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## The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't

Roderick M. Hills Jr.  
*University of Michigan Law School*

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# The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t

Roderick M. Hills, Jr.\*

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\* Assistant Professor of Law, University of Michigan Law School. B.A. 1987, J.D. 1991, Yale. — Ed. I would like to thank Akhil Amar, Vik Amar, Evan Caminker, Steve Croley, Laura Croley, Elizabeth Garrett, Clayton Gillette, Peter Hammer, Michael Heller, Don Herzog, Larry Kramer, Mark Killenbeck, Jim Krier, Rick Lempert, Saul Levmore, Kyle Logue, Chip Lupu, Ron Mann, Michael McConnell, Rick Pildes, Don Regan, Dan Rodriguez, Julie Roin, Eric Stein, and Terry Sandalow for comments made on drafts. I would also like to thank the participants who attended the workshop on federalism at the Boalt Hall School of Law, University of California, Berkeley, the workshop for works-in-progress at George Washington University Law School, and the Law and Economics Workshop at the University of Michigan Law School, where earlier versions of this paper were presented. Finally, I would like to express my gratitude to the University of Michigan Law School for providing generous research support from the Cook Endowment and to Chris Sagers and Matthew Hamermesh for extraordinarily able research assistance.

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It is commonplace to observe that "dual federalism" is dead, replaced by something variously called "cooperative federalism," "intergovernmental relations," or "marble-cake federalism."<sup>1</sup> According to this conventional wisdom, state and local officials do not enforce merely their own laws in their distinct policymaking sphere. Rather, as analyzed in a voluminous literature,<sup>2</sup> state and local governments also cooperate with the federal government in many policymaking areas, ranging from unemployment insurance to historic preservation. These nonfederal governments help implement federal policy in a variety of ways: by submitting implementation plans to federal agencies, by promulgating regulations, and by bringing administrative actions to enforce federal statutes. Thus, cooperative federalism offers us a vision of independent governments working together to implement federal policy.

But what happens if this harmonious relationship breaks down? What if state and local governments refuse to "cooperate"? Can the federal government force the state and local governments to implement federal policy? Or is the federal government able to rely only on the voluntary participation of state and local governments?

The phenomenon of cooperative federalism, and notably its failures, has brought into sharp relief a basic puzzle of federalism:<sup>3</sup>

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1. Edward Corwin provided one of the earliest autopsies of "dual federalism" in Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950). For a more recent declaration to the same effect, see MICHAEL D. REAGAN & JOHN G. SANZONE, *THE NEW FEDERALISM* 11-13 (2d ed. 1981); DEIL S. WRIGHT, *UNDERSTANDING INTERGOVERNMENTAL RELATIONS* 36-37 (3d ed. 1988).

2. For general overviews of the theory and empirical literature concerning intergovernmental relations or cooperative federalism, see THOMAS J. ANTON, *AMERICAN FEDERALISM AND PUBLIC POLICY: HOW THE SYSTEM WORKS* (1989); THOMAS R. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* (1990); DONALD F. KETTL, *THE REGULATION OF AMERICAN FEDERALISM* (1983); PAUL E. PETERSON ET AL., *WHEN FEDERALISM WORKS* (1986); WRIGHT, *supra* note 1. For a history of intergovernmental programs from the framing of the Constitution until the present, see DAVID B. WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON* (1995). For a more detailed account of intergovernmental relations from the Nixon through the Reagan administrations, see TIMOTHY CONLAN, *THE NEW FEDERALISM: INTERGOVERNMENTAL REFORM FROM NIXON TO REAGAN* (1988).

3. By *federalism*, I mean the delegation of governmental powers to territorially limited governments within a nation; the policymakers of the limited governments are elected by the persons residing within those governments' jurisdictions. This is not, of course, the only possible definition of the term. For an extensive history of the term's changing meaning, see S. RUFUS DAVIS, *THE FEDERAL PRINCIPLE: A JOURNEY THROUGH TIME IN QUEST OF A MEANING* (1978).

Given our commitment to having both state governments with certain powers and a national government with limited but supreme powers, where do we draw the line between the two? The national government has unique needs in maintaining the supremacy of federal law and an orderly federal system, yet there must be a limit to federal power and a corresponding reservoir of state power if federalism is to have any meaning at all. This article attempts to draw that line, but not by appealing to abstract concepts such as "dual sovereignty."

Instead, this article proposes a functional theory of cooperative federalism to define the proper limits of federal power to obtain state and local governments' implementation of federal policy. This theory is consistent with judicial precedent and the original understanding of the U.S. Constitution, as Part V of the article explains. Nevertheless, I defend this theory primarily in terms of sensible policy by applying the tools of basic transaction-costs economics to modern intergovernmental relations. I argue that the framework for intergovernmental relations proposed here serves intuitively useful functions: it preserves the power of state and local governments and yet also maintains the supremacy of the federal government. I call the theory a "functional" theory for this reason.

The essence of this functional theory is an analogy between nonfederal governments — states, municipalities, counties, school districts, and so on — and private organizations. Beginning with broad empirical observations about intergovernmental relations, the theory maintains that state and local governments should have "autonomy" — that is, immunity from federal demands for regulatory services. Such demands are just as unnecessary, economically inefficient, distributionally unjust, and needlessly destructive of expressive autonomy as governmental confiscation of private organizations' property or conscription of private organizations' services. When the national government seeks goods and services from private organizations, it normally purchases such goods and services from such organizations through mutually voluntary agreements. The Pentagon, for example, does not confiscate military trucks from private defense contractors. Rather, it purchases such vehicles from contractors who submit acceptable bids. This reliance on voluntary agreement rather than conscription or confiscation makes eminent sense, because confiscation or conscription would be both economically inefficient and distributionally unjust; it would deter investors from investing money in military vehicle manufacture, and it would place the cost of national defense on the shoulders of

the owners of private defense contractors without any ethically plausible reason for doing so.

This article maintains that identical considerations suggest that the federal government should not confiscate the property or conscript the services of nonfederal governments. Rather, the federal government should purchase such services through a voluntary intergovernmental agreement. This article maintains that a requirement that the national government purchase rather than conscript nonfederal governments' regulatory services will not impede useful intergovernmental cooperation. Moreover, such purchases will avoid the inefficiencies, distributive injustice, and invasion of expressive autonomy that probably would result from the national government's commandeering of nonfederal governments' regulatory processes. In short, by granting state and local governments autonomy, the line between federal and state power is not fixed, but fluid; it responds to the costs and benefits of intergovernmental relations, seamlessly adjusting in that uncertain region where sovereigns meet.

As this thumbnail sketch of the theory suggests, the justification for nonfederal governments' autonomy presented here differs substantially from the justification provided by the U.S. Supreme Court in *Printz v. United States*<sup>4</sup> and *New York v. United States*.<sup>5</sup> In these opinions, the Court ruled by narrow majorities that the national government cannot unconditionally force state and local legislatures or executive officials to implement federal statutes by regulating private persons according to federal standards. This holding that nonfederal governments should have autonomy is, of course, the conclusion I reach as well. The problem with the Court's opinions is not the conclusion but the Court's reasoning. The Court, largely abstaining from any empirical examination of intergovernmental relations, relied on the abstract notions of dual sovereignty and political accountability to support its doctrine that the national government cannot commandeer the regulatory processes of the state and local governments.

But, as Part I of this article explains, these concepts cannot explain why federal demands for state or local services should be regarded as more of an intrusion on state sovereignty than simple federal preemption of state or local law. Federal demands that state and local officials implement federal policies at least preserve

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4. 117 S. Ct. 2365 (1997).

5. 505 U.S. 144 (1992).

some role for such officials. By contrast, preemption eliminates their role entirely. Moreover, even if one could explain why commandeering is especially threatening to sovereignty, why are state and local governments protected only from unconditional federal demands for regulatory services but not from *conditional* demands — that is, demands extracted by threats of federal preemption of state law or withdrawal of grant money? And why do *Printz* and *New York* allow federal regulation of both nonfederal governments and private organizations with generally applicable laws? To these questions the Court's theory of "political accountability" has offered no acceptable answer. By contrast, my functional theory makes sense of these limits on state autonomy.

If the functional theory makes so much sense, why has it not been adopted by the U.S. Supreme Court as the basis for state autonomy? The problem is that the Court's jurisprudence is still haunted by a theory of state autonomy it inherited from nineteenth-century jurisprudence — a theory that I call *nationalistic dual federalism*. As I explain in sections I.A and I.B, this theory has its roots in the ratification debates and some of the classic decisions of the Marshall and Taney Courts — notably, *Martin v. Hunter's Lessee*,<sup>6</sup> *McCulloch v. Maryland*,<sup>7</sup> *Gibbons v. Ogden*,<sup>8</sup> and *Prigg v. Pennsylvania*.<sup>9</sup> The Marshall and Taney Courts, led by Justice Story, used these decisions to develop a theory of state autonomy that, ironically, was rooted in contempt and distrust for state officials. The implicit premise of this theory — first laid out by Publius in *The Federalist* but carried to its ultimate conclusion by Justice Story in *Prigg* — was that state officials were parochial, deceitful, and nonuniform policymakers whose incompetence or untrustworthiness disqualified them from exercising any federal functions. In its purest form, such a nationalistic theory barred Congress from delegating federal responsibilities to state officials even when state officials were willing to accept such duties.

As I explain in section I.B.3, the theory of nationalistic dual federalism simply makes no sense in the late twentieth century. It is now settled law that state and federal governments have largely overlapping jurisdictions and routinely cooperate to implement state-federal regulatory schemes. Yet the Court still invokes the slogans and concepts of this jurisprudence, and, perhaps half con-

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6. 14 U.S. (1 Wheat.) 304 (1816).

7. 17 U.S. (4 Wheat.) 316 (1819).

8. 22 U.S. (9 Wheat.) 1 (1824).

9. 41 U.S. (16 Pet.) 539 (1842).

sciously, provides a bad reason for a good rule — indeed, a justification that, if taken seriously, would deprive nonfederal officials of some of their most important functions.

Thus, the justification traditionally offered for state autonomy in judicial opinions no longer seems persuasive. Nevertheless, as explained in the subsequent three Parts of the article, autonomy itself — what I call the *New York* entitlement<sup>10</sup> — makes eminent sense as a matter of policy. In Parts II, III, and IV, I lay out a functional theory to justify autonomy. As explained earlier, this functional theory rests on one simple proposition: The federal government should commandeer the services of nonfederal governments no more than it should commandeer the services of private organizations or persons.

Part II of this article explains why it is *unnecessary* for the national government to commandeer the regulatory processes of state and local governments. The federal government can purchase the services of state and local governments whenever it is cost-effective to do so; it has no more need to conscript such services than it has to conscript the services of secretaries, FBI agents, janitors, or Supreme Court Justices. There is a vigorous intergovernmental marketplace in which municipalities, counties, and states — like private organizations and persons — compete with each other for the chance to obtain federal revenue. Therefore, whenever the national government values such services enough to pay nonfederal governments the costs of providing them, the national government can obtain the cooperation of state or local governments in implementing federal law.

Part III uses the analogy between private organizations and nonfederal governments to explain why federal conscription of nonfederal governments' services is improper as well as unnecessary. When the government conscripts specific types of private services or confiscates specific types of private property, it can inefficiently discourage private persons or organizations from investing resources in the production of such services or property. Moreover, the distributive injustice of such confiscation is fairly obvious; to the extent that the conscripted service or confiscated property benefits the public generally, it is difficult to argue that persons who happen to have the ability to provide the service or good ought to bear the costs of such programs exclusively.

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10. I name the entitlement after *New York v. United States* rather than *Printz v. United States* only because *New York* originally announced the doctrine.



But, as Part III argues, these same considerations suggest that the federal government ought not to conscript services or confiscate property from nonfederal governments. Section III.A notes that one would expect such demands inefficiently to discourage involvement in state and local politics. Moreover, as section III.B explains, one would also expect such commandeering arbitrarily and, perhaps, inequitably to place the costs of federal programs on the coalitions of voters who control state and local governments. Finally, as section III.C suggests, federal demands that state and local governments regulate according to federal standards unnecessarily burden the expressive liberties of state and local officials by forcing them to endorse federal policies with their mandated votes. In short, federal demands for nonfederal governments' regulatory services are improper for the same reasons that confiscation of private property or conscription of private action is improper.

Part IV applies the functional theory outlined in Parts II and III to four specific problems in intergovernmental relations: (1) the issues of "generally applicable laws"; (2) the problem of conditional preemption; (3) the question of whether the federal government should be able to "commandeer" the services of nonfederal executive and judicial officers; and (4) the question of whether the federal government should be able to impose *funded* mandates on state and local governments. As Part IV explains, the theory outlined in Parts II and III better explains the exceptions for generally applicable laws and conditional preemption than the theories of state sovereignty that are most frequently invoked to justify the holdings in *New York* and *Printz*. The theory also suggests that *Printz* was correct to forbid commandeering of nonfederal executive officers' regulatory services. Finally, the theory suggests that Justice Souter's argument that the federal government be permitted to impose funded mandates on state and local governments is impractical and unnecessary.

In Part V, I offer some reasons to believe that the functional argument suggested in Parts II and III might be inferred from constitutional sources other than the traditions of dual federalism, state sovereignty, or political accountability that now provide it with such an unpersuasive foundation. In particular, Part V argues that, by reading the Necessary and Proper Clause<sup>11</sup> in light of the Fifth Amendment's prohibition on takings of private property without just compensation<sup>12</sup> and the First Amendment's protection of the

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11. See U.S. CONST. art. I, § 8, cl. 18.

12. See U.S. CONST. amend. V.

freedom of speech,<sup>13</sup> one can derive a stronger and more intellectually satisfying foundation for the doctrine of state autonomy announced in *Printz* and *New York* than the notion of dual sovereignty that the Court invoked.

At the outset, it is important to make clear that this article will *not* discuss the issue of whether “state autonomy” would be adequately protected through the political process even without judicial enforcement of constitutional limits on Congress’s power. I have two reasons for such a limit on the article’s scope.

First, such “political process” theories of constitutional federalism are not really theories of federalism at all but theories of judicial review; they are addressed exclusively to courts and purport to define when *judicial* enforcement of constitutional constraints is appropriate.<sup>14</sup> But I wish to ask a different question: Even assuming that the courts should not protect state autonomy, what constitutional limits should *other*, nonjudicial decisionmakers — Congress or the President — sensibly enforce? Theories of judicial review have nothing to say to such decisionmakers, yet Congress and the President have a crucial role in determining the Constitution’s meaning.<sup>15</sup> This article is addressed to those political decisionmakers.

Second, political process theories commonly rest on the premise that federalism will be “adequately” protected through the political process.<sup>16</sup> It is impossible to know, however, whether the protection afforded by the political process is “adequate” until one has some sort of normative theory defining the proper role of the federal and nonfederal governments.<sup>17</sup> Otherwise, empirical verification of whether Congress adequately protects state autonomy degenerates into a meaningless string of anecdotes describing state victories or defeats; such anecdotes yield no *normative* conclusions about the adequacy of the political process unless one knows when

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13. See U.S. CONST. amend. I.

14. The most famous of such theories are JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 180-84 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

15. See Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975). For an example of how Congress might consider such issues, see Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 KAN. L. REV. 1113 (1997).

16. See, e.g., CHOPER, *supra* note 14, at 171-95; Lewis Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 857-68 (1979).

17. For an acknowledgement of this problem, see Garrett, *supra* note 15, at 1119-20.

nonfederal officials *ought* to prevail.<sup>18</sup> This article provides a benchmark for evaluating the political process, without which political process theories make little sense.

# I. THE INADEQUACY OF THE SUPREME COURT'S ARGUMENTS FOR STATE AUTONOMY

To understand the problem posed by *New York's* anticommandeering rule, it is useful to define carefully at the outset the sort of entitlement that *New York* might provide to the state governments. Under a broad reading, *New York* seems to give the highest state and local governmental decisionmakers — as defined by the relevant state's constitution — a limited right to withhold their own services and the services of state and local personnel subject to their constitutional authority from the federal government. Moreover — although again, *New York* did not resolve the question — *New York* seems to bar *all* federal efforts to commandeer the regulatory processes of the state, even if the federal government were to compensate the state governments for the costs of the implementation.<sup>19</sup>

So understood, *New York* provides a particular kind of entitlement to state governments that is protected by a property rule. I use the term *property rule* in the sense defined by Calabresi and Melamed in their classic 1972 article.<sup>20</sup> The entitlement provided by *New York* — what I call the “*New York* entitlement” — gives state governments a right to enjoin federal efforts to force state officials to implement national law. To put this entitlement in perspective, one can contrast it with three other possible allocations of control over state regulatory processes:

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18. For an example of such an incoherent “list” of state officials’ victories in Congress, see CHOPER, *supra* note 14, at 185-88. Choper never explains why these victories “outweigh” the defeats that state officials incur — an impossible task for Choper given that he provides no normative theory about what level of state autonomy is sufficient to ensure that federalism works. Thus, his argument resembles a race without a finish line: there simply is no metric by which to determine whether or not Congress has adequately protected federalism.

19. Justice Scalia seems to have rejected the idea that Congress might impose *funded* mandates on state officials when he suggested that calculating compensation would be judicially unmanageable. See *Printz v. United States*, 117 S. Ct. 2365, 2376 (1997). As explained in Part IV, *infra*, he was probably right.

20. See Guido Calabresi & Douglas A. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

# FOUR RULES FOR ALLOCATING CONTROL OVER A STATE GOVERNMENT'S REGULATORY MACHINERY

<p><b>Property Rule to State Government (the <i>New York</i> entitlement):</b> State governments' policymakers have an entitlement to withhold regulatory processes from the federal government.</p>	<p><b>Liability Rule to State Government:</b> The federal government can demand that state governmental officials implement national law so long as the federal government provides objectively reasonable funding to cover costs of the demand.</p>
<p><b>Property Rule to National Government:</b> The federal government may demand that state officials implement national law.</p>	<p><b>Liability Rule to National Government:</b> The state government may withhold its regulatory processes and refuse to implement national law — but only upon compensating the federal government for the costs of such national implementation.</p>

In some sense, therefore, the *New York* entitlement is a powerful rule. It allows state governments to hold out and refuse to implement national legislation even when the costs to the state of such implementation are trivial and the benefits to the national government are quite large. The *New York* entitlement also seems to allow the state governments to resist fully funded mandates — that is, federal demands that the state governments implement national law accompanied by grants-in-aid sufficient to cover the costs of such implementation.

Yet in a second sense, *New York* and *Printz* are trivial, in that they do nothing to prevent Congress from directly regulating private persons with national laws and administrators, thereby preempting inconsistent state laws. To be sure, the doctrine of enumerated powers — and, in particular, the so-called “substantial effects” test of *Wickard v. Filburn*<sup>21</sup> — places some modest limits on the power of the national government to regulate private persons. These limits were recently restated and — perhaps — significantly reinvigorated in the recent decision of *United States v. Lopez*.<sup>22</sup> Under the best view, however, *Lopez* probably imposes extremely modest constraints on the power of the national government to regulate private persons directly.<sup>23</sup>

21. 317 U.S. 111, 125 (1942) (“[I]f appellee’s activity be local . . . it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce”).

22. 514 U.S. 549 (1995).

23. For an extended analysis both of *Lopez* and of recent lower court opinions that apply *Lopez* in various contexts, see Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995).

Seen against a background of almost unlimited national powers to regulate private persons directly, *New York* and *Printz* present something of a paradox: Why give state governments the right to withhold their regulatory processes while simultaneously giving the state governments nothing to regulate with those processes?<sup>24</sup> Why permit the national government to preempt virtually all significant regulatory fields, leaving the state governments with no significant jurisdiction remaining to them, while strictly forbidding the national government from imposing even modest regulatory responsibilities on state officials? In short, what good is the preservation of state administrative autonomy, if the states are not guaranteed some area of subject matter jurisdiction in which to exercise it?

This question takes two forms, both of which I address in this article. First, one could ask why any intelligent framer would *want* such a policy. Second, one can ask whether the text and traditions of the U.S. Constitution plausibly contain such a policy. Both Justice O'Connor's opinion in *New York* and Justice Scalia's opinion in *Printz* are gravely inadequate as efforts to answer either question. This Part explains why I believe that the theories of federalism and constitutional meaning canvassed by these two opinions simply cannot justify their holdings.

A. *What Is the Function of the New York and Printz Anticommandeering Rule? The Inadequacy of the Argument Based on Political Accountability*

*New York* offered a functional argument to justify the rule against commandeering. The Court stated that the rule was necessary to protect "political accountability." According to Justice O'Connor,

[w]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulations.<sup>25</sup>

Thus on the facts of *New York*, because the Federal Low-Level Radioactive Waste Policy Act Amendments take the form of a requirement that the state make the final unpopular decision to site

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24. *But see* text accompanying notes 194-201 (observing the existence of practical barriers to the federal government's ability to extend its regulatory authority over areas ostensibly within the scope of federal power).

25. *New York v. United States*, 505 U.S. 144, 169 (1992).

or subsidize waste,<sup>26</sup> aggrieved voters will find it especially difficult to trace the causes of these costs to the federal government. Because the costs are imposed in the immediate form of a state law, the voters will tend incorrectly to attribute the consequent rise in their state tax burden or the construction of a state-owned landfill to the state government. Since Congress will know that such commandeering obscures lines of political accountability, it will have all the more incentive to engage in such commandeering.<sup>27</sup>

Such an argument is analogous to the argument commonly made by lawyers and political scientists against broad congressional delegation of legislative powers to federal administrative agencies. Under this thesis — most famously expounded by Morris Fiorina<sup>28</sup> and recently revived by David Schoenbrod<sup>29</sup> — Congress will have an improper incentive to evade voter scrutiny by taking credit for vague and popular statutory schemes while delegating responsibility for implementing such schemes — and their accompanying costs — to federal administrative agencies. Voters burdened by agency decision — say, a regulation requiring ignition interlock — will lash out against the bureaucrats who imposed the decision and not the legislators who ultimately enacted the scheme that required the agency to make cost-imposing decisions. Likewise, Justice O'Connor seems to argue that, by forcing state officials to administer potentially unpopular federal programs, Congress will be able to take credit for the benefits of such programs while shunting blame onto the hapless nonfederal officials.

