, only one of which is based primarily on the definition of formal, rigid rules. Rule of law concerns for clarity may conflict with rule of law concerns for coherence with other rules and with stability. Likewise, federalism requires both flexibility and respect for the federal agreement, ideas that are in obvious tension. That federalism requires flexibility does not self-evidently require that judicially developed rules be flexible, but it does suggest a caution in adopting categorical rules that are not solidly grounded in constitutional history and practice.

318 Note, however, that the apparent sharpness of the rule is muddied by the Court's inconsistency on what constitutes compulsion, *see supra* notes 143–144, and by the possible willingness of at least one of the five justices in the *Printz* majority to apply a different rule to information-reporting requirements than to other forms of commands, *see* Printz v. United States, 117 S. Ct. 2365, 2385 (1997) (O'Connor, J., concurring).

319 *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510–11, 540–44 (1988) (developing an argument for formalist rules as an effective constraint on mistakes in applying more flexible, individualized tests); Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1, 14–15 (1996) (exploring formalism's benefits for appellate court decisions); *see also* Lessig, *supra* note 204, at 172–73 (arguing that a decentralized system in which many judges can rule on constitutional issues requires formalist rules more than systems in which a single, centralized court rules on constitutional questions).

However, given the relative institutional competences of courts and Congress, the necessarily pragmatic and instrumental nature of the constitutional role of federalism, and the absence of support for the particular bright line chosen in *Printz*, the constitutionality of federal mandates to state governments may be better evaluated using a deferential, "all-things-considered" approach.[320] 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 either overinclusive or underinclusive in serving their substantive purposes.[321] In the last three decades, the chief problem in identifying federalism constraints on federal power has not been inconsistency in lower court decisions as much as inconsistency in the Supreme Court's own posture.[322] A more flexible standard may prove easier to live with over the long haul and thus prove more durable.[323] Moreover, to the extent that the rule of law is served by credibly anchoring judicial decisions in authoritative legal texts,[324] the breadth of the *Printz* rule, and its absence of textual and historic support, is problematic.

Finally, the nature of federalism,[325] and the limited aspirations we should have for judicial enforcement of its limits on Congress's power, would favor a deferential, flexible, multifactor approach to developing any substantive limits on Congress's powers. Such an approach would focus on whether the nature of the command, the choices available to

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320 If the spirit of the Constitution, or its "essential postulates," can be invoked to support a bright-line rule, *Printz*, 117 S. Ct. at 2376 (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934)) (internal quotation marks omitted), that same spirit can be invoked to establish a workable government and flexibility. Although a constitutional system may be able to achieve flexibility even with categorical or inflexible limits in one area, depending on the nature of other constitutional powers and structures, *Printz*'s rule is disappointing because of its rigidity, which could impair exercises of national power to enlist state officers in executing federal law in grave emergencies, and because of its lack of grounding in the conventional tools of constitutional adjudication.

321 *See* Sullivan, *supra* note 316, at 58 & n.236, 59.

322 *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled by* National League of Cities v. Usery, 426 U.S. 833, 852–55 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985). And *Garcia*'s approach has been narrow or ignored in more recent decisions. *See* Jackson, *supra* note 67, at 542.

323 Indeed, to the extent that the *Printz* rule would preclude federal commandeering of state officials to respond to national emergencies of a larger scale, such as sudden invasion or epidemic, it seems unlikely to be applied. (Perhaps exceptions to *Printz*'s "categorical" rule would be found, for example, in war powers provisions.)

324 *See* Fallon, *supra* note 196, at 26–28 (discussing the "historicist" model of the rule of law); *cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–79 (1989) (linking the importance of clear-cut rules to concerns for democratic legitimacy as well as concerns for constraining judges to restrain their own discretion).

325 United States federalism is notable both for its political complexity, *see* Kramer *supra* note 154, at 1542–46 (discussing Morton Grodzin's work on "marble-cake federalism"), and the Constitution's relative silence on allocations of substantive regulatory powers to states, and emphasis on structures of governance.

state officials, the reasons for the federal law, and the substantiality and nature of the burdens imposed, are inconsistent with the constitutional status and governmental functions of the states.[326] With respect to Congress's power to regulate private conduct, a strong presumption of validity, combined with a process-based rule requiring justification when the connection to a federal power was not obvious, would correct at least some of the political casualness that may have offended the Court in *Lopez*.

Thus, I believe the Court can articulate a sufficiently principled approach to federalism, and both *Lopez* and *New York* provide some useful tools toward that goal. But the Court has not succeeded, either in *Lopez* or in *Printz*, in identifying a doctrine that combines in appropriate degrees recognition of the fundamentally political character of federalism, its overarching goal of creating a strong national union, and a textually and historically plausible account of when that national power is limited by the constitutionally secured interests of the states. Abandoning the "enclave" theory, focusing on the adequacy of congressional process to justify assertions of federal power over private citizens, and attending to the actual risks of politically nonaccountable behavior in particular programs of commandeering state facilities would help move the doctrine toward a "sufficiently principled" basis for achieving the goal of maintaining states as constitutionally important locations of power in a strong and effective national union based on the rule of law.

Unaccountable and irresponsible legislative behavior is not on the whole or in the long run a good idea. Unaccountable and irresponsible behavior in larger, more centralized units can do more harm than such behavior in smaller units. If *Lopez* can be understood as a mild application of a reinvigorated requirement that Congress's means of carrying out its powers must be "necessary and proper" to enumerated ends, then this aspect of the Court's federalism jurisprudence may have salutary effects. And maintaining some special constitutional solicitude for the organs of state government (albeit not of the absolute and categorical variety found in *Printz*) is consistent with the states' consti-

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326 As one *Printz* dissent suggested, this model may permit at least some federal "commandeering" of state officers. *See* Printz v. United States, 117 S. Ct. 2365, 2394 (1997) (Stevens, J., dissenting) (referring to the possibility of Congress imposing "modest burdens . . . from time to time"). The dissent might uphold a general rule presuming valid federal commandeering of executive officials. *See id.* at 2396 (arguing that political safeguards are effective and unelected federal judges should leave the protection of federalism to the political process "in all but the most extraordinary circumstances"). Yet the dissent's repeated references to the "modest" or "trivial" nature of the burden imposed by the Brady Act suggests that factors relevant to whether a federal law unduly interferes with the states' constitutional functions might include the degree to which the mandated act is ministerial, is directed at a discrete but urgent problem, and is temporary in character.

tutional status and the prospects their existence provides for a workable union.