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26. See 505 U.S. at 177.

27. See *Printz v. United States*, 117 S. Ct. 2365, 2382 (1997). This argument is made in detail by Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355 (1993). As Zelinsky explains, the "political accountability" argument will not work unless one assumes that Congress commandeers state governments in response to well-organized interest groups who are aware that Congress is the ultimate cause of the program. Otherwise, while Congress would not receive any blame for the costs of the program, it would also not receive any credit for the benefits of the program. Commandeering would be a wash. For commandeering to make sense, Congress would have to deliver benefits to groups who would know that Congress was responsible for the benefits but impose costs on other voters who would be oblivious of Congress's ultimate responsibility for such costs. See *id.* at 1374-75. For a discussion of the concept of "traceability" of government action, see R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 47-51 (1990).

28. See generally Morris Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 175 (Roger Noll ed., 1985). The argument is made in simpler form in MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (2d ed. 1989).

29. See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

Such a thesis has been subjected to some persuasive empirical challenges in the context of administrative law,<sup>30</sup> and Justice O'Connor's analogous thesis undoubtedly is similarly vulnerable to the contention that it lacks empirical support.<sup>31</sup> But there is a deeper conceptual difficulty with the political accountability argument: it proves too much. Such an argument seems to condemn not merely federal laws that commandeer state or local services but also even *voluntary* intergovernmental cooperation.

After all, whenever federal, state, and local officials jointly administer some regulatory scheme, it may be difficult for voters to determine which set of officials is responsible for which duties: intergovernmental schemes can be notoriously complex in their allocation of responsibilities. Take, for example, block grants — federal grants to state and local governments that give the grantees broad discretion to choose how to spend the money. As several commentators have noted, such programs tend to undermine the political accountability of state and local politicians who receive the cash, because they get the luxury of spending revenue without having the responsibility of raising local taxes to generate it.<sup>32</sup> In effect, block grants are exactly the reverse of federal laws that commandeer state and local officials: such grants allow state and local officials to impose costs on the federal government. If blurring the lines of political accountability is somehow constitutionally problematic, then such grants ought to be suspect.

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30. See, e.g., MURRAY J. HORN, *THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION: INSTITUTIONAL CHOICE IN THE PUBLIC SECTOR* 44-46 (1995); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-99 (1985). Horn argues that the thesis depends on an unusual degree of voter apathy and inability to trace the proximate cause of a particular burden. He notes that in parliamentary regimes, where such tracing should be easy because the executive and legislative branches stand and fall together during elections, one still finds broad delegations of power to the bureaucracy, indicating that a desire to evade voter scrutiny is not necessarily the cause of such arrangements. See HORN, *supra*, at 44-46.

31. See Evan H. Caminker, *Sovereignty and Subordinacy: Can Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1061-67 (1995).

32. See PAUL PETERSON, *THE PRICE OF FEDERALISM* 63 (1995) ("Why . . . should the federal taxpayer give unrestricted money to local governments? Would not local officials be more accountable to their own citizens and taxpayers if they were not so dependent on federal assistance?"); Thomas G. Donlan, *A More Perfect Union: Welfare Reform and the New Federalism Raise Constitutional Concerns*, BARRON'S, July 29, 1996, at 43; Alan Ehrenhalt, *The Locust in the Garden of Government*, GOVERNING, Mar. 1995, at 7-8 (observing that block grants are a convenient way for state officials to avoid political responsibility for costs of their own spending decisions). Of course, voters might be astute enough to blame Congress for imprudently giving unrestricted funds to nonfederal governments and blame nonfederal governments for the waste of such funds. But, if voters are so adept at apportioning responsibility, it is hard to see why they could not also properly assign blame for unconditional mandates on nonfederal officials. Why is imprudent coercion easier to detect than imprudent expenditures?

Indeed, one should go further: *all* intergovernmental arrangements under which state officials carry out federal law ought to be suspect, because all such arrangements have the potential to confuse voters about the ultimate responsibility for some policy decision. Martha Derthick provides a detailed illustration of this danger in her account of the public assistance program in Massachusetts.<sup>33</sup> The federal Bureau of Public Assistance demanded in the late 1940s that the state welfare commissioner exclude nonprofessional officials from administering federal welfare grants in Massachusetts.<sup>34</sup> The federal agency, however, did not openly tell the state legislature that it would forfeit federal funds if the state did not change its system of having part-time selectmen administer public assistance, because such overt threats might have made the federal agency "vulnerable to congressional intervention."<sup>35</sup> Instead, the federal agency counted on the state agency to act as its proxy with the state legislature. The state agency would warn that federal funds might be terminated, while the federal agency remained discreetly in the background expressing no opinion on the issue directly to the state legislature. When speaking directly to the state legislature, federal agency officials were more circumspect in order to assure Congress and the general public that the federal agency was not meddling in state affairs.<sup>36</sup>

This practice of using state officials to inform state legislators of federal program requirements led to considerable confusion about exactly who was responsible for imposing requirements on the state. The powerful Massachusetts senator, Henry Cabot Lodge, forwarded complaints from taxpayers' groups to federal agencies, which then sent them along to the state agency that was directly responsible for promulgating the controversial regulations, which would, in turn, cite the requirements of federal law.<sup>37</sup> In the end, as Derthick notes, "responsibility is hard to fix because it is shared: when the federal administration compels the state agency to issue a rule, but when the state agency drafts the rule and has some measure of discretion as to its content, both have, but can deny, responsibility for the consequences."<sup>38</sup>

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33. See MARTHA DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS* (1970).

34. Derthick provides an account of the origins of the federal agency's interest in the merit system. See *id.* at 98-102.

35. See *id.* at 117.

36. See *id.* at 117-19.

37. See *id.*

38. *Id.* at 118.



In short, erosion of political accountability is endemic to *all* forms of cooperative federalism; whenever the federal government induces states to act, whether with block grants or categorical grants, there is a considerable risk that voters will be confused about which level of government imposed the regulatory burdens of the program. At least one scholar has suggested that Congress's use of its spending power to impose conditions on federal grants raises the same sort of problems of political accountability as commandeering legislation.<sup>39</sup> To prevent such voter confusion, one would simply have to prohibit the federal government from delegating responsibilities to state and local officials.

Indeed, even absent such delegation, one would have to bar the federal and state governments from ever assuming any overlapping duties in order to guarantee "accountability." After all, voters could be confused about which level of government is responsible for the state of some regulatory field if both state and federal officials could play some role in regulating that field. Such a use of the rhetoric of political accountability is not an academic musing; Justices Kennedy and O'Connor have deployed the political accountability argument in their *Lopez* concurrence to condemn even federal preemption of state law in regulatory fields traditionally governed by the states.<sup>40</sup>

The difficulty with such political accountability arguments is that they overlook the complexity inherent in any system of federalism that always has the potential to confuse voters and thereby undermine political accountability. As de Tocqueville famously noted, federal systems of government demand that voters possess high levels of sophistication about the responsibilities of each level of government.<sup>41</sup> If one's goal is to maximize political accountability, then one would simply adopt a unitary state. Otherwise, to ensure that lines of political accountability are not blurred, one would not merely have to prohibit commandeering; one would have to build an unbreachable wall between state and federal responsibilities to demarcate clearly the jurisdiction of each level of government.

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39. See Edward A. Zelinsky, *Accountability and Mandates: Redefining the Problem of Federal Spending Conditions*, 4 CORNELL J.L. & PUB. POLY. 482 (1995).

40. See *United States v. Lopez*, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring) (stating that "political accountability" would be undermined if "the Federal Government [were] to take over the regulation of entire areas of traditional state concern" because "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory").

41. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 166 (Phillips Bradley ed., 1945) ("The most prominent evil of all federal systems is the complicated nature of the means they employ.").

As section I.B observes, such a strict separation of state and federal functions is not unprecedented: Justice Story developed precisely such a theory of federalism in several important opinions for the Marshall and Taney Courts. But such a theory logically implies not merely that the federal government cannot commandeer state and local officials, but also that the federal government cannot even enter into intergovernmental bargains to purchase the *voluntary* regulatory services of nonfederal officials. In the language of Calabresi and Melamed, such a theory of federalism would protect state and local autonomy with an *inalienability* rule rather than a property rule. Such an inalienability rule would deal a devastating blow to the prestige and real power of state and local governments by depriving them of some of their most important regulatory duties in administering federal programs. Thus, the logical if ironical consequence of the political accountability theory expounded in *New York* and *Printz* is erosion of state power.

Justices Scalia and O'Connor do not share Justice Story's nationalistic agenda, and so they hardly can be expected to limit Congress's spending powers to exclude all cooperative federalism. But they can provide no principled reason for why such an exemption for conditional grants makes any sense in light of their worries about political accountability. In the end, *New York* and *Printz* cannot embrace the consequences of their political accountability functional theory, and this inability suggests that the theory is a poor foundation for any doctrine of state autonomy.

*New York* and *Printz* back away from the implications of their political accountability theory in a second way. As O'Connor states, the "state autonomy" doctrine in these opinions does not apply to "generally applicable laws," meaning laws that apply to both private and governmental entities.<sup>42</sup> Yet Justice O'Connor provides no explanation for why such generally applicable laws burden political accountability less than laws that apply only to governmental entities.<sup>43</sup>

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42. See *New York v. United States*, 505 U.S. 144, 177-78 (1992).

43. See 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 (1982). Professor La Pierre, the academic who initially devised the "political accountability" theory, has argued that "generally applicable laws" burden political accountability less than laws that apply only to governmental entities because, by burdening private parties, they create incentives for governmental entities and private persons to form coalitions to fight such laws. See *id.* at 1000-04. But this is a non sequitur: burdens that fall exclusively on governmental organizations motivate them to form powerful lobbying groups such as the National League of Cities, the National Governors' Association, and the National Association of Counties. Cf. DAVID S. ARNOLD & JEREMY F. PLANT, *PUBLIC OFFICIAL ASSOCIATIONS AND STATE AND LOCAL GOVERNMENT: A BRIDGE ACROSS ONE HUNDRED YEARS* (1994) (describing

At bottom, the fundamental difficulty with the functional argument offered by *New York* and *Printz* — the political accountability argument — is that it leads to unacceptably nationalistic conclusions. It casts suspicion on one of the nonfederal governments' most important sources of power — the power to implement federal legislation. As section I.B explains, this weakness is not peculiar to *New York* and *Printz*; judicial theories of state autonomy have long been rooted in a nationalistic distrust of state governments.<sup>44</sup>

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the formation and political clout of these organizations). Why should one believe that such groups are somehow more vulnerable to political exploitation than lobbies composed exclusively of private interests? Moreover, as a recent commentator has noted, Congress frequently extends regulatory burdens by stages, first imposing such burdens on private enterprises and later imposing the burdens on governmental entities. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1512-13 (1994). It is not obvious that private enterprises would have any incentive to lobby against the latter extension, given that such a regulatory burden would have no effect on their own compliance costs.

*New York v. United States*, 326 U.S. 572 (1946), presents a similar debate over the relevance of "general applicability" in the context of federal taxation of state agencies. In that case, the question arose whether the United States could impose a tax on the operations of New York's water-bottling business at Saratoga Springs. See 326 U.S. at 573-74. According to Justice Frankfurter, such a tax did not violate any implied state immunity from federal taxes, because the tax also applied to similarly situated private persons. See 326 U.S. at 575-76, 583-84. By contrast, federal property taxation of, say, a municipal government's city hall would constitute an unconstitutional tax, because such a tax would fall upon local governments alone; private persons do not own city halls and therefore would not pay the tax. The difficulty with such a theory, as Justice Stone noted in his *New York* concurrence, is that it does not provide any account of when a governmental entity is similarly situated to a private enterprise. See 326 U.S. at 586-88 (Stone, J., concurring). For example, if municipal corporations are analogous to private corporations, then a tax on city legislative buildings would not discriminate against governmental entities but rather subject them to the same tax treatment as private corporations, which must pay federal taxes on their assets.

44. Justice O'Connor tentatively invokes a fourth notion to support the decision in *New York*: she cites Professor Merritt's work for the proposition that commandeering legislation might deprive the persons of a "republican form of government" in violation of Article IV, section 4. See *New York*, 505 U.S. at 169 (citing Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 61-62 (1988)). According to this argument, when Congress forces state governments to enact legislation, those state governments are prevented from being responsive to their constituents' interests; because they are forced to address federally established priorities, they are prevented from devoting state resources to problems of more pressing concern to their own constituents.

To the extent that this argument simply restates the political accountability argument in Guarantee Clause clothing, I have addressed it already. But to the extent that the argument claims that state governments are no longer republican in form if they are unresponsive to their constituents, then the argument does not distinguish commandeering legislation from preemption. After all, if Congress bars state legislative action on some concern that is deemed important by the state's residents, then the state government will be incapable of responding to constituent concerns. How is a veto less of a threat to republican government than an affirmative command?

B. *Searching for State Autonomy in Text, History, and Precedent:  
The Nationalistic Origins of "State Autonomy"  
Jurisprudence in American History*

The political accountability argument, of course, is not the only arrow in the quivers of the *New York* and *Printz* Courts. At least as important is their reliance on originalist history. Both decisions rely heavily on sources from the ratification debates suggesting that the framers intended to prohibit the national government from commandeering the regulatory services of nonfederal officials.

How persuasive is this argument? The answer to this question is paradoxical. On one hand, as explained in this section, there is a long constitutional tradition maintaining that Congress cannot force state officials to implement federal law. This tradition is embodied in the objections to "requisitions" made by Federalists during the debates over the ratification of the Constitution. It is also suggested by Justice Story's position in *Prigg v. Pennsylvania*,<sup>45</sup> which was, in turn, rooted in the larger jurisprudence of the Marshall Court in *Gibbons v. Ogden*,<sup>46</sup> *McCulloch v. Maryland*,<sup>47</sup> and *Martin v. Hunter's Lessee*.<sup>48</sup>

But, on the other hand, as noted in section I.C, there is a deeper sense in which such tradition provides a dubious foundation for *New York* and *Printz*. Ironically, the problem with the reasoning of Publius, Justice Story, and the tradition of dual federalism on which Story's views rested, is that such reasoning is excessively *nationalistic*. The fundamental assumption of both Publius's reasoning during the ratification debates and Story's reasoning in *Prigg* is that state governments are unfit to implement federal law because state officials are devious, demagogic, untrustworthy, parochial, and inherently rebellious and, therefore, ought to be excluded entirely from implementing federal policy.

The problem with such a nationalistic theory is that it proves too much: it suggests not only that Congress should not commandeer the services of state officers but also that Congress ought not use such services even when they are volunteered by state governments. In effect, such a doctrine of state autonomy is really a nondelegation theory: it bars Congress from delegating federal responsibilities to state officials. Such a theory is entirely unacceptable in the

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45. 41 U.S. (16 Pet.) 539 (1842).

46. 22 U.S. (9 Wheat.) 1 (1824).

47. 17 U.S. (4 Wheat.) 316 (1819).

48. 14 U.S. (1 Wheat.) 304 (1816).

late twentieth century, when systems of cooperative federalism are commonplace and it is widely conceded that the federal and state governments have largely, albeit not entirely, concurrent jurisdictions.

Therefore, although there is a long constitutional tradition that condemns the federal commandeering of state officials, the tradition does not provide a persuasive justification for the condemnation. We have a rule without a reason. In Part II of this article, I tentatively suggest how the functional argument presented here might fill this void in constitutional doctrine by providing a more satisfactory textual and precedential justification for the *New York* entitlement in an era of cooperative federalism.

### 1. *The Antecedents of State Autonomy in the Ratification Debates: Publius's Nationalist Case Against Requisitions*

*New York*, *Printz*, and scholarly commentators root their arguments concerning state autonomy in the debates over the ratification of the U.S. Constitution.<sup>49</sup> *New York* and *Printz* note that many ratifiers of the Constitution agreed that the Articles of Confederation ought to be amended so that the new government would be able to regulate private persons directly and not be required to requisition the state governments to raise taxes and troops on behalf of the national government. In Hamilton's words, quoted with approval by Justice O'Connor, "The new National Government 'must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations.'"<sup>50</sup>

Against this originalist argument, Justice Stevens responded that, by making these statements, the ratifiers simply wanted to "enhance the power of the national government, not to provide some new unmentioned immunity for state officers."<sup>51</sup> The Federalists certainly believed that *requiring* the national government to rely on state governments for enforcement of national law was "cumbersome and inefficient."<sup>52</sup> But, according to Stevens, it hardly follows that the Federalists wished to prohibit the national government from having the *option* of commandeering the state

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49. The main scholarly treatments of *New York* all devote considerable space to parsing the ratification debates. See Caminker, *supra* note 31; H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993).

50. *New York v. United States*, 505 U.S. 144, 163 (1992) (quoting THE FEDERALIST NO. 16, at 116 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

51. *Printz v. United States*, 117 S. Ct. 2365, 2389 (1997) (Stevens, J., dissenting).

52. See *Printz*, 117 S. Ct. at 2389 (Stevens, J., dissenting).

governments, when such commandeering might not be so divisive. Indeed, Justice Stevens relied on *The Federalist No. 27* and *The Federalist No. 36* to argue that "the federal government was to have the power to demand that local officials implement national policy programs."<sup>53</sup>

Which side has the better view of history? The trouble with both positions is that each overlooks how an intense *nationalism* might be the basis for a rule against commandeering state governments. As Stevens correctly noted, the *New York* and *Printz* majorities misleadingly imply that the Framers somehow opposed requisitions to preserve state autonomy. Further, the majorities' view ignores the fact that the Anti-Federalists — quintessential defenders of state power — *wanted* the national government to rely *exclusively* on the state governments to implement national policy.<sup>54</sup> They feared that preemption rather than commandeering would destroy the state governments by depriving those governments of meaningful subject-matter jurisdiction.<sup>55</sup> Neither Justices O'Connor nor Scalia ever explain how *allowing* the federal government to do precisely what the strongest advocates of state power wanted to *require* the federal government to do would violate some important norm of federalism in the eyes of the ratifiers of the Constitution.

But Stevens is equally misleading when he implies that the Constitution's ratifiers merely wished to supplement the national government's power to impose requisitions by giving the national government an additional power to tax individuals directly. Such a position ignores the vehemence with which the Federalists rejected the system of requisitions established by the Articles of Confederation.

A quick summary of Publius's views suggests that Stevens substantially understated the Federalists' objections to requisitions. According to Publius, the difficulty was that state politicians, motivated by "love of power," would inevitably display "an impatience

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53. *Printz*, 117 S. Ct. at 2389-90 (Stevens, J., dissenting) (citing *THE FEDERALIST NO. 27*, *supra* note 50, at 180 (Alexander Hamilton); *No. 36*, *supra* note 50, at 235 (Alexander Hamilton)).

54. As one leading Anti-Federalist pamphleteer, the "Federal Farmer," argued, the Articles of Confederation were preferable to the proposed Constitution because, under the Articles, "the state governments stand between the union and individuals; the laws of the union operate on states, as such, and federally: Here, nothing can be done without the meetings of the state legislatures." LETTER XVII OF THE FEDERAL FARMER (1788), *reprinted in* 2 *THE COMPLETE ANTI-FEDERALIST* 330, 331-32 (Herbert J. Storing ed., 1981).

55. *See, e.g.*, ESSAY I OF BRUTUS (1787), *reprinted in* 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 54, at 363.

with political control” and “look with an evil eye upon all external attempts to restrain or direct [state power].”<sup>56</sup> The courts would be useless to force political bodies to comply with requisitions,<sup>57</sup> and the national government would lack resources sufficient to exact obedience to requisitions through sheer military force.<sup>58</sup> Moreover, Publius argued in *The Federalist No. 16* that the national government would not be able to determine whether state officials were complying with requisitions in good faith.<sup>59</sup> State officials might plead “inability” rather than “disinclination,” and the national government would find it extremely difficult to determine whether the states’ bad faith was sufficiently flagrant “to justify the harsh expedient of compulsion.”<sup>60</sup>

These arguments suggest a deep distrust and disapproval of state officials. Contrary to Stevens’s assertion, Publius is not merely arguing that state officials are somehow “cumbersome and inefficient.” Rather, he is arguing that state officials are disloyal and dishonest, because they would deliberately resist and undermine federal policies and then conceal their resistance. Such a view of state officials is completely consistent with the Federalists’ more general ideological commitments. The Federalists’ experience in the Continental Congress or the Revolutionary Army — institutions in which many had served — led them to believe that state politicians were parochial, narrow-minded, perhaps even unpatriotic demagogues.<sup>61</sup> State politicians, after all, had refused to approve an impost needed to pay the veterans of the Revolutionary Army,<sup>62</sup> and they had failed to comply with requisitions needed to

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56. THE FEDERALIST NO. 15, *supra* note 50, at 111 (Alexander Hamilton).

57. *See id.* at 110.

58. *See* THE FEDERALIST NO. 16, *supra* note 50, at 115 (Alexander Hamilton).

59. *See id.* at 116-17.

60. THE FEDERALIST NO. 15, *supra* note 50, at 115 (Alexander Hamilton). This was Hamilton’s complaint about New York — that the state legislature “made an external compliance . . . to a requisition of congress” but “at the same time counteract[ed] their compliance by gratifying the local objects of the state so as to defeat their concession.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 295 (Max Farrand ed., revised ed. 1966) (1911). Alexis de Tocqueville makes a similar argument about the inability of state governments to monitor and control New England townships when those townships carried out state law. *See* 1 DE TOCQUEVILLE, *supra* note 41, at 78-80. Like Publius, de Tocqueville notes that the election of township officials by the local electorate makes control of such officials by the state extraordinarily difficult. *See id.*

61. *See* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 164-65 (1985); *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 89 (speech by Edmund Randolph, as recorded by James Madison, decrying “the local demagogues who will be degraded by [the proposed Constitution] from the importance they now hold”).

62. *See* JACKSON TURNER MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788*, at 72-102 (1961) (describing state politicians’ opposition to proposals to pro-

make payments on Revolutionary War bonds.<sup>63</sup> Some states also had refused to protect the property rights of Loyalists in violation of national treaties,<sup>64</sup> and Rhode Island notoriously had required creditors to accept depreciated paper money as payment of debts, in violation of contractual rights.<sup>65</sup> The Federalists regarded this misbehavior as endemic to state governments, blaming state politicians' misconduct on institutional factors such as excessively democratic state constitutions<sup>66</sup> or excessively small constituencies.<sup>67</sup> State politicians, to the Federalists, were simply not suited for the pursuit of "great and national objects."<sup>68</sup>

When read in light of these more general principles, *The Federalist No. 15* suggests that Publius did not want merely to supplement requisitions with direct taxation and regulation — a relatively modest reform that would have been acceptable to most Anti-Federalists.<sup>69</sup> Rather, the Federalists wanted as much as possible to replace such reliance on state officials with exclusive dependence on federal officials, persons who would owe their entire loyalty to the national government and the national characters who would presumably oc-

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vide the Continental Congress with an impost on trade). As Main notes, this opposition was directly linked with state politicians' fear of the Revolutionary Army: one purpose of the impost was to finance life pensions for officers in the army — a project strongly opposed by many state officials. *See id.* at 106-07.

63. *See* McDONALD, *supra* note 61, at 170-71.

64. *See id.* at 155-56.

65. *See id.* at 175-76. As McDonald notes, Rhode Island was a *bête noire* of the Federalists, and the heat of their indignant rhetoric greatly exceeded the actual harm of Rhode Island's action to creditors.

66. *See, e.g.,* McDONALD, *supra* note 61, at 157; MAIN, *supra* note 62, at 42-48 (describing the controversy over the Pennsylvania Constitution of 1776). For the classic account of the controversies concerning the radical democracy unleashed at the state level by the American Revolution, see MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781*, at 17-53 (1940).

67. The classic account is, of course, *THE FEDERALIST NO. 10* (James Madison).

68. *See* *THE FEDERALIST NO. 10*, *supra* note 50, at 83 (James Madison); *see also* *THE FEDERALIST NO. 35*, *supra* note 50, at 216 (Alexander Hamilton) (asserting that national politicians will have the opportunity for "extensive inquiry and information" that less-educated state politicians will lack).

69. Most Anti-Federalists did not condemn direct federal taxation of individuals out of hand, but instead argued that the national government should try requisitions first and resort to direct taxation of private individuals only if the state governments proved unwilling to satisfy the requisitions. Anti-Federalists proposed such a mixed system of requisitions and direct taxes in the ratifying conventions of Massachusetts, New Hampshire, Virginia, North Carolina, Maryland, and New York. *See* MAIN, *supra* note 62, at 145-46. Martin Luther, the garrulous Anti-Federalist leader from Maryland, proposed such a mixed system at the Philadelphia Convention. *See* 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 60, at 359.



cupy Congress and the Presidency.<sup>70</sup> In short, both Justice Scalia and Justice Stevens are correct: the Federalists' case against requisitions did not depend on any regard for state autonomy, but the Federalists nevertheless probably wished to discourage state implementation of national law for totally nationalistic reasons.

To be sure, as a concession to the Anti-Federalists, Publius argued in *The Federalist No. 36* that the national government would be able to "make use" of state tax collectors.<sup>71</sup> But, given Publius's general skepticism about the federal governments' ability to enforce demands on obstinate state politicians by court injunction, it is implausible to read these statements as suggestions that the federal government could simply conscript state tax officials by enacting a statutory demand for their services. Rather, Publius seems to recommend a more subtle policy of what we would now call conditional preemption. According to Publius,

[T]he existence of such a power [of direct federal taxation] will have a strong influence in giving efficacy to requisitions. When the States know that the Union can supply itself without their agency, it will be a powerful motive for exertion on their part.<sup>72</sup>

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70. For the Federalists, national or diffuse characters were persons whose military or political achievements had won them honor throughout the entire continent. A crucial aspect of the new Constitution for the Federalists was that it provided a forum of sufficient dignity for persons with such a reputation — quintessentially, George Washington. For summaries of how the Federalists believed that large jurisdictions encouraged control of government by the natural aristocracy — the most educated, patriotic, cultivated, and wealthiest persons with the greatest degree of fame and ambition for fame — see GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 216-47 (1981); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 471-518 (1969). For an interesting discussion of how James Wilson believed that voters themselves would adopt a disinterested style of politics in a larger jurisdiction, see Stephen Conrad, *Metaphor and Imagination in James Wilson's Theory of Federal Union*, 13 L. & SOC. INQUIRY 1, 47-49, 57 (1988). For the classic account of the Framers' obsession with widespread fame, see Douglass Adair, *Fame and the Founding Fathers*, in *FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR* 3, 7 (Trevor Colbourn ed., 1974). For more detailed evidence of this obsession, see STANLEY ELKINS & ERIC MCKITTRICK, *THE FOUNDING FATHERS: YOUNG MEN OF THE REVOLUTION* (1962) (arguing that the Framers were motivated by a desire for reputations within the larger empire of the new republic); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 713-39 (1997).

71. See *THE FEDERALIST* NO. 36, *supra* note 50, at 220 (Alexander Hamilton) ("The national legislature can make use of the *system of each State within that State* [for assessing and collecting property taxes]. The method of laying and collecting this species of taxes in each State can, in all parts, be adopted and employed by the federal government. . . . [I]f the exercise of the power of internal taxation by the Union should be judged . . . inconvenient, the federal government may forbear the use of it and have recourse to requisitions in its stead.").

72. *Id.* at 221. Given the context of the paper, it seems a reasonable conjecture that *The Federalist No. 36* was written as a concession to Anti-Federalists like the "Federal Farmer," who wished to preserve some state influence over any federal system of taxation. In light of Publius's argument in *The Federalist No. 15* that commandeering strategies would be inefficacious, see *THE FEDERALIST* NO. 15, *supra* note 50, at 110-11 (Alexander Hamilton), it seems

In other words, rather than defend a power to commandeer the states through unconditional orders, a power that Publius had already decried as futile in *The Federalist No. 15*, Publius recommends a classic strategy of cooperative federalism: threaten to bypass state officials unless they comply with federal requisitions. The state officials' interest in obtaining implementation powers will give them the incentive to obey federal commands when direct orders would necessarily fail.

Such a power of conditional preemption might also explain *The Federalist No. 27*, a passage of which was cited by both Justices Souter and Stevens as evidence that the ratifiers of the Constitution authorized Congress to commandeer the states.<sup>73</sup> In this paragraph, Publius argued that Congress's power to regulate private individuals directly would "enable the government to employ the ordinary magistracy of each in the execution of its laws."<sup>74</sup> According to Publius,

It merits particular attention in this place, that the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction 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 respective members 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.<sup>75</sup>

According to Justice Scalia, this passage suggests only that state officials have a duty "not to obstruct the operation of federal law."<sup>76</sup> Justice Souter disagreed, arguing that the natural import of the language is that state officials have a duty also to "take appropriate action" to obey the federal government's commands.<sup>77</sup>

But there is also a third reading that makes the most sense in light of the topic sentence of the paragraph. According to this sentence, Publius believed that the national government, by virtue of its ability to regulate "the individual citizens of the several States," will be able "to employ the ordinary magistracy of [the states] in the

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unlikely that Publius regarded the requisition power as an important or even useful aspect of national supremacy.

73. See *Printz v. United States*, 117 S. Ct. 2365, 2389 (1997) (Stevens, J., dissenting); 117 S. Ct. at 2402 (Souter, J., dissenting).

74. *THE FEDERALIST NO. 27*, *supra* note 50, at 176 (Alexander Hamilton).

75. *Id.* at 177 (footnote omitted).

76. *Printz*, 117 S. Ct. at 2374.

77. 117 S. Ct. at 2402 (Souter, J., dissenting).

execution of [the national government's] laws."<sup>78</sup> The puzzle of *The Federalist No. 27*, therefore, is to explain how this might be so — how direct federal regulation of private persons might help Congress use the states' magistracy.

*The Federalist No. 36* and its implicit concept of conditional preemption might provide the key to *The Federalist No. 27*: the power to regulate private persons might induce the states to participate in federal regulatory schemes, because, as Publius noted in *The Federalist No. 36*, if the states refuse to enforce federal laws, then the federal government simply can threaten the states with the ultimate weapon — the weapon of bypass.<sup>79</sup> In short, state officials will become agents of the national government, because conditional preemption of state power will provide a "powerful motive" for intergovernmental cooperation<sup>80</sup> when direct coercion, according to *The Federalist No. 15*<sup>81</sup> and *The Federalist No. 16*,<sup>82</sup> would surely fail.

To be sure, this reading of *The Federalist No. 27* is not unquestionably correct. But it has the virtue of reconciling Publius's statements in *The Federalist No. 27* with his frequently expressed belief that the legal power to coerce state officials by direct order is a useless, futile power. Any other view makes Publius praise the Constitution for bestowing a power on the national government that Publius has elsewhere condemned as pointless and divisive.

In sum, read in context of the general ratification debates, Publius seems to argue that Congress practically would never be able to demand state officials' services through court injunction or even military force because state officials are too parochial, recalcitrant, and devious to be coerced and will defeat any direct order through evasion and passive resistance that Congress might not even be able to detect, let alone effectively remedy. At most, *The Federalist No. 36* suggests that state officials might voluntarily aid the national government if they know that their disobedience will lead to their exclusion from national affairs because "the union can supply itself without their agency."<sup>83</sup>

Does this distrust of state officials necessarily imply that Publius, or the Federalists more generally, believed that the pro-

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78. THE FEDERALIST NO. 27, *supra* note 50, at 176 (Alexander Hamilton).

79. See THE FEDERALIST NO. 36, *supra* note 50, at 220-21 (Alexander Hamilton).

80. See *id.* at 221.

81. THE FEDERALIST NO. 15, *supra* note 50, at 110-11 (Alexander Hamilton).

82. THE FEDERALIST NO. 16, *supra* note 50, at 115-17 (Alexander Hamilton).

83. THE FEDERALIST NO. 36, *supra* note 50, at 221 (Alexander Hamilton).

posed Constitution barred Congress from attempting to commandeer state regulatory services? In support of Justice Stevens and the other *Printz* dissenters, one can reply: not necessarily. One can believe that a regulatory technique is foolish and futile without believing that it is unconstitutional. On the specific question raised by *Printz* — the legal power of Congress to demand that state officials regulate private persons according to federal standards — both the text of the Constitution and the debates surrounding its ratification are silent.

Yet while the Federalists never expressly stated that they wished to prohibit commandeering, the historical record nonetheless suggests that such an immunity would not have bothered them in the least — that, indeed, such an immunity would be perfectly consistent with their general views. But before applauding the *Printz* majority, note the deeper irony to such an originalist defense of state autonomy. Publius's dislike of requisitions, after all, is clearly rooted in contempt for state officials — in an extremely nationalistic view that parochial political loyalties drive state officers to subvert federal policies either covertly or overtly. Slandering the good faith of state politicians seems like a strange way to vindicate state autonomy. As the next section discusses, this contempt for, and distrust of, state officials becomes the explicit basis for the theory of state autonomy recognized by Justice Story. Indeed, the whole doctrine of state autonomy, as it is first recognized in *Kentucky v. Dennison*<sup>84</sup> and *Collector v. Day*,<sup>85</sup> springs directly out the extreme nationalism of the Marshall Court and Justice Story.

## 2. *State Autonomy in the Marshall and Taney Courts: The Nationalistic Roots of Dual Federalism*

What about postratification political practice or judicial precedent? As the *Printz* dissenters note, there were numerous instances in which the national government relied on state officials to carry out federal laws.<sup>86</sup> But, as the *Printz* majority notes, it is difficult to say whether Congress believed that it could *force* the state governments to undertake these duties, because the state governments never resisted their performance.<sup>87</sup> Again, there simply was no occasion for Congress to rely on force when it could obtain state serv-

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84. 65 U.S. (24 How.) 66 (1861).

85. 78 U.S. (11 Wall.) 113 (1870).

86. See *Printz v. United States*, 117 S. Ct. 2365, 2391-92 (1997) (Stevens, J., dissenting).

87. See *Printz*, 117 S. Ct. at 2370-71.

ices through cooperation. Thus, Congress never addressed clearly the question asked by the *Printz* court.

But there is a source of authority that, at least at first glance, seems to suggest much more clearly that the *Printz* and *New York* majorities were correct in their view of constitutional tradition: the opinions of Justice Story. This section first explains how Story's views provide support for *Printz* and *New York*. But it then shows how these views — and the larger edifice of dual federalism upon which they rest — actually are a weak and unconvincing basis for modern doctrines of state autonomy. Story indeed defended the notion that the federal government cannot impose regulatory duties on nonfederal officers, but he did so not out of respect for state autonomy but out of contempt for state officials' capacities. The best view of the limited evidence available is that Story wanted to exclude nonfederal officials from even *voluntarily* implementing federal law. Story's doctrine of state autonomy, therefore, is more a nondelegation doctrine, requiring Congress to create federal agencies and barring state officials from carrying out federal responsibilities.

Consider Story's dissent in *Houston v. Moore*,<sup>88</sup> an 1820 decision holding that Pennsylvania courts could try militiamen for refusing to serve in the United States forces during the War of 1812. Justice Story thought that the state courts had no such power, but in his dissent he went even further:

There is no pretence to say, that Congress can compel a State Court to convene and sit in judgment on such an offence. Such an authority is no where confided to it by the constitution. Its power is limited to the few cases already specified, and these assuredly do not embrace it; for it is not an implied power necessary or proper to carry into effect the given powers. The national may organize its own tribunals for this purpose; and it has no necessity to resort to other tribunals to enforce its rights. If it do [sic] not choose to organize such tribunals, it is its own fault; but it is not, therefore, imperative upon a state tribunal to volunteer in its service.<sup>89</sup>

Again, in *Prigg v. Pennsylvania*,<sup>90</sup> Story stated that the Pennsylvania officers could not enforce the Fugitive Slave Clause of Article IV. As in *Houston*, Justice Story went further, arguing that the national government could not force the state government to enforce the Fugitive Slave Clause even if it had wanted to do so. He wrote:

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88. 18 U.S. (5 Wheat.) 1 (1820).

89. 18 U.S. (5 Wheat.) at 67 (Story, J., dissenting) (emphasis added).

90. 41 U.S. (16 Pet.) 539 (1842).

The clause is found in the national Constitution, and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. *The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution.*<sup>91</sup>

In short, Justice Story's dicta suggests that, well before *Kentucky v. Dennison*,<sup>92</sup> Justice Story believed that the national government could not require the state governments to implement national law.

Of course, Justice Story was merely one justice on the Court, and his statements were either dicta, in *Prigg*, or dissenting statements, in *Houston*. But his views seem to have been widely shared. As Justice McLean noted in *Prigg*, "It seems to be taken as a conceded point . . . that Congress had no power to impose duties on state officers."<sup>93</sup> Justice Marshall himself seems to have dropped hints in *Wayman v. Southard*<sup>94</sup> that he was sympathetic to Justice Story's views, and there is historical evidence that Marshall endorsed Story's opinion in *Houston*.<sup>95</sup>

There is another, more important reason to pay special heed to the views of Justice Story on the issue of state autonomy: Justice Story is famously an ultranationalist of the Marshall Court, a justice who had little patience for Calhoun's confederation theory or the notion of state nullification.<sup>96</sup> One might conclude, therefore, that if a justice as nationalistically inclined as Justice Story embraced the theory of *New York* and *Printz*, then such a theory does not require one to accept antebellum antinationalist views of state sovereignty that are now best viewed as Gone with the Wind of the Civil War.

Is *Prigg* the forgotten foundation for *New York* and *Printz* — the constitutional authority suggesting that Justices Scalia and

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91. 41 U.S. (16 Pet.) at 615-16 (emphasis added).

92. 65 U.S. (24 How.) 66 (1861).

93. *Prigg*, 41 U.S. (16 Pet.) at 664 (McLean, J., concurring). Even Justice McLean himself conceded that "[a]s a general principle, this is true," but he drew an exception for Article IV's Fugitive Slave Clause which expressly imposed duties on state governments. See *Prigg*, 41 U.S. (16 Pet.) at 664 (McLean, J., concurring).

94. 23 U.S. (10 Wheat.) 1 (1825).

95. In *Wayman*, Marshall stated that "the laws of the Union may permit such agency [i.e., state executive officers' implementation of federal laws], but it is by no means clear that they can compel it." 23 U.S. (10 Wheat.) at 39-40. The issue in *Wayman* was whether state law governed the manner in which federal marshalls executed judgments of federal courts. 23 U.S. (10 Wheat.) at 3.

96. Story certainly did not accept the notion that "affirmative" burdens on state officials were somehow contrary to the "spirit" of the Constitution. See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 343-44 (1816) ("It is a mistake that the constitution was not designed to operate upon states, in their corporate capacities.").

O'Connor were right after all? Oddly, neither Justice Scalia nor Justice O'Connor cites *Prigg*. Perhaps this omission is sensible, because, on close reading, *Prigg* and the jurisprudence from which it emerges provide deeply paradoxical support for any modern theory of state autonomy. Ironically, the problem is not that *Prigg* is too devoted to states' rights, but rather that *Prigg* and its intellectual foundation in the Marshall Court's jurisprudence — like the writings of Publius — are too nationalistic: *Prigg* springs out of the same deep suspicion of state governments that seems indefensible in an era of cooperative federalism. The legacy of dual federalism that Justice Scalia invokes is, indeed, a nationalistic legacy, forged by the Marshall Court and carried forward by Justice Story out of distrust for state institutions rather than love of state autonomy.

Consider Justice Story's logic in the passage above quoted from *Houston*. Story contends that the Necessary and Proper Clause does not authorize Congress to force state tribunals to adjudicate federal crimes, because, given that Congress can create its own federal tribunals, Congress has no necessity to demand such tribunals from the states. But this argument, if taken seriously, would seem to prohibit Congress from using state tribunals even with the consent of state legislatures. After all, if one can create federal courts, then it is not strictly speaking necessary to delegate business to state courts even if they voluntarily accept it. Embedded in Story's rhetoric of state autonomy is a deeply nationalistic nondelegation theory.

Story had already elaborated such a theory in *Martin v. Hunters' Lessee*.<sup>97</sup> In *Martin*, Justice Story argued in dicta that Congress has an obligation to create federal courts sufficient to hear every class of case enumerated in Article III, section 2 of the Constitution.<sup>98</sup> A large and sophisticated literature analyzes Story's claim.<sup>99</sup> For the purpose of this article, it is important to rehearse only the undisputed essence of Story's argument. According to Story, by declaring that the judicial power "shall be vested" in Article III courts, section 1 of Article III bars Congress from "vest[ing] any portion of the judicial power of the United States, except in courts ordained

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97. 14 U.S. (1 Wheat.) 304 (1816).

98. See 14 U.S. (1 Wheat.) at 327-33.

99. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 55-58; Robert J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990).

and established by itself.”<sup>100</sup> The essence of Story’s argument is a nondelegation theory: Congress simply cannot give final authority to adjudicate any Article III case to state tribunals, and Congress cannot give *any* authority to state courts to adjudicate certain classes of federal business — in particular, maritime and admiralty cases and federal crimes.<sup>101</sup> If the state courts are to have any power to hear federal cases, it is only because federal issues inevitably arise during the course of ordinary state judicial business under the state court’s preexisting jurisdiction.

As *Houston* suggests, this nondelegation doctrine also can be the basis of a doctrine of state autonomy: if state courts are unfit to hear certain types of federal cases, then Congress *a fortiori* cannot force them to hear such cases. But, as both *Houston* and *Martin* suggest, this doctrine of state autonomy is hardly a tribute to the dignity of state government. Rather, Story’s theory is rooted in the belief that “[t]he constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.”<sup>102</sup> This is not to say that state courts cannot hear some federal business that incidentally arises in the course of their state duties. But Story’s strong suggestion in both *Houston* and *Martin* is that Congress cannot encourage such state exercise of federal duties by delegating them as a matter of federal law.

In short, Story simply transforms Publius’s prudential advice not to trust state officials into a constitutional command. *Martin* thus extends *The Federalist No. 15*’s suggestion that state institutions are simply too parochial, disuniform, populist, and prejudiced to be trusted to carry out federal business.

Like his *Houston* dissent, Story’s dicta in *Prigg v. Pennsylvania* that “the states cannot . . . be compelled to enforce [the Fugitive Slave Clause of Article IV]”<sup>103</sup> appears to reflect a nationalistic nondelegation doctrine rooted in *Martin* rather than any high regard for state institutions’ independence. According to Story, Congress cannot force county magistrates to enforce slaveowners’

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100. *Martin*, 14 U.S. (1 Wheat.) at 330-31.

101. See 14 U.S. (1 Wheat.) at 337. Story could be read to go even farther: he might be arguing that Congress must create federal *district* courts to exercise original jurisdictions over all federal business to the exclusion of state courts. See 14 U.S. (1 Wheat.) at 336. But, as Michael Collins notes, this seems to be wistful acknowledgment of an argument rather than adoption of it. See Collins, *supra* note 99, at 57 n.45.

102. *Martin*, 14 U.S. (1 Wheat.) at 347.

103. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615 (1842).



claims arising under the Fugitive Slave Clause, because "the clause is found in the national Constitution" and "does not point out any state functionaries . . . to carry its provisions into effect."<sup>104</sup>

But this logic, like the logic of *Houston*, implies that Congress could not make use of county magistrates even if they consented to such duties. After all, the magistrates' consent would not alter the fact that Article IV duties are "duties of the national government, nowhere delegated or intrusted to [state officials] by the Constitution."<sup>105</sup> Story, indeed, seems to invoke *Martin* by suggesting that Congress cannot rely on state institutions to enforce slaveowners' rights, stating that "the natural, if not the necessary conclusion is that the national government . . . is bound, *through its own proper departments*, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution."<sup>106</sup>

This is not to say that Story believed that state officials could not adjudicate slaveowners' claims to recover their slaves. To the contrary, he states that "state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation."<sup>107</sup> Story seems to be arguing here only that state officials have a preexisting police power to "arrest and restrain runaway slaves and remove them from their borders," a power that "may essentially promote and aid the interests of the owners" but was "designed generally for other purposes, for the protection, safety, and peace of the state."<sup>108</sup> Such a view would mirror his theory in *Martin* and *Houston* that, while state courts may "incidentally" hear federal business pursuant to their preexisting jurisdiction, Congress cannot deliberately delegate such business to them, because such delegation would interfere with the uniform administration of federal law. It follows incidentally from such a nondelegation theory that Congress cannot force state officials to hear Article IV claims. Such an immunity is not rooted in any high regard for state autonomy but

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104. 41 U.S. (16 Pet.) at 615.

105. 41 U.S. (16 Pet.) at 616.

106. 41 U.S. (16 Pet.) at 616 (emphasis added). While Story does not cite *Martin*, counsel for respondent did, stating that "so far as [the 1793 Fugitive Slave Act] attempts to vest this or any jurisdiction in state officers, it is unconstitutional and void. The solemn decision of this Court [in *Martin*] has branded such attempt with condemnation." 41 U.S. (16 Pet.) at 598.

107. 41 U.S. (16 Pet.) at 622.

108. 41 U.S. (16 Pet.) at 625. As David Currie notes, Story's argument against state enforcement of Article IV seems to rest on "the need for uniformity." See DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, at 242 (1985).

rather in distrust for state officials; the Constitution simply does not trust them to carry out federal business.<sup>109</sup>

Story's rejection of intergovernmental cooperation is not an anomaly. It springs directly out of what I call the Marshall Court's jurisprudence of "nationalistic dual federalism," referring to the desire of Marshall to protect the integrity of the federal government by excluding state governments from meddling in federal affairs. The presupposition of this jurisprudence is that state and national governments should enforce their own laws with their own bureaucracy, each avoiding any dependence on the other. As Marshall stated in *McCulloch*:

No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and *on those means alone was it expected to rely for the accomplishment of its ends.*<sup>110</sup>

The "intention" to which Marshall refers is best exemplified by the Federalists' rejection of requisitions and the creation of a national government with its own executive and judicial officials. By contending that the new government was "expected to rely" on its own institutions "alone," Marshall asserts that direct taxation and regulation of individuals *replaced* rather than supplemented requisitions. Put another way, the federal government had a duty as well as a right to be independent of the states.

One might object that *McCulloch* is simply rejecting the notion that the national government would be *required* to rely on state institutions. This does not imply necessarily that the national government lacks the *option* to rely on such state institutions if it wishes. But Marshall's broad argument for separating state and federal functions carries a not-so-subtle hint of such a prohibition. In arguing for a categorical bar against even possibly good-faith state taxation of federal institutions, Marshall compares state governments' relations with the national government to the relations between two separate states: "Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government?" Marshall asks rhetorically. "Why, then, should we suppose that the people of any one State should be will-

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109. See JAMES McLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 263 (1971) (noting that Story's opinions "seem to discount the possibility of cooperation between the national and state governments and rigidly divide jurisdictions into compartments, nearly always at the expense of state power").

110. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819) (emphasis added).

ing to trust those of another with a power to control the operations of [the national government]?"<sup>111</sup>

If one accepts this analogy, then it is natural to bar the national government from delegating regulatory power to state governments. After all, it would be odd to allow the Minnesota legislature to delegate regulatory duties to the Wisconsin legislature. If federal-state relations are analogous to state-state relations, then it ought to be equally odd to allow Congress to delegate its regulatory responsibilities to state officials.<sup>112</sup> For Congress to delegate significant regulatory responsibilities to state officials would be to invite the "abuse" that "the people" — that is, the Constitution — prohibit. To borrow Marshall's phrase, "[t]his was not intended by the American people. They did not design to make their government dependent on the States."<sup>113</sup>

In short, Marshall's opinion in *McCulloch* suggests a nondelegation theory that is defended explicitly by Justice Story in *Martin, Prigg*, and *Houston*. While Marshall is never as clear as Justice Story in prohibiting Congress from delegating responsibilities to state officials, he seemed to presuppose just such a bar in *Gibbons v. Ogden* when he stated that "[a]lthough Congress cannot enable a state to regulate, Congress may adopt the provisions of a state on any subject."<sup>114</sup>

Why would Marshall and Story be so distrustful of Congress that they would want to bar Congress from delegating powers to state governments? It seems that they did not believe that *nationalism* would be protected through the national political process; perhaps they believed that there was simply too much danger that Congress might be captured by parochial — or, at least, Jeffersonian — state interests, turn over too much responsibility to state governments, and thus undermine the purposes of the Union.<sup>115</sup> If state governments were simply too disuniform or parochial to carry

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111. 17 U.S. (4 Wheat.) at 431.

112. See 17 U.S. (4 Wheat.) at 431 ("The legislature of the Union alone . . . can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.").

113. 17 U.S. (4 Wheat.) at 432.

114. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 207 (1824).

115. As Professor Vikram Amar has noted, this worry may have been much more plausible prior to enactment of the Seventeenth Amendment, because state legislatures controlled the U.S. Senate. See Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1378 (1996). One might speculate that Marshall's distrust of state officials might have been related to the political reality that, by 1819, most state governments — and, thus, state courts — were being taken over by Republican followers of Thomas Jefferson. By contrast, much of the federal judiciary still remained firmly under the control of Federalists appointed by John Adams.

out federal responsibilities, as the Court has sometimes suggested,<sup>116</sup> then the Court would have to step in to control Congress's susceptibility to delegate such responsibilities to state officials.

In any case, the earliest judicial expressions favoring state autonomy in *Prigg* and *Houston* seem to owe their existence to this hostility toward state officials and to the belief that Congress must be barred from relying on them. State autonomy follows naturally from the nationalistic dual federalism set forth in *Martin*, *McCulloch*, and *Gibbons* — the view that state and federal governments must have rigidly separate jurisdictions, pursuing different purposes with different sets of officials. While it might seem ironic to us that the theory of state autonomy has its origins in fear and loathing of states, such a view is not so distant from the arguments of Publius upon which Justice Scalia relied so heavily in *Printz*.

### 3. *The Demise of Nationalistic Dual Federalism: From Dennison and Day to the Intergovernmental State*

The problem with the theory of nationalistic dual federalism and the doctrine of state autonomy based on it is that the nationalistic premises of the theory were simply untenable. Simply put, advocates of state power destroyed Marshall's and Story's basis for state autonomy because they refused to accept the nationalistic premise that state governments cannot be trusted with federal responsibilities. Starting with Chief Justice Taney's concurring opinion in *Prigg* and ending with the New Deal Court's repudiation of the Marshall Court's nondelegation doctrine, the Court's growing trust of state governments rendered obsolete the theory of state autonomy announced by Justice Story in *Prigg*.

But, while the Court quickly rejected dual federalism, it never replaced Story's analysis with a more persuasive basis for state autonomy. This is not to say that the Court did not embrace the concept of state autonomy. To the contrary, it continued to repeat Story's formula that the national government could not demand that state officials implement federal law. But, unlike Story, the Court has never come up with a logically consistent reason for the rule.

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116. See, e.g., *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 218 (1917) (barring Congress from permitting state officials to apply state workers' compensation law to longshoremen and other maritime workers). *Jensen* demonstrates a deep concern, also reflected in *Martin*, that federal jurisdiction over maritime matters is nondelegable.

The two decisions of *Kentucky v. Dennison*<sup>117</sup> and *Collector v. Day*<sup>118</sup> illustrate both the inadequacy of nationalistic dual federalism as a basis for state autonomy and the Court's inability to replace such a theory with a different analysis. Justice Taney could not rely on the theory of nationalistic dual federalism in *Dennison*; he concurred in *Prigg* expressly to reject Story's argument that state officials could not enforce the Fugitive Slave Clause of Article IV, section 2, contending that Congress had properly "counted upon [state officials'] cordial co-operation" in the enforcement of the 1793 Fugitive Slave Act.<sup>119</sup> As a practical matter, Taney worried that, by excluding state officials from enforcing Article IV, Story's views would effectively cripple slaveowners' ability to recover fugitive slaves.<sup>120</sup> But, quite apart from this immediate practical concern, the Taney Court generally promoted the notion that state governments could exercise concurrent jurisdiction with Congress, most famously in *Cooley v. Board of Wardens*.<sup>121</sup> Story's exclusion of state officials from federal responsibilities may have rankled this commitment to state power.

Thus, Taney had to come up with a new theory of state autonomy, one that did not imply that state officials could not voluntarily carry out federal duties. In *Kentucky v. Dennison*, Taney rewrote *Prigg* to advance such a theory. The issues before the Court were, first, whether the antislavery governor of Ohio had violated federal constitutional or statutory extradition law by refusing to extradite Willis Lago, a man who had helped a slave escape, and, second,

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117. 65 U.S. (24 How.) 66 (1861).

118. 78 U.S. (11 Wall.) 113 (1870).

119. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 631 (1842).

120. In Taney's view, the federal government lacked a sufficient bureaucracy to ensure such recovery, and the states' police powers were insufficient to ensure the recovery of fugitive slaves. See *Prigg*, 41 U.S. (16 Pet.) at 632-33. Story may have intended his theory of state autonomy to impede the recovery of fugitive slaves. This was, at least, the spin that his son later placed upon his father's *Prigg* opinion, arguing that Story's argument actually represented the triumph of freedom, because, by allowing state officials to withdraw from the enforcement of the fugitive slave laws, the doctrine would make recovery of fugitives practically impossible. See Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 249. It remains controversial whether Story actually intended to promote the freedom of fugitive slaves with his opinion. Story later wrote a letter to Senator Berrien from Georgia instructing him on how to draft a new fugitive slave law that would not offend *Prigg*'s anticommandeering principle. See McLELLAN, *supra* note 109, at 262 n.94.

121. 53 U.S. (12 How.) 299, 319 (1851) (upholding a state law requiring ships to hire a local pilot on the ground that such port regulations, while involving "the power to regulate commerce," also involved "the local necessities of navigation").

whether the Court could issue a writ of mandamus to the governor requiring him to extradite the man as Kentucky had requested.<sup>122</sup>

Taney agreed with Kentucky that the governor had violated federal extradition law, but he refused to issue the writ of mandamus, holding that "the Federal Government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it."<sup>123</sup> There was nothing new about this opinion; Taney had expressed the same view in his *Prigg* concurrence.<sup>124</sup> But Taney could not defend this holding by invoking the dual federalism of Story without contradicting his own theory of concurrent jurisdiction laid out in *Prigg*. Thus, Taney's *Dennison* opinion did not mention the classic statement of dual federalism, written by Taney himself three years earlier in *Ableman v. Booth*, that "the powers of the General Government, and the States, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres,"<sup>125</sup> because his own views as expressed in *Prigg* concerning Article IV contradicted every word. In Taney's view, the state and federal governments had concurrent rather than separate and distinct powers to enforce the Article IV Extradition Clause, and they did not act independently and separately but rather with "cordial co-operation."<sup>126</sup> In short, precisely because Taney wished to enhance state powers, dual federalism would be of no use to Taney in making the first systematic defense of state autonomy.

Instead, Taney relied on two new arguments to support the right of state officials to decline federal commands. These assertions would, in both their vagueness and unpersuasiveness, later become typical of state autonomy jurisprudence. First, Taney argued that there was no "clause or provision in the Constitution which arms the Government of the United States with th[e] power [to issue commands to state officials]."<sup>127</sup> Second, Taney argued that, if Congress could impose duties on state officers, then "it might overload

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122. See *Dennison*, 65 U.S. (24 How.) at 97-99; 5 C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-1864, at 686-87 (1974).

123. *Dennison*, 65 U.S. (24 How.) at 107.

124. See *Prigg*, 41 U.S. (16 Pet.) at 630 (Taney, J., concurring) ("[S]tate officers . . . are not bound to execute the duties imposed upon them by Congress, unless they choose to do so or are required to do so by a law of the state.").

125. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1858). Edward Corwin credits Taney with providing the first clear statement of dual federalism in this passage. See EDWARD CORWIN, TOTAL WAR AND THE CONSTITUTION 173 (1947).

126. See *Prigg*, 41 U.S. (16 Pet.) at 631.

127. *Dennison*, 65 U.S. (24 How.) at 107.

the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State."<sup>128</sup>

These arguments are decidedly underwhelming. While the Constitution does not mention any congressional power to demand services from state officials, an argument could be made that such a power is nonetheless given to Congress implicitly because it is plainly adapted to accomplish a legitimate end of Congress — namely, enforcement of rights under Article IV.<sup>129</sup> As for the burdens that such demands might impose on state officials, Taney provides no reason to distinguish them from the normal burden of preemption of state policies, which might also “disable [an officer] from performing his obligations to the state”<sup>130</sup> simply by making those obligations illegal. Of course, demands for state officers’ services will cost the state government money, but so will preemption of state taxes by congressionally conferred tax immunity.<sup>131</sup> In short, having abandoned Story’s theory of dual federalism, Taney could not come up with any alternative theory justifying state autonomy that was minimally persuasive.

*Collector v. Day*<sup>132</sup> differs from *Dennison* in that the *Day* Court had no compunction about relying upon the notion of dual federalism or separate and distinct spheres. Moreover, *Day* correctly expounded the logic of dual federalism as it was expressed in *McCulloch*. The problem with *Day* is that such a theory never reflected intergovernmental reality in the United States — not even at the time *Day* was handed down.

*Day* involved a federal income tax imposed on the income of a state probate judge. The state judge paid the tax under protest and then sought recovery in federal court.<sup>133</sup> In affirming the right of the state judge to refuse to pay the tax, the Court restated *Ableman*’s classic formulation of dual federalism:

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the

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128. *Dennison*, 65 U.S. (24 How.) at 108.

129. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

130. *Dennison*, 65 U.S. (24 How.) at 108.

131. See *McCulloch*, 17 U.S. (4 Wheat.) at 376-77 (argument of Luther Martin, Maryland Attorney General).

132. 78 U.S. (11 Wall.) 113 (1870).

133. See 78 U.S. (11 Wall.) at 113-14.

States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States.<sup>134</sup>

Having invoked the notion of dual federalism, the Court then simply turned the leading precedent of nationalistic dual federalism — *McCulloch v. Maryland* — on its head. "[I]f the means and instrumentalities employed by [the national government] to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States . . . equally exempt from Federal taxation?"<sup>135</sup>

Justice Nelson's conclusion followed neatly from the premises of *McCulloch* and, more generally, from the notion that the federal government ought to be completely independent of the states. By taxing the salary of the probate judge, the national government indirectly was taxing the revenue used to pay that salary, and therefore arguably relying on requisitions against state revenue to fund its operations.<sup>136</sup> Such dependence on the states was not expressly forbidden by *McCulloch*, but it certainly was inconsistent with the theme of national independence that ran throughout the opinion. If the national government was supposed to rely on its resources alone, as Marshall implied, then why should it lay a tax on a salary that was the product of a state legislature's appropriation of state revenue?<sup>137</sup>

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134. 78 U.S. (11 Wall.) at 124.

135. 78 U.S. (11 Wall.) at 127.

136. The conclusion was not necessary, but it was implied by the Court's earlier holding that, by taxing the income of federal officers, the state governments violated the federal government's tax immunity. See *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 135 (1842).

137. Marshall himself had attempted to distinguish federal from state tax immunity by observing that the state governments and people were all represented in Congress, whereas the national government and people were not represented in the legislature of the taxing state. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435-36 (1819). Marshall implied that this difference in representation gave the Court better reason to believe that Congress would not abuse its authority to tax state institutions. Justice Bradley repeated the argument, see *Day*, 78 U.S. (11 Wall.) at 128-29 (Bradley, J., dissenting), but it is notably unpersuasive: even Marshall did not rest on the argument but instead stated that "if the full application of this argument [equating state and federal tax immunity] could be admitted, it might bring into question the right of Congress to tax the State banks, and could not prove the right of the States to tax the Bank of the United States," *McCulloch*, 17 U.S. (4 Wheat.) at 436. The problem with the argument is that, if each state's representation in Congress sufficiently protects it from federal taxation, then it is difficult to see why such representation does not also adequately protect the states from the taxes of sister states. After all, if a state legislature were to tax some federal agency abusively, the other states' congressional delegations could use their power in Congress to bestow express tax immunity on the federal agency, preempt the state tax, and thereby end the abuse. That is, if federalism were adequately protected



The difficulty with *Collector v. Day* was not logical but empirical. *Day's* deductions from the premises of *McCulloch* and *Ableman* was unpersuasive because those premises were unpersuasive. In particular, it had never been the case that the federal and state governments operated in "separate and distinct spheres" pursuing independent and distinct objects with distinct resources. The federal government, for example, had bankrolled state governments from the outset of the republic by assuming state Revolutionary War debt, an action that subsidized state operations until the end of the eighteenth century.<sup>138</sup> The state governments had subsidized federal operations by, for example, subscribing to shares of the national bank, and the national government had subsidized state banks by making them federal depositories after 1836.<sup>139</sup> By 1870, when *Day* was decided, the rudiments of the system of intergovernmental aid had been in place for almost a decade: the Morrill Act, enacted in 1862, had provided the state governments with Western land to subsidize state educational policy.<sup>140</sup>

This is not to say that a full-blown system of intergovernmental relations existed before the twentieth century.<sup>141</sup> But the theory of federalism implied by *McCulloch*, *Martin*, *Gibbons*, *Prigg*, and *Ableman* — the nationalistic notion that the federal government should deeply distrust the states and should not rely on state officials to carry out federal duties — had never really reflected the nation's practice. Indeed, given that the state and national governments governed almost the same population and territory with the same tax base and pursued overlapping regulatory purposes, intergovernmental separation of the sort assumed by *McCulloch* and *Day* was utterly impractical.<sup>142</sup>

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through the national political process, then *a fortiori* nationalism would also be adequately protected through the same political process.

138. See WILLIAM J. SCHULTZE & M.R. CAINE, *THE FINANCIAL DEVELOPMENT OF THE UNITED STATES* 117-18 (1937). For an account of the politics of assumption, see STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM* 146-161 (1993).

139. See DANIEL ELAZAR, *THE AMERICAN PARTNERSHIP* 89-99 (1961).

140. See ARTHUR MACMAHON, *ADMINISTERING FEDERALISM IN A DEMOCRACY* 72 (1972).

141. See Harry Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619, 633-34 (1978) (attacking the Elazar thesis that federal involvement in state projects and intergovernmental relations were common before the Civil War).

142. Even in *Ableman*, where Taney had provided the definitive formulation of dual federalism and intergovernmental separation, the facts of the case suggested intergovernmental dependence: the federal prisoner whose release by a state writ of habeas corpus had been overruled by *Ableman* in the name of federal supremacy and independence had been confined by the federal district judge in a county jail because there was no federal jail in Wisconsin. See 5 SWISHER, *supra* note 122, at 661-62.

By 1883, the Court acknowledged that the national government could delegate at least some regulatory responsibilities to state officials. In *United States v. Jones*,<sup>143</sup> the Court held that Congress could delegate to a state board the responsibility for determining the amount of compensation owed by the federal government to landowners who suffered flooding from federal government-owned dams. The Court did not formally reject Story's nondelegation doctrine; to the contrary, the Court formally declared that the national government's "power of appropriating private property . . . cannot be transferred to a State any more than its other sovereign attributes."<sup>144</sup> The Court could hardly deny, however, that Congress repeatedly had delegated administrative duties to state courts and officials since the founding. So the Court instead reconciled the practical reality of intergovernmental relations with the formal nondelegation doctrine by stipulating without explanation that the power to ascertain compensation owed was not a "sovereign" function and, therefore, could be delegated to a state's administrative agency.<sup>145</sup>

Even this formalistic acknowledgment of Story's nondelegation theory was soon exploded completely by the development of cooperative federalism during and after the New Deal. There is no need to rehash the broad range of federal programs that are administered by state officials in areas ranging from environmental protection and worker safety to unemployment insurance and historic preservation. In light of this reality, described in section II.A of this article, the Court has thoroughly repudiated the notion that the federal government should not rely on state officials to carry out federal responsibilities. In *Prudential Insurance Co. v. Benjamin*,<sup>146</sup> for example, the Court held that Congress could authorize state governments to regulate interstate commerce in insurance, even though such regulation would not fall within the states' police power absent such authorization. In upholding this delegation of federal responsibilities to the state governments, the Court emphat-

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143. 109 U.S. 513 (1883).

144. 109 U.S. at 518-19.

145. See 109 U.S. at 518-19. The Court's distinction between "sovereign" — and therefore nondelegable — functions and nonsovereign functions is analogous to the distinction drawn by Story between attempts by Congress to bestow federal jurisdiction on state courts — which, Story suggests, is prohibited — and the state court's independent power to hear federal claims pursuant to their preexisting jurisdiction conferred by state law, which is generally permitted. As Paul Bator has noted, Story's distinction seems "theological." See Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *IND. L.J.* 233, 240-43 (1990). The *Jones* Court's distinction seems equally cryptic.

146. 328 U.S. 408 (1946).

ically rejected Justice Story's notion that state officers should not exercise federal responsibilities, stating that Congress has "broad authority" to regulate interstate commerce "in conjunction with coordinated action by the states."<sup>147</sup>

How does the untenability of nationalistic dual federalism bear on the doctrine of state autonomy? Recall that state autonomy doctrine first arose in the form of a nondelegation doctrine. Its earliest coherent justification seems to be Justice Story's suggestion that the federal government could not demand services from the state governments because the national government instead should rely on its own officials to carry out federal law.

The problem with the modern doctrine of state autonomy is that, while the premises of such nationalistic dual federalism generally have been rejected by the Court in other doctrinal areas and completely rejected by national political practice, the doctrine of state autonomy has never really weaned itself from these origins. Some of the precedents, like *Collector v. Day*, seem to rely on the notion that the federal and state governments somehow operate in separate and distinct spheres. Others, like *Dennison* and its lineal descendant *National League of Cities v. Usery*,<sup>148</sup> instead nebulously assert without much in the way of explanation that, by demanding services of state governments, the federal government somehow endangers the "sovereignty" or existence of state governments more than when it preempts state law. But no "state autonomy" decision provides a convincing reason for why commandeering is worse than preemption except by invoking the theory of nationalistic dual federalism, a theory that seems inconsistent with well-known facts of intergovernmental relations.

*Printz* and *New York* are no exceptions. Both opinions rely heavily on the Federalists' objections to requisitions. But, as explained in section I.B.1, this history suggests more a nationalist hostility towards state governments than a high regard for state autonomy. Both *New York* and *Printz* also invoke the notion that federal mandates threaten political accountability. But, as noted in section I.A, these objections would seem to apply just as well to voluntary intergovernmental cooperation, because such "political

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147. 328 U.S. at 434. The Court reinforced this holding 12 years later in *United States v. Sharpnack*, 355 U.S. 286 (1958), when it held that Congress prospectively could adopt whatever criminal laws a state legislature might choose to enact in the future as the criminal code governing federal enclaves.

148. 426 U.S. 833 (1976).

accountability" arguments imply that federal and state programs ought to be separate and distinct.

Finally, *Printz* adds a new rationale that suggests a complete return to the nondelegation doctrine first proposed by Justice Story. According to Justice Scalia, by demanding that nonfederal governments administer federal programs, Congress undermines "the separation and equilibration of powers between the three branches of the Federal Government itself."<sup>149</sup> According to Scalia, when Congress requires state officials to enforce federal laws, Congress thereby reduces the power of the President to control the execution of the laws.

But, as Justice Stevens notes, such a defense of Presidential power would seem to indict *all* forms of cooperative federalism, including programs rooted in state acceptance of federal grants or state submission of implementation plans to avoid federal preemption.<sup>150</sup> After all, every such program of cooperative federalism deprives the President of the power to execute the laws just as much as congressional "commandeering" of state governments. Justice Scalia's only response to this argument is to suggest that it is difficult for Congress to induce nonfederal governments to implement federal law with conditional grants or conditional preemption.<sup>151</sup> This, however, is a *non sequitur*: it confuses likelihood of success with constitutionality of result. Maybe conditional grants are less likely to succeed in depriving the president of his Article II powers. Nevertheless, when they *do* succeed, Scalia's logic would suggest that they deprive the president of his powers to control the execution of the laws and, therefore, should be invalidated. Justice Scalia's Article II argument is, in short, a revival of Justice Story's argument against delegation of federal powers to state officials. As Justice Story realized, such an argument works just as well against voluntary state implementation of federal law as against involuntary implementation.

## II. WHY COMMANDEERING IS UNNECESSARY: AN ECONOMIC ANALYSIS OF INTERGOVERNMENTAL TRANSACTIONS

The justifications for state autonomy, as they exist in judicial precedent, are deeply unsatisfying. Does this mean that the doctrine itself is misguided? As I argue in the next three Parts, the

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149. See *Printz v. United States*, 117 S. Ct. 2365, 2378 (1997).

150. See 117 S. Ct. at 2396-97 (Stevens, J., dissenting).

151. See 117 S. Ct. at 2378 n.12.

doctrine can be defended on grounds of policy: it serves extremely useful functions. Recall the basic nature of the *New York* entitlement. The entitlement allows nonfederal governments to refuse to implement national law even when the national government fully funds the mandate. Therefore, as noted above, *New York* protects nonfederal governments' control over their regulatory machinery — their administrative agencies, legislative bodies, and other officers — with a "property rule," an absolute power to "hold out" for the highest price that the national government is willing to offer.

Why might it be worthwhile to give nonfederal governments this entitlement? Part II starts from the premise that federalism is a useful structural arrangement.<sup>152</sup> The challenge of constitutional law, therefore, is not deciding *whether* to protect federalism, but rather deciding *how* to do so at an acceptably low cost, without encroaching on other important values like a free national market or protection of important national rights.<sup>153</sup> Unlike previous doctrines designed to protect state power, the doctrine of state autonomy in *New York* and *Printz* is useful because it *costlessly* promotes federalism by distributing power to nonfederal governments without impeding any useful national programs.

Section II.A demonstrates that the *New York* entitlement provides nonfederal governments with significant power in a federal system, contrary to the widespread academic belief<sup>154</sup> that *New York* and *Printz* are merely formalistic hurdles that provide nonfederal governments with little useful power. This section describes the process by which nonfederal governments can use the *New York* entitlement to extract revenue and policymaking discretion from the federal government when bargaining over a potential agreement for nonfederal implementation of federal policy.

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152. For reasons too familiar to bear repetition here, federalism is widely recognized to be a useful structural arrangement. For a concise summary of arguments in favor of federal regimes, see Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-511 (1987). McConnell notes, among other things, that, by devolving power to territorially circumscribed states responsive to a local electorate, federal regimes allow groups smaller than a national majority to satisfy their preferences for public goods, multiply opportunities for political participation, and diffuse power in a way to promote electoral competition. See *id.* at 1493-94. This catalogue now makes a regular appearance in U.S. Supreme Court opinions. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). For more lengthy and detailed arguments on behalf of federalism, see DANIEL J. ELAZAR, *EXPLORING FEDERALISM* (1987); VINCENT OSTROM, *THE MEANING OF AMERICAN FEDERALISM: CONSTITUTING A SELF-GOVERNING SOCIETY* 223-48 (1991); ALICE M. RIVLIN, *REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES, & THE FEDERAL GOVERNMENT* (1992).

153. See *Kramer*, *supra* note 43, at 1511.

154. For an example of such an attitude, see Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1652 (1994) (stating that *New York* does not significantly affect the power of Congress or the states).

Section II.B argues that this grant of power to state and local governments is essentially costless, because the national government easily can use its spending power to reclaim the power granted to nonfederal governments: the federal government can purchase such services whenever it is cost-justified for nonfederal governments to assist the national government. As section II.B explains, intergovernmental bargains are not likely to be plagued by transaction costs such as “holdout” problems or other sorts of strategic behavior that would prevent such intergovernmental transactions.

The ease with which the national government can purchase the entitlement protected by *New York* and *Printz* distinguishes those cases from past judicial efforts to protect federalism — for example, the doctrine of *United States v. E.C. Knight Co.*<sup>155</sup> holding that state governments have exclusive powers to regulate manufacturing. Whatever the value of those past doctrines to the promotion of federalism, such doctrines seriously impeded important interests in national supremacy that simply could not be vindicated through voluntary intergovernmental transactions. By contrast, the national government has no need to commandeer state or local governments’ regulatory processes, because Congress easily can purchase those processes through its spending powers supplemented with its power of conditional preemption. Commandeering of nonfederal governments’ regulatory power, therefore, is *pointless* centralization; it sacrifices an important protection of federalism for no useful purpose.

In this respect, *New York* is similar to any rule forbidding pointless confiscation or condemnation of private property.<sup>156</sup> One argument for (sometimes) protecting private owners’ control of assets with a “property rule” — an injunction rather than an entitlement to just compensation — is that transaction costs are sometimes so low that the government can purchase private assets through voluntary exchange rather than through forced sales.<sup>157</sup> The government simply does not need eminent domain or the power of confiscation

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155. 156 U.S. 1 (1895).

156. One such rule is the doctrine — still sometimes enforced by state courts — that governments may not condemn private property without a “public purpose.” For a rare example of a court actually imposing such a limit on government’s eminent domain power, see *City of Lansing v. Edward Rose Realty, Inc.*, 502 N.W.2d 638 (Mich. 1993), where the court struck down a city’s condemnation of an easement for a cable on the grounds that the condemnation lacked “public purpose.”

157. See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

to obtain computers, pencils, squad cars, or any other items for which there is a competitive market; if it wants them, then it can simply buy them like anyone else. We expect government to do so, because, *ceteris paribus*, we wish to promote private autonomy, and this method of promoting private autonomy is essentially costless.

Likewise, Part II argues that, if the federal government wants state or local governments' regulatory services, then they should buy them through voluntary sales. The federal government has no more need to commandeer state regulatory processes than it has a need to confiscate office supplies or conscript janitors. If one accepts even a weak presumption in favor of federal regimes and their implication of state power, then *New York* and *Printz* make eminent functional sense.

#### A. *An Overview of Cooperative Federalism: Why State Autonomy Is Valuable to State and Local Governments*

In understanding how *New York* provides a valuable entitlement to state and local governments, the essential point to remember is that *New York* does not merely give the states something to use but, just as important, something to *sell*. The value of the *New York* entitlement, in other words, must be measured not simply by what the states can *do* with it but also by what they can *get* for it.

How can the states sell their *New York* entitlement? Such sales occur routinely in the broad category of legislation first described by Morton Grodzins as "marble-cake federalism."<sup>158</sup> In all such legislation, Congress purchases the use of state regulatory machinery to implement federal law. The two mechanisms by which such purchases occur are described in *New York* itself — conditional grants and conditional preemption.

##### 1. *The System of Conditional Grants*

Barrels of ink have been spilled describing the multitude of conditional grant systems, their probable effect on state behavior, the nature and need for federal oversight, and the character of the federal "strings."<sup>159</sup> The following brief summary, however, suffices to

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158. See MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 8 (Daniel J. Elazar ed., 1966).

159. See, e.g., James L. Barr & Otto A. Davis, *An Elementary Political and Economic Theory of the Expenditures of Local Governments*, 33 S. ECON. J. 149 (1966); Edward M. Gramlich, *Alternative Federal Policies for Stimulating State and Local Expenditures: A Comparison of Their Effects*, 21 NATL. TAX J. 119 (1968); E.M. Gramlich, *The Effects of Federal Grants on State-Local Expenditures: A Review of the Econometric Literature*, in PROCEEDINGS OF THE 62D ANNUAL CONFERENCE ON TAXATION 569 (1969).

explain how states sell their *New York* immunity by accepting conditional grants.

Conditional grants are exercises of Congress's spending power as it has been understood since *Steward Machine Co. v. Davis*.<sup>160</sup> Congress provides funds to the states on the condition that the state spend the funds in accordance with federal priorities. As a general matter, such conditional grants involve a two-step process. The first step concerns the original design of the grant: Congress enacts legislation defining the purposes of the grant, establishing the criteria for getting the money, any matching requirements, and so on. During this stage, nonfederal government entities<sup>161</sup> and their various intergovernmental lobbying organizations may press for federal money with little or no conditions on how the funds are spent. State and local governments accomplish this end by asking for either (1) (relatively) unconditional grants — for example, so-called block grants and general revenue sharing — or (2) grants with conditions that, as a practical matter, are already consistent with the states' own spending priorities — for example, so-called "developmental programs" that promote the states' economic welfare and do not redistribute wealth.<sup>162</sup> Against such state and local lobbying efforts, various organizations — sometimes private nonprofit groups such as the NAACP, the Lawyers Committee for Civil Rights, and the Children's Defense Fund,<sup>163</sup> but sometimes rival state and local government agencies<sup>164</sup> — urge more careful restric-

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160. 301 U.S. 548, 590-91 (1937). The widespread use of such grants actually precedes the New Deal. See, e.g., *Frothingham v. Mellon*, 262 U.S. 447 (1923); WALKER, *supra* note 2, at 76-91.

161. It is important to avoid treating the state governments as unitary "black boxes" by assuming that the grants provided by the federal government to nonfederal levels of government benefit the "states" without distinguishing between the subdivisions of the states — school districts, municipalities, counties, and so on — or branches of the state government — for example, the governors' office, state departments of transportation, and state legislatures — to which such funds might actually be directed. Of course, at least since the New Deal and perhaps as long ago as the early 19th century, the Federal Government also has provided assistance directly to local governments within the states, often against the wishes of the state governments that are, at least nominally, the creators of the localities receiving the funds. Congress also might provide funds to the "state" that are spent by the governor without being appropriated by the legislature. These *intragovernmental* controversies are an important part of the intergovernmental lobbying process and are discussed *infra* section II.B.

162. For a general theoretical account of the differences between categorical and block grants, see PETERSON, *supra* note 32, at 23-37. For an argument that the practical distinction between categorical and block grants can be largely illusory, see PETERSON ET AL., *supra* note 2, at 22-23.

163. For a description of such lobbying by private interest groups, see PETERSON ET AL., *supra* note 2, at 137-38.

164. For descriptions of specific instances in which one level or department of state government struggled against another for control over federal funds, see CONLAN, *supra* note 2, at 37-38 (describing the efforts of state departments of transportation to prevent the Nixon



tions to prevent states from diverting federal funds to nonfederal purposes.

In response to such pressures, Congress may impose various substantive conditions on both the federal grant money and preexisting state funds<sup>165</sup> to ensure the federal grant is spent for specified classes of beneficiaries or specified federal purposes. Congress may also demand that state agencies responsible for spending the federal revenue comply with various structural or procedural requirements such as "public participation" requirements,<sup>166</sup> "single agency" requirements,<sup>167</sup> and merit selection of state personnel.<sup>168</sup>

In the second stage, *individual* states decide whether to accept the conditions and apply for the funds. This second stage provides a second opportunity for one-on-one bargaining between state and

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administration from creating a transportation block grant program that would effectively transfer power over federal funds from departments to state governors); DONALD H. HAIDER, *WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING* 98-113 (1974) (describing the rivalry between governors and mayors for control of federal funds).

165. Congress may, for example, impose a "nonsupplanting" or "maintenance of effort" condition on federal funds, requiring state governments to provide assurances that funds provided to the State will be used only to supplement, and not to supplant, the amount of federal, state, and local funds otherwise expended for the federal purpose in the State. *See, e.g.*, 42 U.S.C. § 1396a(C) (1988) (enacting a "maintenance of effort" provision for the Medicare Catastrophic Coverage Act of 1988). Such requirements bar states from reducing preexisting state spending on programs that serve purposes similar to programs funded by the federal grant in order to ensure that federal dollars are not effectively converted from federal to state purposes. *See* HAIDER, *supra* note 164, at 79.

166. For examples of public participation requirements, *see* JOHN C. DONOVAN, *THE POLITICS OF POVERTY* 35 (2d ed. 1973); SAR A. LEVITAN, *THE GREAT SOCIETY'S POOR LAW: A NEW APPROACH TO POVERTY* 63-64 (1969). For more recent provisions requiring that state law allow consumers of federally funded services to participate in decisionmaking regarding such services, *see* the Individuals with Disabilities Education Act, 20 U.S.C. § 1412(7) (1994) (requiring that states assure that the school district consult with parents of children with disabilities concerning the student's individual education plan); *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990).

167. "Single agency" requirements essentially force state governments to delegate responsibility for administering a federally funded program to a single state agency that specializes in the program. Such requirements tend to strengthen the position of unelected state civil servants who specialize in the particular federally funded service. *See, e.g.*, Charles L. Schultze, *Federal Spending: Past, Present, and Future*, in *SETTING NATIONAL PRIORITIES: THE NEXT TEN YEARS* 323 (Henry Owen & Charles L. Schultze eds., 1976). Such ostensibly state bureaucracies can have a greater degree of loyalty to federal program goals than elected state officials. *See* HAROLD SEIDMAN, *POLITICS, POSITION, AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION* 174-190 (3d ed. 1980). Not surprisingly, state elected officials dislike the intrusion on their discretion. Governor Mark Hatfield, for example, fought unsuccessfully against the Department of Health, Education, and Welfare in 1961 to avoid the "single agency" requirement. *See* HAIDER, *supra* note 164, at 128.

168. *See, e.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. § 667(c)(4) (1986). For implementing regulations, *see* 29 C.F.R. § 1902.3(g), (h) (1989) (requiring state programs to hire "qualified personnel").

local officials and the national government.<sup>169</sup> Even if the grant system consists of "formula grants" with specifically defined criteria for eligibility,<sup>170</sup> the states and localities can bargain with the national government over how stringently the national government will enforce the conditions ostensibly attached to the national funds. State and local officials may induce individual members of Congress to pressure federal agencies to relax their oversight of state and local expenditures of nonsource revenue.<sup>171</sup> If the program consists of "project" or other nonformula grants based on general criteria providing federal administrators with significant discretion to deny or approve applications for federal money, then an even greater opportunity for intergovernmental lobbying exists. At this stage of the process, states and localities lobby federal administrators for funds through various degrees of "grantsmanship." Again, members of Congress predictably intervene in the application process on behalf of state and local officials from their constituencies.

Conditional grants-in-aid, therefore, resemble fee-for-service contracts under which the national government provides nonsource revenue resembling "fees" in return for state-provided services. Assuming that the state and local governments possess the *New York* entitlement, each nonfederal government can independently decide whether to proffer the requested services for the tendered "price." In this sense, conditional grants-in-aid do not differ in kind from other methods by which the national government purchases goods and services from private persons. By accepting the money, the public or private contractor signals that the costs of performing the service are less than the revenue provided by the grant.

Before I discuss conditional preemption, the second method by which the national government obtains state and local governmen-

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169. See ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 22-23 (1993) (distinguishing between intergovernmental relations based on "all-on-one," in which all regions lobby for more autonomy against the central government, versus "one-on-one," in which a single region seeks greater autonomy from the central government, and finding that the former was more effective than the latter).

170. In this category, one can place various tax expenditures that benefit the states. For example, the federal tax code allows taxpayers to deduct state and local property and income taxes to reduce their adjusted gross income on the federal tax returns. See WRIGHT, *supra* note 1, at 143. By reducing residents' federal tax liability in proportion to their state and local tax liability, these deductions reduce residents' opposition to state and local taxation. There is, however, great uncertainty about how much such deductions actually increase state and local revenues. See 1 OFFICE OF STATE AND LOCAL FIN., U.S. DEPT. OF THE TREASURY, *FEDERAL-STATE-LOCAL FISCAL RELATIONS: TECHNICAL PAPERS* 313-552 (1986).

171. See, e.g., John E. Chubb, *The Political Economy of Federalism*, 79 AM. POL. SCI. REV. 994, 1008-11 (1985).

tal services, I must digress and analyze one objection to the analogy between conditional grants-in-aid and other contracts. According to one line of reasoning, every offer made by Congress is an offer that the states cannot refuse. If Congress offers a grant-in-aid earmarked for particular purposes and with matching conditions, then the states will be compelled, as a matter of practical political necessity, to accept the money — for which the state's residents are already paying federal taxes — and accept Congress's conditions that follow the grant.<sup>172</sup>

What justifies this dim view of states' ability to decline federal money? The intuitive reason seems to be that state governments rarely *do* decline federal grants, even when the conditions attached to the funds seem onerous. But this is hardly compelling evidence that the conditions attached to grants are coercive; state and local willingness to sell services might mean only that Congress has made a correct estimate of the nonfederal governments' opportunity costs of providing the requested services. After all, Congress designs the grant package with input from nonfederal governments and their organizations, such as the National League of Cities and the National Governors' Association. Therefore, it should not be surprising that, when Congress actually offers the grant, nonfederal governments accept it. One might as well argue that one coerces storeowners by buying their products because, when one presents the requested price for a product, the sales clerk invariably hands over the product.<sup>173</sup>

Indeed, the evidence suggests that, when state governments face special opportunity costs in complying with the conditions attached to federal grants, they *are* willing to forgo the federal funds. So, for example, Arizona initially opted out of the Medicaid system by declining funds available under the Social Security Act on the ground

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172. See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1935-39 (1995); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1989 SUP. CT. REV. 85, 100-01; William Van Alstyne, "Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law, 16 HARV. J.L. & PUB. POLY. 303 *passim* (1993).

173. As Martha Derthick notes, "the acceptance of grants would not be so prompt and widespread if the conditions accompanying them were very costly and were known to be strictly enforced." MARTHA DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS* 196 (1970). This is not to say that all nonfederal governments benefit equally from such grants. To the contrary, any nonfederal governments that already provide the federally requested service to their constituents will receive the grant and incur zero opportunity costs; such governments will obtain pure rents from the grant. Indeed, one would expect governments that provide services to their constituents to urge the national government to provide grants to cover the cost of the service simply as a way of getting a cross-subsidy for the service from taxpayers residing in other states. Such rent-seeking behavior is not commendable, but it is hard to see why it is "coercive" in any meaningful sense of the word.

that the burden of providing services for its Native American population exceeded the value of the grant.<sup>174</sup> Likewise, more than half of all states have declined funds available under the Occupational Safety and Health Act of 1970,<sup>175</sup> despite the fact that such funds cover ninety percent of the cost of devising the state OSHA implementation plan and fifty percent of the cost of the actual implementation.<sup>176</sup> Moreover, Congress is acutely conscious of the danger that nonfederal governments may decline federal funds in order to avoid what they regard as onerous conditions. For example, in congressional hearings concerning regulatory barriers to affordable housing, both witnesses and members of Congress have expressed skepticism that threats to withdraw federal funds provided by the Department of Housing and Urban Development would induce suburban communities to discontinue exclusionary zoning practices.<sup>177</sup> Such skepticism might be justified: communities have been known to decline federal funds as a way of escaping obligations to provide access or services to nonresidents.<sup>178</sup>

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174. See *Hearings Before ACIR on Intergovernmental Problems in Medicaid* 26 (San Francisco, Sept. 16, 1968) (statement of Charles H. Shreve, Director, Region IX, U.S. Dept. of Health, Education, and Welfare); *Arizona State Medicaid Chart*, 3 Medicare & Medicaid Guide (CCH) ¶ 15,554 (1997); *Introduction to Medicaid*, 3 Medicare & Medicaid Guide (CCH) ¶ 14,010 (1996). The Colorado legislature threatened to follow Arizona's example in 1992 when it voted to withdraw from the Medicaid system in response to the cost of federal conditions on Medicaid money. Only a veto by Governor Romer prevented such withdrawal. See Eric Anderson, *Quayle Opposes Bird Medicaid Plan: Proposal to Opt Out of System Called Unwise*, DENV. POST, Feb. 20, 1992, at 5B.

175. See *State Activity*, 1 Empl. Safety & Health Guide (CCH) ¶¶ 5300-5840 (1996).

176. See 29 U.S.C. § 672(f)-(g) (1985); 29 C.F.R. §§ 1950-51 (1994).

177. Economist William Fischel testified that "[t]he reward system of giving extra money to communities who will take low-income housing is simply apt to be ignored by the suburban communities that are the most restrictive. These communities are simply apt to ignore the Federal program entirely." *Joint Hearing Before the Subcomm. on Policy Research and Insurance and the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance, and Urban Affairs*, 101st Cong. 27 (1990) (statement of William Fischel, Professor of Economics, Dartmouth College). Testifying the same day, economist Susan Wachter also doubted "that there is very much room for incentives, especially from HUD alone," but she suggested that conditions on funds "from other Federal sources" might induce states to prevent exclusionary practices. *Id.* at 28 (statement of Susan Wachter, Associate Professor of Finance, University of Pennsylvania).

The Advisory Commission on Regulatory Barriers to Affordable Housing recommended that the federal government discourage such barriers by requiring states to take steps to remove the barriers as a condition of enjoying the tax exemption on the interest of mortgage revenue bonds for single-family home ownership and the tax credit for interest on Industrial development bonds issued to build multifamily housing under the Low Income Housing Tax Credit program. See ADVISORY COMM. ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACK YARD": REMOVING REGULATORY BARRIERS TO AFFORDABLE HOUSING, 6-4, 7-1 to 7-11 (1991).

178. See, e.g., MICHAEL J. RICH, *FEDERAL POLICYMAKING AND THE POOR: NATIONAL GOALS, LOCAL CHOICES, AND DISTRIBUTIONAL OUTCOMES* 233-34 (1993) (describing the refusal of suburban communities to apply for community block grant funds in order to avoid an obligation to accept low-income housing); ROBERT D. THOMAS & RICHARD W. MURRAY,

Such anecdotes do not, of course, establish that the federal government ought to be permitted to place onerous conditions on federal funds. They suggest, however, that overblown statements about the "coerciveness" of federal grant conditions require a more careful analysis of what is meant by "coercion." There does not seem to be any *a priori* reason to believe that state and local governments are any more coerced by such conditions than any other federal contractor who is required to provide services in return for payment of federal monies.

Some commentators have made the more theoretically elaborate argument that Congress somehow has monopoly power over the tax base of the United States.<sup>179</sup> According to this view, the federal taxes from which federal grants-in-aid are derived occupy the "tax space" available to the states. As federal taxes increasingly burden each state's residents, such residents are increasingly unwilling to pay additional state taxes, and the state legislatures find it politically prudent to avoid reliance on own-source revenues. Instead, the states become more dependent on federal revenues to replace their shrinking tax bases. In effect, the federal government siphons off the state legislatures' revenue sources through federal taxes and converts state tax revenue into federal grant revenue, forcing the states to rely on the latter rather than the former.

The difficulty with this theory is that it is hard in practice to see how the federal government has any monopoly over tax revenue. State and local governments also have taxing powers and used them with surprising effectiveness to replace federal grants-in-aid eliminated by the Reagan administration.<sup>180</sup> To be sure, the federal gov-

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PROGROWTH POLITICS: CHANGE AND GOVERNANCE IN HOUSTON 284-88 (1991) (describing the adamant refusal of Houston to apply for federal funds available for urban renewal or subsidized housing prior to the late 1960s); James Bennet, *Keeping Its Shores to Itself: Greenwich Eschews Federal Aid to Repair Recreational Sites*, N.Y. TIMES, Jan. 8, 1993, at B1 (describing Greenwich, Connecticut's refusal to apply for federal disaster relief to repair beaches damaged by a hurricane for fear that conditions on federal money would require giving the general public access to the beach).

179. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 150-57 (1993); Baker, *supra* note 172, at 1935-39.

180. See Richard P. Nathan & John R. Lago, *Intergovernmental Fiscal Roles and Relations*, 509 ANNALS AM. ACAD. ASSN. POL. SOC. SCI. 36 (1990). State revenue-raising devices are not limited to taxes. States also make heavy use of user fees, impact fees, special assessments, and other benefits charges, as well as financing devices like revenue bonds and special assessment bonds that are linked to such charges. See WRIGHT, *supra* note 1, at 130-32. By contrast, the federal government makes much more limited use of these devices. See Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795, 797 (1987). For a description of five significant federal systems under which taxes linked to infrastructure are dedicated to the infrastructure, see APOGEE RESEARCH, INC., *FEDERAL TRUST FUNDS: OPTIONS TO USE THE CASH* (report prepared for the National Council on Public Works Improvement, Sept. 28, 1987).

ernment has some taxation advantages: federal taxes, for instance, respond more elastically — meaning, more immediately — to increases in wealth than state taxes.<sup>181</sup> Against this federal advantage, however, one must consider that state taxes seem to be relatively more popular than federal taxes; according to the American Council of Intergovernmental Relations's surveys of public opinion, state sales and income taxes consistently are ranked more fair by the public than the federal income tax.<sup>182</sup>

By contrast, the federal government, burdened by deficits and public impatience with additional federal taxes, has discovered since at least the 1980s that it is hardly the financial juggernaut some have suggested. Far from having a monopoly on any revenue source, it cannot offer unlimited bribes to nonfederal governments in return for unlimited cooperation.<sup>183</sup> While it is true that federal taxes make it more politically risky for state legislatures to impose additional state taxes upon their constituents, the converse is also true; state taxes "crowd out" federal taxes by occupying tax space that Congress could otherwise occupy. Whether the voters will smite Congress or the state legislatures first for their temerity in raising revenue will depend on numerous considerations concerning the relative visibility of the taxes, the relative popularity of the programs financed by the taxes, the general standing of the governments imposing the taxes, and so on. All of these are complex empirical questions about which only one fact is certain: the evidence does not support the conclusion that the states are so dependent on federal revenue that they cannot just say "no" to federal grants.<sup>184</sup>

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181. See Steven D. Gold, *The Federal Role in State Fiscal Stress*, 22 *PUBLICUS*, Summer 1992, at 42-46 (explaining the concept of tax elasticity).

182. See ACIR, *CHANGING PUBLIC ATTITUDES ON GOVERNMENTS AND TAXES* at S-15 (1986); WRIGHT, *supra* note 1, at 136-37.

183. See PETERSON, *supra* note 32, at 175-83 (describing the demise of President Clinton's public investment programs in the face of congressional skepticism about further federal developmental spending). As the national government, led by Ronald Reagan, reduced or eliminated federal grants-in-aid, state and local governments redirected their attention away from Washington, D.C., which suggests that the national government's influence over the nonfederal governments was also being diminished. See DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 252 (3d ed. 1984); RICHARD NATHAN ET AL., *REAGAN AND THE STATES* 14-17 (1987); WRIGHT, *supra* note 1, at 99.

184. The more realistic argument for the position that conditional grants-in-aid are "coercive" stems from the congressional practice of imposing new "cross-cutting" conditions on "old" grant money. This practice began during the New Deal but became even more prevalent during the 1960s under President Johnson's promotion of "creative federalism." The practice reached its height, ironically, during the Reagan and Bush administrations, despite Reagan's early commitment to a program of New Federalism. Such new conditions come in at least two varieties. First, Congress may impose so-called "cross-over" conditions on grant money by enacting new legislation that would withdraw future funds provided under some

## 2. *The System of Conditional Preemption*

Aside from the use of conditional grants, Congress can also "hire" the states to carry out federal programs through the use of conditional preemption. Under this system, Congress enacts a general regulatory scheme, delegating implementation to the states on the condition that the states submit an acceptable implementation plan to the federal government.

As with conditional grants, conditional preemption occurs in two stages. In the first stage, Congress creates the general federal regulatory scheme, responding to, among other interests, the inter-governmental lobbying organizations. So, for example, the national government may enact a statute providing that, unless the state governments submit an acceptable plan for reducing airborne pollutants, the administrator of the Environmental Protection Agency will promulgate and enforce a purely federal plan that will preempt any inconsistent state law. Again, during the legislative process, states and localities may lobby to insert clauses preserving state common law from preemption, limiting the ability of federal agencies to turn down state implementation plans, or delaying the time by which the states must achieve compliance. Such systems of conditional preemption frequently are accompanied by federal grants to cover the costs of state implementation of federal law,<sup>185</sup> and state governments may lobby to ensure that the percentage of support provided by the federal government is as high as possible.

There is an opportunity for a second stage of intergovernmental lobbying that depends on the specificity of the federal acceptance conditions. Conditions that lodge considerable discretion in the hands of federal administrators in evaluating state implementation

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specific preexisting grant program — for example, highway funds — if the states did not enact some new federally mandated regulation — for example, regulations concerning the drinking age. Second, Congress may enact more global "cross-cutting" conditions on *all* federal aid, requiring, for example, that the state facilitate public participation for *all* federally funded programs. See U.S. ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, FEDERALLY INDUCED COSTS AFFECTING STATE AND LOCAL GOVERNMENTS, M-193, at 21-22 (1994).

To the extent that such "cross-cutting" and "cross-over" conditions impose unanticipated obligations on state and local governments, one *perhaps* can argue that the Congress coerces the states with such conditions. Under this "bait-and-switch" model of coercion, Congress first "addicts" the states to federal money by getting the state to commit some of its own resources to some program that is partially funded by federal dollars and that has few costly conditions attached to the federal money. After the state has committed the matching funds and becomes politically incapable of discontinuing the program, Congress then adds new conditions, that, if apparent from the outset, would have deterred the states from accepting the funds in the first place. So put, the argument is analogous to equitable estoppel.

185. See, e.g., Occupational Safety and Health Act of 1970, 29 U.S.C. § 672(f)-(g) (1986); 29 C.F.R. §§ 1950-51 (1994); Clean Air Act, 42 U.S.C. §§ 7405, 7544 (1995).

plans<sup>186</sup> give states another opportunity to “lobby” the federal government by submitting its implementation plan for approval. At this stage, each state can work out individually tailored enforcement “deals” with the agency within whatever parameters have been set by Congress — sometimes with the aid of their congressional delegation.<sup>187</sup> Of course, individual states can always refuse to submit any plan — and they do, when the combination of discretion and federal funds provided for implementation is insufficient.<sup>188</sup> To summarize, programs for conditional preemption resemble programs for project grants; rather than presenting every state with the same package of conditions and benefits, Congress establishes a set of criteria that each state might be able to meet in a different manner by individually applying to a Federal agency for approval of its implementation plan.

If conditional grants-in-aid can be analogized to fee-for-service contracts, conditional preemption can be analogized to the various conditional duties that the federal government frequently imposes on private enterprises. So, for example, when the national government requires private employers to pay a minimum wage,<sup>189</sup> take precautions to protect consumer safety,<sup>190</sup> finance unemployment insurance,<sup>191</sup> give notice to workers about pending layoffs,<sup>192</sup> or bargain in good faith with employees organized in a certified bargaining unit,<sup>193</sup> the national government effectively “preempts” business activities that are not consistent with national standards. Likewise, when the national government conditionally preempts

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186. See, e.g., John C. Gray, Jr. & Jane Greengold Stevens, *The Law and Politics of the Enforcement of Federal Standards for the Administration of Unemployment Insurance Hearings*, 29 U. MICH. J.L. REFORM 509, 512-16 (1995) (discussing political constraints on the strict enforcement of unemployment insurance standards). The Environmental Protection Agency's implementation of the Clean Air Act is a salient example of an administrative agency taking advantage of such discretion. See Gary Lee, *Compromising on Clean Air Act: Under Republican Pressure, EPA Reduces Enforcement Efforts*, WASH. POST, Feb. 21, 1996, at A1 (quoting Administrator Browner's statement that “[b]y giving the states flexibility in enforcing the law, we hope to avoid a congressional fight over the act”).

187. So, for example, the State of Michigan has authority delegated by the Army Corps of Engineers to enforce federal regulations concerning wetlands. See Mary Goodenough, *Public Participation in a State-Assumed Wetlands Permit Program: The Michigan Example*, 10 J. ENVTL. L. & LITIG. 221, 222 (1995).

188. So, for example, over half of all states have not submitted any plan for the implementation of OSHA workplace safety standards. See 29 C.F.R. § 1952 (1997); *Current Status of State Approved Plans*, 1 Empl. Safety & Health Guide (CCH) ¶¶ 5003-5840 (1996).

189. See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1994).

190. See Consumer Product Safety Act, 15 U.S.C. §§ 2054-2055 (1994).

191. See Subchapter III of the Social Security Act, 42 U.S.C. §§ 501-504 (1994).

192. See Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 (1994).

193. See National Labor Management Relations Act, 29 U.S.C. §§ 151-169 (1994).



state laws regulating worker safety, the national government demands that the state governments must either regulate worker safety according to federal standards or "get out of the business" of safety regulation, leaving the field to the federal government. In either case, the national government presents the public or private entity with a choice of ceasing to engage in some activity or following federally specified standards in the performance of the activity.

Like conditional grants-in-aid, conditional preemption has been criticized as a "coercive" infringement on state autonomy.<sup>194</sup> As with conditional grants, however, it is not obvious what is meant by "coercion" or why such coercion is especially threatening to state governments. With conditional grants, Congress is constrained by its limited fiscal capacity. With conditional preemption, Congress is constrained by its limited regulatory capacity. Congress cannot obtain the condition unless it can make a credible threat of preemption. But preemption is politically costly. Especially where federal regulators are inexperienced in some field, they might not be capable of replacing state law with equally popular federal laws. Federal inexperience might turn any federally implemented regulatory scheme into a political liability for Congress.

So, for example, state governments' refusals to perform eligibility reviews of disabled persons under the Social Security Act in 1982-1983 helped to cripple the Social Security Administration's efforts to perform such eligibility reviews. The Social Security Administration simply lacked the trained personnel and experience to "federalize" this function on such short notice.<sup>195</sup> Likewise, the national government could make no credible threat after *New York* that it would replace state siting systems for low-level radioactive waste with some system of federal sites, because Congress lacked the institutional will and constituent trust necessary for such a federalization of siting law.<sup>196</sup> Similar considerations prevented the

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194. See, e.g., *THE NATIONALIZATION OF STATE GOVERNMENT* (Jerome J. Hanus ed., 1981).

195. See MARTHA DERTHICK, *AGENCY UNDER STRESS: THE SOCIAL SECURITY ADMINISTRATION IN AMERICAN GOVERNMENT* 37-46 (1990).

196. Anecdotal evidence suggests that congressional not-in-my-backyard sentiment defeated post-*New York* attempts to create a purely federal system of low-level radioactive waste site selection. The Low-Level Radioactive Waste Policy Act of 1996, H.R. 3394, 104th Cong. (1996), was defeated in part because Senator Barbara Boxer feared that the Act would result in approval of the Ward Valley site for waste in California. See 142 CONG. REC. E718-03 (daily ed. May 7, 1996) (statement of Rep. Lewis) (denouncing the "emotional demagoguery of California's junior Senator" in opposing the Act). Aside from Congress's institutional incapacity to take on such a controversial question, the federal government's poor track record of building up public trust in federal siting activities when dealing with *high-level* radioactive waste might have blocked any comprehensive federal scheme. See WRIGHT, *supra*

Environmental Protection Agency (EPA) from implementing its own transportation plan when California officials refused to promulgate a state implementation plan within the deadline set by the Clean Air Act. As EPA officials noted, the federal agency lacked the personnel and experience necessary to regulate the driving habits of millions of commuters in Southern California.<sup>197</sup>

This inability to federalize regulatory fields at will is consistent with conventional political theory about the relative capacity of different levels of government to regulate. According to one prominent theory, lower levels of government serving smaller numbers of constituents have a comparative advantage in delivery of labor-intensive services, while higher-level governments with greater capital resources have a comparative advantage in delivering capital-intensive services where there are significant economies of scale.<sup>198</sup> So, for example, some commentators have argued that metropolitan governments are better equipped than small municipalities to provide capital-intensive services like light rail, sewage systems, and expensive forensic labs, while smaller municipalities are better suited to provide labor-intensive services like basic police patrols, zoning hearings, and building inspections.<sup>199</sup> Analogous reasoning suggests that the federal government is well-equipped to provide capital-intensive services like the construction of deep salt-lined storage facilities for high-level nuclear waste,<sup>200</sup> but is likely to be

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note 1, at 378-82. While the federal government has exclusive responsibility for such waste, it has managed simultaneously to fail at providing viable sites while also generating public distrust about the fairness or competence of its siting procedures. See EARNING PUBLIC TRUST AND CONFIDENCE: REQUISITES FOR MANAGING RADIOACTIVE WASTES (Final Report of the Secy. of Energy's Task Force on Radioactive Waste Management Nov. 1993) (noting the widespread lack of public trust in the Department of Energy's radioactive waste management policies).

197. See JAMES E. KRIER & EDMUND URSIN, *POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940-1975*, at 233 (1977). As one EPA administrator noted, the Ninth Circuit decision in *Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975), barring the EPA from forcing California officials to promulgate an implementation plan "may virtually paralyze our present efforts to reduce auto pollution in metropolitan areas." KRIER & URSIN, *supra*, at 233. As one commentator has noted, state governments' "option to do nothing" gives them "considerable political leverage because most environmental programs are complex and require a skilled staff to administer. Thus, as a practical matter, the federal government has few options as attractive as delegating operational responsibility to the states." Arnold W. Reitze, Jr., *Federalism and the Inspection and Maintenance Program Under the Clean Air Act*, 27 PAC. L.J. 1461, 1463 (1996).

198. See VINCENT OSTROM ET AL., *LOCAL GOVERNMENT IN THE UNITED STATES* 97-99 (1988).

199. See *id.* at 113-37.

200. See Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 613 (1996) (arguing that the federal government may be better equipped than the states to develop technological standards for environmental regulation).

inept at conducting labor-intensive services like the management of public hearings to minimize public opposition to waste sites.<sup>201</sup> If different levels of government have different comparative advantages, then one would expect that the federal government would be less capable of credibly threatening to preempt fields where the states enjoy the greatest advantage. The political costs of likely federal bumbling would simply be too high for members of Congress to bear.

In sum, there are practical limits on Congress's ability to tax and to regulate, and these limits also necessarily place limits on Congress's ability to obtain state and local regulatory services with conditional grants and conditional preemption. In either case, the nonfederal government's threat to decline the money or accept preemption of nonfederal activities places an important constraint on the national government's power over state and local governments.

In this respect, nonfederal governments are exactly like private firms. Private contractors refuse to provide services for the national government when the price offered for such services is too low, and private investors reduce their investment in regulated industries — by allowing the government to “preempt” their economic activities — when the regulatory conditions, analogous to “mandates,” imposed on such activities become too expensive.<sup>202</sup> Such private capacity to abstain from action forms an important constraint on governmental regulation of private enterprises. Consider, for example, legislators' fear that raising the minimum wage would cause businesses to reduce their economic activities by laying off or refusing to hire workers. One can view laws like the Fair Labor Standards Act<sup>203</sup> as a sort of “conditional preemption” of economic activity, the effectiveness of which will vary with the private persons' interest in pursuing the activity — what one might call the cost-elasticity of supply.

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201. For a detailed examination of the relative effectiveness of siting procedures used by Minnesota, Massachusetts, Manitoba, Alberta, and other jurisdictions, see BARRY G. RABE, *BEYOND NIMBY: HAZARDOUS WASTE SITING IN CANADA AND THE UNITED STATES* (1994). Rabe concludes that “command-and-control” preemption systems of siting are relatively ineffective at actually siting waste, whereas more labor-intensive systems of early participation by the residents of the site area are more effective. *See id.* at 44-57.

202. William A. Fischel notes that the willingness of private investors to exit a regulated industry forms a powerful constraint on governmental regulation. He offers the additional insight that if exit is difficult and investment is cost-inelastic, then heightened judicial scrutiny may be appropriate. *See* William Fischel, *Exploring the Kozinski Paradox: Why is More Efficient Regulation a Taking of Property?*, 67 *CHI.-KENT L. REV.* 865, 887-94 (1991). Fischel explores this thesis more generally in WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 135-36, 301-02 (1995).

203. 29 U.S.C. §§ 201-219 (1994).

Conditional grants to private persons and conditional preemption of private activities, in short, hardly give the federal government unlimited power over private enterprises. Likewise, one should not expect that such grants or preemption would give the national government unlimited power over nonfederal governments. In either case, the ability of the private or public organization to exercise the *New York* entitlement — that is, abstain from action — imposes an important constraint on the ability of the national government to obtain their services.

### B. *Why State Autonomy Permits All Cost-Justified Intergovernmental Bargains*

So far, this article has argued that, far from being a formalistic hurdle, the *New York* entitlement could prove to be a valuable entitlement to the states. The measure of its value will be the measure of Congress's need for the states' cooperation, for such need will determine the amount that Congress will be prepared to pay for the purchase of the *New York* entitlement. But the question remains whether such an entitlement is harmful to the nation. How can we be sure that such promotion of federalism is not purchased at too great a sacrifice of other important values or interests?

In this Part of the article, I explain that the *New York* entitlement *costlessly* protects federalism, because the national government can purchase such an entitlement from nonfederal governments whenever intergovernmental cooperation is cost-justified. Section II.B.1 argues that *New York* and *Printz* will interfere with no cost-justified form of cooperative federalism assuming that (1) state and national elected officials faithfully represent their constituents' preferences and (2) no significant transaction costs affect intergovernmental bargaining. In section II.B.2, I relax the assumption of no "transaction costs" and consider whether there might be "hold-out" problems that could prevent cost-justified intergovernmental arrangements. Section II.B.2 concludes that few transaction costs impede intergovernmental transactions. Therefore, if the national government's need for nonfederal governments' services exceeds the nonfederal governments' interest in autonomy, then the national government can purchase nonfederal governments' services. In section II.B.3, I relax the assumption of no "agency costs" and briefly consider whether "agency costs" might interfere with cost-justified intergovernmental arrangements.

### 1. *The Effects of State Autonomy Assuming No Agency Costs or Transaction Costs*

For the purpose of initially explaining the effect of *New York* on the incentives of the federal and state governments to cooperate, I start with two simplifying assumptions that I will later relax. First, I assume that there are no significant agency costs affecting the relationship between state and federal elected officials and their respective constituencies. That is, I assume that elected officials generally vote in order to maximize the satisfaction of their constituents' preferences. Second, I assume that there are no transaction costs impeding state-federal bargains. That is, I assume that (1) it is relatively inexpensive for the state and local governments to negotiate with the national government, using the various institutions of intergovernmental lobbying, and (2) problems of strategic behavior such as "hold-out" resulting from bilateral monopoly do not impede bargains.

With these assumptions in mind, what is the effect of the *New York* entitlement? *New York* permits Congress to use the states to implement federal law only when Congress purchases the services of the states in the marketplace of intergovernmental relations. If Congress is willing to pay the price — in federal money or implementing discretion — demanded by each state, then Congress can use each state's regulatory machinery to implement federal law; if not, then Congress must rely on purely federal methods of implementation.

Under these circumstances, the *New York* entitlement ought not interfere with any cost-justified scheme of intergovernmental cooperation. As with any other property entitlement, unless there are significant transaction costs, the *New York* entitlement will be transferred to the level of government that values it the most. If Congress is willing to pay what the states demand, then Congress can acquire the states' implementation of federal law in the marketplace of intergovernmental deals. By contrast, if Congress is not willing to meet the market price demanded by the states for their regulatory machinery, then use of the states to implement federal law is probably inefficient, and federal law would be implemented more cheaply by purely federal means.

Why should one equate the respective reservation prices of politicians sitting in Congress and state legislatures with the true value of cooperative federalism? The answer is based on the assumption of no agency costs. Under this assumption, each legislator would wish to take responsibility for implementing a program only if (1)

the legislator's constituency favors the goal of the program and (2) the officials implementing the program are capable of effectively implementing those goals. To the extent that legislators believe that they are well-equipped to "sell" the program to their constituents and that their level of government will be relatively effective at implementing the program, legislators will be more eager to take responsibility for the program.<sup>204</sup>

An example illustrates the principle. Suppose that Congress is considering the possibility of using the state governments to site low-level radioactive waste. Assume what is probably true — that the federal government enjoys certain economies of scale in setting technological standards for siting waste,<sup>205</sup> indicating that the *fiscal* costs of siting such waste are relatively lower for the federal government than the state governments.

But nonfiscal costs — that is, the likely private resentment that the governmental decision would generate — might be higher for the federal government. As suggested above, smaller-scale governments systematically may be better than larger-scale governments at managing nonfiscal costs like community resentment through labor-intensive methods such as regular appearances at hearings, easy availability to constituents by mail or telephone, and personal campaigning in neighborhoods affected by waste.<sup>206</sup> If this is true,

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204. It would be a mistake, however, to assert that elected representatives' willingness to take responsibility for a regulation is solely a function of the costs of such regulation to their constituents. Willingness to impose costly regulations may also depend on the proportion of the representative's constituents who are burdened by the program and, therefore, on the size of the representative's constituency. One would expect, for example, that members of Congress systematically would be more willing to take responsibility for enacting programs that imposed costs on geographically discrete groups than state or local legislators with overlapping constituencies, because the costs of the program would tend to incite anger from a smaller proportion of the federal representatives' constituencies. Thus, the federal government, in bargaining with state and local governments, might undervalue costs imposed on geographically discrete groups too small to capture a congressional seat. This, of course, is a persistent fear in the history of both American federalism and electoral law. See ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES 1776-1850* (1987) (discussing the problems of federalism in the context of large and small state controversy).

205. See Esty, *supra* note 200, at 603.

206. On the empirical evidence suggesting the ability of officials elected from smaller constituencies to make contact with constituents and generate voter satisfaction, see ROBERT A. DAHL & EDWARD R. TUFTE, *SIZE AND DEMOCRACY* 73-88 (1973); SIDNEY VERBA ET AL., *PARTICIPATION AND POLITICAL EQUALITY: A SEVEN-NATION COMPARISON* 269-85 (1978) (finding lower rates of political participation in urban than in rural areas); JEFFREY M. BERRY ET AL., *THE REBIRTH OF URBAN DEMOCRACY* 49 (1993) (describing the relationship between neighborhood size and effectiveness of neighborhood self-government). On the effectiveness of state governments in creating participatory structures addressing the issue of waste disposal, see RABE, *supra* note 201, at 90-106 (describing how early participation of citizens reduced neighborhood opposition to Manitoba waste disposal). The evidence suggests that state governments have performed more effectively than the federal government in

then one might conclude that the political costs to state politicians of state implementation of any siting system might be lower than the political costs to federal politicians of a purely federal system.

If Congress is willing to pay more to avoid the fiscal and nonfiscal costs of a federal siting system than it would cost state governments — in terms of both fiscal and nonfiscal costs — to create a state waste-siting system, then conditions exist for an intergovernmental deal. Congress could create a grant package to induce the states to regulate according to federal standards.

But note that, if the states' total costs exceeded the federal government's costs — and therefore its willingness to pay to bribe the states to create a waste-siting system — then no deal *would* or *should* take place. There would be no deal because the minimum bribe that the state government would accept would be greater than the maximum that Congress would offer. There *should* be no deal because, under such circumstances, intergovernmental cooperation would be a bad idea; there would be no political or fiscal advantage to employing the state governments. In such a case, siting of waste would be best served by a purely federal program.

In reality, there is no easy way to ascertain the popular hostility that waste siting would excite against a state versus a federal legislator, nor is there any easy way to measure the relative efficiencies of each level of government. But this is precisely the point: it is hard to know when intergovernmental cooperation is a good idea. The great advantage of intergovernmental deals is that they excuse third parties like judges from the necessity of trying to determine how much federal interference with state independence is "too much." The state and federal politicians themselves, if they are not irrational, will reveal the relative merits of state and federal implementation with their offers and demands. Thus, Congress's offer will be a function of the fiscal savings and political insulation that state cooperation provides; as an outside limit, Congress will offer the states no more than it would cost Congress to implement the federal statute through purely federal means. Likewise, the states will demand a price that varies directly with the political risk and fiscal burden imposed by the law. If a state's minimum reservation price exceeds Congress's maximum reservation price, then there will be

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winning public trust in disposal of radioactive waste. See, e.g., WRIGHT, *supra* note 1, at 378-84.

no deal, and Congress will rely on purely federal means to implement the federal law.<sup>207</sup>

In sum, so long as there are no agency or transaction costs, *New York* should not impede any cost-justified system of intergovernmental cooperation. To the contrary, *New York* allows “free-trade federalism” to flourish. It allows each level of government to transfer powers to some other level whenever such transfer would minimize the fiscal and political costs of implementing federal programs. Unless one can identify some sort of agency cost or transaction cost that makes this description of *New York*’s effects unrealistic, it is difficult to attack *New York* on the ground that it would somehow interfere with useful systems of cooperative federalism. It may be the case that *New York* might doom some intergovernmental cooperation — but only because such systems ought to be doomed; they are not cost-justified.<sup>208</sup>

## 2. *The Problem of Holdouts and Other Transaction Costs*

One might respond to such a sanguine defense of *New York* by noting that the market for the services of nonfederal governments is a good deal thinner than the market for services of private contractors. When the national government wants to purchase military vehicles, it can request bids from various private manufacturers who will then bid against each other to obtain the contract. Any contractor that attempts to misrepresent its production costs to obtain

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207. One might object that this account improperly treats fiscal and nonfiscal costs as equally legitimate, when some nonfiscal costs might seem plainly irrational or selfish. Should we really design institutions to cater to such base constituent fears, greed, and aversion? For example, neighbors may oppose waste sites simply because they want other communities to bear the entire cost of waste disposal and selfishly refuse to accommodate their fair share of landfill space. Should our systems of cooperative federalism allow the state or local representative of such neighbors to opt out of systems of cooperative federalism simply because he is unusually vulnerable to such selfish constituent opposition to landfill sites?

I argue that they should, if only because even irrational or selfish preferences are capable of derailing a regulatory program if they are not managed by politicians capable of — or interested in — defusing them. So, for example, siting standards that acknowledge only technical criteria and ignore likely neighbor reactions tend to founder on the latter, because neighbors are extremely effective at using political pressure, litigation, and administrative procedures to stall sites contrary to their interest. See RABE, *supra* note 201, at 44-57 (detailing ways in which neighbors stop landfill sites chosen through systems that give neighbors no role in site selection).

208. This account of intergovernmental relations is similar to the account in 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 (1990), in that it assumes that political incentives will lead state and local legislators into an equilibrium as they exchange money and regulatory discretion. This account differs from Macey’s in that my account ignores the problem of agency costs, deferring its discussion until section II.B.3, *infra*.



a more lucrative contract may soon find itself without any contract at all.

By contrast, the conventional wisdom is that state governments do not typically bid against each other to enforce federal law; within any given piece of territory, there is often only one state government from which to purchase such services. Why, then, should the national government trust state government assessments of the cost of state implementation? What mechanism guarantees that the intergovernmental lobby will correctly inform Congress of the costs of nonfederal implementation? Might state and local governments strategically exaggerate the fiscal and political costs of implementing federal law?

Such strategic behavior might actually prevent some otherwise cost-justified system of cooperative federalism. Incessant demands for more money by governors and mayors might persuade Congress that nonfederal governments are inefficient service providers. At the least, Congress may become distrustful of state and local officials as reliable sources of information about implementation costs, and might be deterred from using nonfederal governments when it otherwise should. This consequence of strategic behavior casts doubt on the argument that *New York* allows all cost-justified intergovernmental agreements.

I believe that these dangers of strategic behavior are overstated. My reasoning is that the intergovernmental marketplace is more competitive than one might believe. State and local politicians usually are extremely reluctant to turn down federal money in order to avoid grant conditions, because voters are notoriously willing to retaliate against politicians who fail to apply for "free" federal money.<sup>209</sup> But, in order to obtain such funds, state and local politicians do not merely cajole or berate Congress; they also compete

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209. As Nelson Rockefeller observed when he was Governor of New York, "If you don't apply for this money, somebody will get up and say 'Why don't you ask for this money? Here is this free money in Washington you are not using.' Then it becomes a political issue." HAIDER, *supra* note 164, at 97.

Recent experiences in Virginia and New Hampshire illustrate this tendency. Republicans in both states declined Goals 2000 grant money for the reform of public school curricula, based in part on objections to federal meddling with education and opposition to such funds by religious conservatives. In New Hampshire, after a campaign where this decision became a major issue, the Republican candidate, who had been the Chairman of the State Board of Education when the funds were declined, was defeated by his Democratic opponent. See M.L. Elrick, *Shaheen Claims Historic Win*, CONCORD MONITOR, Nov. 6, 1996, at A1. Republican Governor Allen of Virginia was not defeated, but he suffered at the polls for his decision to decline the grant money and eventually reversed it. Indeed, he retaliated against Democrats in the state legislature by accusing them of declining federal money for charter schools. See Michael Hardy & Jeff E. Schapiro, *Allen Successful in His Last Session*, RICHMOND TIMES-DISPATCH, Feb. 23, 1997, at A11.

against each other, private organizations, and federal agencies for authority to implement federal programs. This competition presents a substantial obstacle to nonfederal governments' ability strategically to misrepresent the costs of implementing federal law. In short, the premise that there is merely one nonfederal government that can implement federal policy within a single state government's jurisdiction is simply false.

Consider first the various nonfederal governments that compete with each other for federal funds. There may be three or four nonfederal governments within any given piece of a state's territory, because most states' territory is distributed among several different types of subdivisions — municipalities, counties, townships, school districts, and so on — many of which are legally and practically capable of administering federal programs. These subdivisions aggressively compete with the state government and with each other for enforcement responsibility. So, for example, state and municipal governments actively competed with each other to implement the Crime Control and Safe Streets Act,<sup>210</sup> counties fought hard with cities to receive funds under the Economic Opportunity Act of 1964,<sup>211</sup> and state and municipal governments struggled from the Nixon through the Bush administrations to control the Community Development Block Grant Program.<sup>212</sup> Indeed, the fight between mayors and governors for control over federal funds directed to the "state" has been a perennial controversy of intergovernmental relations since the 1960s.<sup>213</sup> The litigation over the Brady Act in Vermont presents an interesting illustration of such intergovernmental competition. The Brady Act requires "local law enforcement officers" to perform background checks on prospective purchasers of firearms.<sup>214</sup> When the sheriff of Orange County, Vermont, refused to perform these duties, the Vermont Department of

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210. See HAIDER, *supra* note 164, at 187-90, 194-95. The Omnibus Crime Control and Safe Streets Act of 1968 can be found at 42 U.S.C. §§ 3711-3797 (Supp. 1995).

211. See HAIDER, *supra* note 164, at 168-69. The Act itself is codified at 42 U.S.C. §§ 2751-2996L (Supp. 1995).

212. The state governments were able to gain control over the Small Cities component of the program during the Reagan administration, but President Bush was unable to consolidate the entire program as a megagrant to the states as he proposed to do in 1991. See RICH, *supra* note 178, at 107-13. The Community Services Block Grant Act is codified at 42 U.S.C. §§ 9901-9912 (1994).

213. See, e.g., CONLAN, *supra* note 2, at 58-60; RICH, *supra* note 178, at ch. 4.

214. See *Frank v. United States*, 78 F.3d 815, 822-23 (2d Cir. 1996).

Public Safety volunteered their services to the Bureau of Alcohol, Tobacco, and Firearms, which accepted them.<sup>215</sup>

Such competition between nonfederal governments limits the ability of any one type of nonfederal government to "hold out" for more than the fiscal and political cost of implementing federal law. If governors are too recalcitrant in meeting federal demands, then cities will be ready to displace them as federal agents. Counties and school districts, likewise, have their own intergovernmental lobby and also attempt to win enforcement authority from Congress. In short, intergovernmental competition for federal authority is remarkably vigorous.

One might object to this argument on the ground that, because the state's subdivisions are regarded as "creatures of the state" that the state government is free to destroy or restrict, such subdivisions cannot provide genuine competition with their parent state government. But this argument mistakes legal theory for political reality. It is certainly true that, as far as the U.S. Constitution is concerned, state governments have the legal power to prevent their municipalities, school districts, and counties from implementing federal law.<sup>216</sup> Indeed, if one follows the logic of *New York*, the national government should not have the power to prevent the state from controlling its own subdivisions.<sup>217</sup> Therefore, it is theoretically possible for a state government to eliminate municipal competition by barring its subdivisions from accepting federal funds or using them for federal purposes.

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215. See *Frank*, 78 F.3d at 821. The sheriff protested against such competition, arguing that the state department did not constitute "local law enforcement" within the meaning of the Act, but the Second Circuit deferred to the Bureau's interpretation of the statute that it was charged with enforcing. See *Frank*, 78 F.3d at 822-23.

216. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 177-79 (1907).

217. If cities, special districts, and counties are really subdivisions or "creatures" of the state government, then the federal government effectively commandeers the state government when it makes use of these subdivisions against the will of the state government. The fact that the subdivisions' political leaders wish to be so employed might be legally irrelevant, because, according to *Hunter*, they derive their legal personality from state law. See *Hunter*, 207 U.S. at 177-79.

It is unclear, however, whether the Court would accept this reasoning. In at least one case, the Court has suggested that a state may not require a local government to expend federally derived payments in lieu of taxes on purposes specified by the state legislature. The Court reasoned that the Supremacy Clause barred such state interference with funds that had been earmarked by the federal government for different purposes. See *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 270 (1985). There has also been some controversy among lower courts concerning whether a federal agency can give a municipality the power to resist state law.

In practice, however, such state interference with local-federal relations is extremely rare.<sup>218</sup> Especially in states where municipalities have general "home rule" powers, such state interference with municipal powers may violate deep political traditions of local autonomy that state officials might be reluctant to disturb.<sup>219</sup> Moreover, if the national government makes funds available to subdivisions of the state, state decisions barring the subdivisions from accepting such funds might be doubly unpopular, both as burdens on local autonomy and as exports of state residents' tax dollars to other states.<sup>220</sup> Given these political constraints, one would expect to see what actually occurs — vigorous competition between governors, mayors, counties, and other nonfederal entities to obtain federal funds. Such competition should mitigate any theoretical tendency of state governments to act strategically in withholding information about implementation costs from Congress.<sup>221</sup>

State governments also face competition from nongovernmental organizations (NGOs). These organizations play an extraordinarily important role in implementing federal laws that do not involve regulation of third parties.<sup>222</sup> Such NGOs include universities, legal services organizations, hospitals, churches, health clinics, and cultural or social organizations like the Boy Scouts of America.<sup>223</sup> The national government may be barred from delegating regulatory re-

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218. At the dawn of extensive federal-city relations, some state governments were slow to give their municipal governments authority to float revenue bonds; such authorization was required for cities to take advantage of federal loans to ameliorate the municipal debt crisis arising out of the Great Depression. See MARK I. GELFAND, *A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933-1965*, at 49-59 (1975). In the context of municipal bankruptcy, state governments sometimes have attempted to prevent their municipalities from seeking protection under Chapter 9 of the federal bankruptcy code. The most famous example remains Connecticut's effort to prevent the City of Bridgeport from filing for bankruptcy. See Dorothy A. Brown, *Fiscal Distress and Politics: The Bankruptcy Filing of Bridgeport as a Case Study in Reclaiming Local Sovereignty*, 11 BANKR. DEV. J. 625 (1995).

219. See Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) (describing powerful home-rule traditions that limit state interference with local governments' powers).

220. So, for example, although Governor Allen used his veto to prevent Virginia from accepting federal funds for education under the Goals 2000 program, he permitted individual school districts to apply for the money. See *supra* note 209.

221. There is, however, a worrisome trend of increased centralization of state governmental structure. See WRIGHT, *supra* note 1, at 317-19. As Wright notes, this centralization creates "increasing difficulty [for] any national government efforts to target or channel funds to local governments for purposes that are independent of, or contrary to, state policies." *Id.* at 319.

222. See generally ANTON, *supra* note 2, at 157-79.

223. See LESTER M. SALAMON & ALAN J. ABRAMSON, *THE FEDERAL BUDGET AND THE NON-PROFIT SECTOR* 9-19 (1982).

sponsibilities to such private organizations,<sup>224</sup> but there is an enormous range of federal income maintenance, health care, and service provision that do not involve regulatory responsibilities. These programs are frequently delegated to private organizations that effectively compete with nonfederal governments for federal money.<sup>225</sup>

Aside from nonfederal governments and nongovernmental organizations, the state governments face competition from federal executive agencies. The absolute ceiling on the price that state governments can exact from the national government is the cost to the federal government of providing the services "in-house" through federal agencies.<sup>226</sup> Depending on the ingenuity that Congress is prepared to exercise in designing federal agencies, this ceiling could be quite low. In theory at least, Congress might be able to design federal agencies that can match any efficiencies provided by state or local governments.

This statement is not inconsistent with the earlier contention that different levels of government have different comparative advantages in delivering governmental services. It may be true that "local governments" — meaning agencies with jurisdiction over relatively smaller numbers of persons who elect the governments' policymakers — will tend to be more effective at delivering labor-intensive services than larger scale governments. But nothing in principle prevents Congress from creating such small-scale governments with locally elected policymakers and territorially limited jurisdictions. Congress has chartered corporations,<sup>227</sup> funded locally based community action organizations to manage poverty pro-

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224. See *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Eubank v. City of Richmond*, 226 U.S. 137 (1912). See generally George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975).

225. Perhaps the most controversial instance of the federal government encouraging competition between public and private entities occurred pursuant to the Economic Opportunity Act of 1964, which authorized "community action programs" — private, nonprofit agencies — to carry out the programs funded under the Act. See Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 201, 78 Stat. 508, 516 (1964) (repealed 1981). While state governments could also compete for grants and contracts, the reliance on private nonprofit organizations — "private federalism" — was clearly intended to prevent nonfederal governments, distrusted by federal program administrators, from monopolizing the implementation of federal law. See DAVID M. WELBORN & JESSE BURKHEAD, *INTERGOVERNMENTAL RELATIONS IN THE AMERICAN ADMINISTRATIVE STATE: THE JOHNSON PRESIDENCY 63-74* (1989).

226. See *supra* section II.B.1.

227. See, e.g., *American Natl. Red Cross v. S.G.*, 505 U.S. 274 (1992). Some of these corporations strongly resemble municipalities. See, e.g., Martha Hirschfield, Note, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331 (1991) (describing the powers of Alaska Native corporations that manage land and mineral rights belonging to Alaskan native tribes).

grams,<sup>228</sup> and created special districts with territorially circumscribed jurisdictions;<sup>229</sup> these are all forms of federally sponsored local governments that can compete with and even displace conventional municipalities created under state law. Despite their apparently innocuous titles, these federally sponsored local governments are sometimes immensely powerful.<sup>230</sup> To be sure, under *McCulloch*, the national government can choose only those means that are "plainly adapted" to legitimate purposes.<sup>231</sup> But, to the extent that some federally chartered local governments enforce only federal laws that are otherwise within Congress's power to enact, it is difficult to see the constitutional obstacle that would prevent Congress from creating such organizations. The notion that there can be only a single federal rule promulgated by a single national agency is simply a prejudice born of habit rather than legal or practical necessity.<sup>232</sup>

Of course, Congress may be extraordinarily reluctant to create local *elective* offices. Unlike appointed bureaucrats whose professional culture might encourage anonymity,<sup>233</sup> such elected politicians might become rivals to incumbent members of Congress, taking credit for successful federal programs that Congress would like to claim. But such congressional reluctance is not the same as practical or legal impossibility. It does not imply that nonfederal

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228. See *supra* note 225 (discussing the Community Action Program under the Economic Opportunity Act of 1964).

229. So, for example, the United States has subsidized and guided the formation of soil conservancy districts since the New Deal. See Soil Conservation and Domestic Allotment Act of 1936, Act of February 29, 1936, ch. 104, 49 Stat. 1148; SOIL CONSERVATION SERV., U.S. DEPT. OF AGRIC., A STANDARD STATE SOIL CONSERVATION DISTRICTS LAW (1936). Since 1902, the United States has provided subsidies for the creation of 600 water reclamation districts in 17 states, governed by boards elected by certain agricultural end-users of the water. See Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified in scattered sections of 43 U.S.C. from § 371 to § 498) (1994); see also U.S. BUREAU OF RECLAMATION, FINAL ENVIRONMENTAL IMPACT STATEMENT, ACREAGE LIMITATION AND WATER CONSERVATION RULES AND REGULATIONS ch. 3, at 2 (1996); Joseph Sax, *Problems of Federalism in Reclamation Law*, 37 ROCKY MTN. L. REV. 49 (1964-65). More recently, Congress funded the creation of air quality districts under the Clean Air Act to manage state and federal air quality programs. See 42 U.S.C. §§ 7401 (1995); see also KRIER & URSIN, *supra* note 197.

230. The Salt River Project in Arizona, a reclamation district, employs 5000 persons, has its own security force, supplies Phoenix with much of its electricity and water, and uses its power to affect policies on matters ranging from zoning density to acid rain. See JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 192-97 (1988).

231. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

232. See James Krier, *On the Topology of Uniform Environmental Standards in a Federal System — and Why It Matters*, 54 MD. L. REV. 1226, 1238 (1995).

233. For an example of such willingness, see MARTHA DERTHICK, *POLICYMAKING FOR SOCIAL SECURITY* 18-20 (1979) (describing the culture of professional anonymity and indifference to credit taking cultivated in the Social Security Administration).

governments somehow have a monopoly on the power to create elective institutions for local governance.

Congress's regulatory discretion to fashion its own national institutions helps to ensure that the states will lack any monopoly on implementation services. The states constantly are competing with existing or proposed national institutions — the Office of the President, cabinet and subcabinet departments, independent regulatory agencies, and so on — for the right to implement national law. When confronted by the states' demands for larger grants or more implementing discretion, Congress can compare such demands to the fiscal and regulatory costs of purely national implementation.<sup>234</sup>

If the states' bids to implement national law are higher than these bids by purely national institutions, then Congress can opt for the latter, bypass the states, and thwart any state holdouts.<sup>235</sup> Congress also can compare the nonfederal governments' track records for being faithful agents of Congress,<sup>236</sup> assisted by the information provided by federal agencies and other monitors of state conduct.<sup>237</sup> If Congress finds that nonfederal governments consistently are misappropriating federal funds, Congress can pursue a strategy of preemption rather than cooperation. By contrast, if the national government has greater confidence in elected state and local leaders, then the national government can force national agencies to provide such leaders with greater discretion or at least more information through block grants,<sup>238</sup> general revenue sharing,<sup>239</sup> or con-

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234. These costs are reflected in, for example, agencies' budget requests that are contained in the budget prepared by the Office of Management and Budget (OMB) and submitted by the President, the Congressional Budget Office's (CBO's) and OMB's rival baseline projections, and various regulatory "impact statements" on the nonfiscal costs of regulations. See ALLAN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 12-48 (1995) (describing the process by which the budget is developed).

235. This is not to say that there are not legal barriers to Congress's ability to create administrative agencies. For example, Congress cannot *itself* execute the laws through a legislative veto on administrative agencies' actions, nor can Congress itself hire or fire, except through impeachment, executive officers in charge of implementing national law. But such separation of powers doctrines ought not to affect Congress's choices between national and state implementation of national law, because the doctrines apply to *both* sorts of implementation. If Congress cannot impose a unicameral legislative veto on the Immigration and Naturalization Service, it also cannot impose such a veto on a state's department of community affairs.

236. See, e.g., KETTL, *supra* note 2, at 98-101 (discussing Senator Proxmire's hearings concerning Community Development Block Grants).

237. For an account of such monitoring, see *id.* at 76-98.

238. For a detailed account of the operation of the Community Development Block Grant program, see DONALD KETTL, *MANAGING COMMUNITY DEVELOPMENT IN THE NEW FEDERALISM* (1980); RICH, *supra* note 178.

239. For an overview of general revenue sharing, see RICHARD NATHAN ET AL., *REVENUE SHARING: THE SECOND ROUND* (1977).

sulting requirements.<sup>240</sup> The history of cooperative federalism is, in part, a history of struggles between elected policy generalists — mayors, governors, state legislatures, and city councils — and federal agency specialists for greater control over federal programs, with Congress favoring one or another type of organization depending on the political climate and perceived regulatory needs.<sup>241</sup>

In effect, the President and the cabinet and subcabinet departments, states, local governments, and independent regulatory agencies compete with each other to obtain implementation authority from Congress. Each entity seeks from Congress larger appropriations or more discretion in enforcement responsibilities. But, because Congress will seek the most faithful and efficient agent, each entity is forced to keep its requests for budget authority and implementing discretion in check by the possibility that Congress will delegate implementation responsibilities to the other competing entities. Likewise, each level may tend to exploit its control of information about the costs and benefits of implementation to influence Congress's appropriation and oversight decisions.<sup>242</sup> Thus, national agencies might exaggerate the costs of enforcement to inflate their budgets. But the other state and local governments' lobbying efforts provide Congress with another source of information about the costs and benefits of implementation, and Congress can use this source to correct the estimates provided by its own agencies.

Thus, the redundancy created by overlapping state and federal jurisdictions allows Congress to play state and federal officials off of each other to avoid dishonesty or corruption by either. As Susan Rose-Ackerman has noted, such competition among governmental officials reduces the risk of bribe-taking and other illegal bureaucratic behavior.<sup>243</sup> But analogous reasoning also suggests that inter-

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240. For a detailed account of President Johnson's decision to protect the position of elected state and local officials from national agencies' failure to consult with them concerning nonfederal implementation of national law, see HAIDER, *supra* note 164, at 114-23 (describing Johnson's promulgation of Executive Order A-85 requiring federal agencies to consult with state and local elected officials).

241. For an account of such struggles in the context of so-called "picket fence" federalism, see TERRY SANFORD, *STORM OVER THE STATES* 80 (1967). Sanford uses the metaphor of a picket fence to suggest the rivalry between appointed state and federal agency specialists (the "vertical" fence posts) and elected state and federal "generalist" politicians (the horizontal fence boards).

242. For discussions of the difficulty faced by Congress in maintaining control of the federal bureaucracy, see WILLIAM A. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); WILLIAM F. WEST, *CONTROLLING THE BUREAUCRACY: INSTITUTIONAL CONSTRAINTS IN THEORY AND PRACTICE* (1995).

243. See SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* 137-51 (1978).



governmental competition reduces the costs of state autonomy by depriving both the states and national agencies of the ability to hold out indefinitely for national benefits in excess of their opportunity costs.<sup>244</sup> In sum, the risks that strict enforcement of the *New York* entitlement would lead to strategic withholding of that entitlement by state and local governments seem low, given competition from nonfederal, federal, and private sources.

This relative absence of holdout problems distinguishes the *New York* entitlement from other entitlements previously possessed by the state governments under pre-New Deal precedents, like *United States v. E.C. Knight Co.*,<sup>245</sup> *Hammer v. Dagenhart*,<sup>246</sup> *A.L.A. Schechter Poultry Co. v. United States*,<sup>247</sup> and *Carter v. Carter Coal Co.*,<sup>248</sup> which bestowed upon state governments the exclusive entitlement to regulate private noncommercial activities like manufacturing even when such activities produced interstate spillover effects.

Unlike the *New York* entitlement, this "*E.C. Knight* entitlement" would be extremely costly for the national government to purchase. To the extent that a given state's regulation would impose less cost on commercial activity than would federal regulation, that state would not sell its entitlement for fear that it would drive its commercial activity to a state that did not accept federal regulation. It would only sell when it was certain that all other states would sell their entitlement as well, thus uniformly imposing higher costs.<sup>249</sup> In order to enforce a federal regulation in one state, there-

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244. This complex relationship between the power to regulate private persons directly and the power to induce the states to regulate private persons according to federal standards was recognized by Publius in *The Federalist No. 36*, in which Publius remarked that "[w]hen the States know that the Union can supply itself without their agency, it will be a powerful motive for exertion on their parts [in executing national law]." *THE FEDERALIST* No. 36, *supra* note 50, at 221 (Alexander Hamilton).

245. 156 U.S. 1 (1895).

246. 247 U.S. 251 (1918).

247. 295 U.S. 495 (1935).

248. 298 U.S. 238 (1936).

249. The argument here is familiar. See, e.g., Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 *SAN DIEGO L. REV.* 555 (1994). For example, one state's refusal to allow federal regulation of wages and hours might put pressure on other states to abstain from such regulation in order to prevent state residents from fleeing the regulating jurisdiction to the jurisdiction without the redistributive regulations. If even a few states refuse to accept federal regulations requiring employers to pay a minimum wage, then there will be a risk that the adopting states' industry and other tax bases will flee to those recalcitrant states, depressing the economies of those states that accept the federal grant and regulate according to federal standards.

The same sort of analysis applies to state decisions to allow federal regulation of activities that impose "spillover" costs on persons in other states. For example, if a state refuses to allow federally proposed environmental regulations limiting the airborne pollutants that

fore, Congress would simultaneously have to bribe every state to allow enforcement of the proposed law. But it might be difficult for Congress to obtain the agreement of every state simultaneously to yield their *E.C. Knight* entitlement. Because each state could defeat the entire federal scheme, each state might act strategically by demanding a premium in order to allow the entire regime to be enacted. The costs of dividing such a premium among the contending states might exceed the value of the regime to Congress and thereby cause its defeat. Like a land developer trying to assemble fifty parcels of land owned by fifty strategically inclined landowners, the federal government's efforts to create cost-justified regulatory regimes would be defeated by transaction costs and holdouts if Congress had to obtain the simultaneous consent of fifty individual state governments.

By contrast, Congress has less to fear from state holdouts when it bargains to purchase the states' *New York* entitlements because, so long as Congress enforces federal law within a state's territory using federal personnel, no state's refusal to sell the entitlement can prevent federal law from being enforced in every state. Thus, one state's refusal to sell the *New York* entitlement would not affect the costs of purchasing the *New York* entitlement in other states. For example, if some states refuse to implement OSHA with their state administrators, the federal government can and does administer OSHA directly in the recalcitrant states with the federal Department of Labor. Because the federal government can achieve regulatory uniformity without purchasing every state's *New York* entitlement, there is no necessity for *every* state to sell its *New York* entitlement in order for *any* state to sell it.

Of course, it is theoretically possible that if a state refused to implement federal law then purely federal enforcement of such law within the state's territory would be practically impossible. Imagine services that the federal government is so utterly inexperienced in providing — say, K-12 education — that provision through federal personnel would be practically impossible. If a school district refuses to assist the federal government in enforcing federal standards

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manufacturers can emit, then manufacturers within such a state may be able to emit pollutants affecting primarily residents in "downstream" states — in effect, using the airspace above the "downstream" states as a storing area for their emissions. Under such circumstances, it would be politically difficult for the "downstream" states to enact emissions restrictions on their own manufacturers, for the residents of the downstream states would not see any benefit — that is, cleaner air — resulting from regulations that, nevertheless, would burden its economy. For an elaboration of this argument, see Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222-24 (1992).

in public schools, then it might be impractical for the federal government to create its own federal schools to implement such standards. Thus, state refusal to assist the federal government could conceivably amount to a state veto on some federal regulatory scheme, disrupting its uniform enforcement throughout the nation and giving rise to the "holdout problems" described above.

But there are reasons to believe that this theoretical possibility is not a pressing practical danger. First, to the extent that the federal government completely lacks any capacity to provide the regulatory service because nonfederal governments utterly dominate the regulatory field, one might question whether federal involvement in the field is really necessary. Such a field would seem to be a traditional state function best left to nonfederal institutions.<sup>250</sup> Second, federal inefficiency can actually encourage state or local officials to sell their *New York* entitlement rather than tolerate federal administration: the prospect of dealing with slow, inexperienced, or incompetent federal administrators may impel regulated interests within a state to lobby the state's legislature to preserve state implementation of federal law.<sup>251</sup>

### 3. *The Problem of Agency Costs*

A second objection to this argument for the efficiency of *New York* is to dispute the realism of the assumption on which the argument is based — insignificant agency costs. In fact, state and federal legislators are not equally responsive to the voters within their constituencies. In particular, it is simply not the case that every level of regulatory costs imposed by implementation translates automatically into an identical level of political risk. The political risk to state and federal lawmakers arising out of some regulatory cost imposed on constituents will depend to a large extent on *which* constituents are burdened. Well-organized groups of constituents that experience concentrated regulatory costs may make a politician's political career much more risky than the same level of costs dis-

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250. See *United States v. Lopez*, 514 U.S. 549 (1995).

251. See *Rhode Island Gets Unprecedented Warning from Feds over Water Quality Programs*, STATE CAPITALS NEWSL., Feb. 24, 1997, at 2 (noting a state agency director's warning that, if the state legislature does not increase funding for cleanup of the Bay, EPA will take over administration of the Clean Water Act in Rhode Island, which "would be harmful to Rhode Island businesses, which would have to deal with regulators in Boston rather than Providence").

tributed among diffuse groups of disorganized constituents who are less adept at lobbying and turning out to vote at election time.<sup>252</sup>

How might relaxing the assumption concerning agency costs affect the optimistic assessment of *New York* provided above? If elected officials respond to different constituents' identical regulatory costs with different degrees of attention, then one could not assume that the bargains between state and federal officials actually distributed the *New York* entitlement in a way that minimizes regulatory costs. Because local and state governments might be more sensitive to the ideological objections of well-organized interest groups, state and local governments might refuse to implement federal schemes to which such well-organized groups object, even when such implementation might be cost-justified. Local governments might turn down federal grants for low-income housing, for example, because the consumers of such housing have muted voices while the middle-class homeowners who oppose such housing are vocal and well-organized in their opposition.<sup>253</sup>

Agency costs can also arise because nonfederal officials are *themselves* a powerful interest group with interests that can be inconsistent with the well-being of their constituents. Intergovernmental programs may, for instance, suffer from the "flypaper effect" — the tendency of nonfederal government officials to retain federal grants to maintain or increase the size of state and local budgets, even when such funds can be passed on to residents to reduce their tax burden.

In response to the perception that some constituents are over- or underrepresented in the local political process by which federal grant money is spent, Congress has required state and local governments applying for such money to provide for public participation in the programs funded by such money.<sup>254</sup> These "public participa-

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252. There is, of course, a voluminous public choice literature analyzing the formation of interest groups and the possibility that well-organized interest groups will disproportionately affect the political process. For some representative samples, see RUSSELL HARDIN, *COLLECTIVE ACTION* (1982); TERRY M. MOE, *THE ORGANIZATION OF INTERESTS: INCENTIVES AND THE INTERNAL DYNAMICS OF POLITICAL INTEREST GROUPS* (1980); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971); Terry Moe, *Politics and the Theory of Organizations*, 7 J.L. ECON. & ORG. 106 (1991).

253. See *supra* note 177. Other possible explanations of local government hostility toward redistributive programs are, perhaps, more plausible. According to a widely held view, the local government that is reluctant to accept funds for redistributive programs like low-income housing is actually acting as a faithful agent of *all* of its constituents, including low-income constituents, because such programs erode the tax base that the local government needs to survive. See generally PAUL E. PETERSON, *CITY LIMITS* (1981).

254. See Terrance Sandalow, *Federal Grants and the Reform of State and Local Government*, in *MORE MONEY IS NOT THE ONLY ANSWER: REFORM OF GOVERNMENTAL STRUCTURES* 175 (1969).

tion" requirements are ubiquitous and take numerous forms — mandatory hearings, consultation with consumers of federally funded programs, and so on. They also have raised the ire of some local government officials — most famously in the case of the Economic Opportunity Act's requirement of "maximum feasible participation."<sup>255</sup> But such grant conditions will not, by themselves, completely solve the problem of agency costs, because the conditions will be imposed only if elected officials accept these grants. Such conditions, therefore, cannot improve the fairness of the politicians' decisions to apply for or accept the grant.<sup>256</sup>

One might ask whether Congress should have the power to commandeer state and local regulatory processes in order to ensure that all interested constituents are appropriately represented. If the state and local officials do not represent their constituents, then neither do their bargains with the national government. At the very least, Congress might commandeer state and local government structure to require the state or local government to extend the suffrage to all residents within their boundaries, impose limits on how such boundaries might be drawn, and require certain governments to elect their members by single-member districts to prevent the dilution of constituencies unpopular with a local majority.

Indeed, the Court's *New York* doctrine may accommodate such commandeering, because the *New York* entitlement might not limit Congress's enforcement powers under section 5 of the Fourteenth Amendment or its Article I, section 4, power to require state governments to regulate federal elections according to federal standards. The *New York* Court did not address the issue of whether *New York's* anticommandeering rule applied to any exercise of the

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255. See J. DAVID GREENSTONE & PAUL E. PETERSON, RACE AND AUTHORITY IN URBAN POLITICS: COMMUNITY PARTICIPATION IN THE WAR ON POVERTY 4-6 (1973); SAR LEVITAN, THE GREAT SOCIETY'S POOR LAW: A NEW APPROACH TO POVERTY (1969); DANIEL PATRICK MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY 110-13 (1969) (expressing skepticism about community action programs). Consider also the statutory requirements for school districts to consult with parents of handicapped children in designing an individualized education plan under the Individuals with Disabilities Education Act. See 20 U.S.C. §§ 1400-1485 (1995); 34 C.F.R. § 300.8 (1997). For a detailed description of the purposes that such a requirement can serve, see JOEL HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY ch. 7 (1986).

256. See, e.g., RICH, *supra* note 178, at 233-34; Elizabeth Provencio, Making the Silent Voices of the Colonias Heard: Examining the Lack of CDBG Funding in Dona Ana County, New Mexico (unpublished seminar paper, submitted Apr. 23, 1997, on file with author) (describing the failure of border counties to apply for small cities CDBG funds despite eligibility). In particular, as noted by Greenstone and Peterson, powerful mayors like Chicago's Mayor Daley simply refused to create community action organizations with genuine autonomy from the city government, but Chicago still received federal grant money. See Greenstone & Peterson, *supra* note 255, at 19-24.

Fourteenth Amendment, but the Court has upheld provisions of the Voting Rights Act of 1965<sup>257</sup> that arguably commandeer the electoral process of state governments,<sup>258</sup> and, as early as its 1879 decision in *Ex parte Siebold*,<sup>259</sup> the Court upheld Congress's power to commandeer state officials' services pursuant to Congress's power to regulate the "time, place, and manner" of federal elections.<sup>260</sup> To be sure, the Court has been more reluctant to allow Congress to grant voting rights to groups other than racial minorities in nonfederal elections.<sup>261</sup> But the functional argument outlined here suggests that Congress's need to commandeer nonfederal governments' *electoral* process is greater than its need to commandeer nonfederal governments' *regulatory* processes.

One should be wary, however, about too casually invoking the unresponsiveness of state and local legislators to their constituents as a way to justify congressional imposition of duties upon nonfederal officials. Congress, too, is affected by agency costs, and giving Congress the power to demand regulatory services from state and local governments unconditionally might exacerbate such costs.

Consider, for example, the often recognized tendency for Congress to favor programs that maximize its ability to perform casework for constituents and take credit for "unsticking" the bureaucratic process.<sup>262</sup> This incentive can encourage Congress to deprive elected policy generalists — governors, mayors, state and local legislators — of influence in intergovernmental arrangements even when such influence might be desirable. After all, members of Congress may regard elected policy generalists like mayors, governors, and state and local legislators as potential challengers in re-election campaigns.<sup>263</sup> Therefore, Congress might disfavor any

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257. 42 U.S.C. §§ 1971, 1973-1973bb-1 (1994).

258. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 177 (1980).

259. 100 U.S. 371, 397-99 (1879).

260. Cf. *Thornburg v. Gingles*, 478 U.S. 30, 46-52 (1986) (describing vote dilution). Both of these powers have been invoked to uphold the so-called "motor voter" law, a measure designed to increase the registration of racial minorities and other underregistered groups. See *Condon v. Reno*, 913 F. Supp. 946, 967 (D.S.C. 1995) (upholding the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg (1994)).

261. See *Oregon v. Mitchell*, 400 U.S. 112, 117-296 (1970) (striking down an amendment of the Voting Rights Act that bestowed the right to vote in state and local elections on persons between 18 and 21 years of age).

262. The thesis was initially propounded in FIORINA, *supra* note 28. It is developed with more data and sophistication in BRUCE CAIN ET AL., *THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE* (1987).

263. See HAIDER, *supra* note 164, at 98-101. Haider cites "Egger's Law" of intergovernmental relations — "the contempt that a U.S. Senator feels for his Governor is equal and opposite to the contempt that the Governor feels for his U.S. Senator." This fear of state elected officials as potential rivals for office is thoroughly justified. The state house is essen-

form of cooperative federalism that gives such potential rivals opportunities for credit-taking that the members of Congress would prefer to reserve for themselves.<sup>264</sup> Such a suspicion of state and local elected leaders is not necessarily inefficient.<sup>265</sup> Congress, however, might use such power in perverse ways to strip elected officials of most policymaking discretion, transferring that discretion to state bureaucrats who are less likely to be challengers to federal incumbents and more easily controlled by federal officeholders, both elected and unelected. By allowing state and local elected officials to withhold their state bureaucracy, *New York* gives them bargaining power against Congress to counteract what John Chubb calls the "bias for centralization."<sup>266</sup>

In short, the safest conclusion is that, to the extent that one is willing generally to trust the electoral process to ensure that elected officials fairly represent their constituents, then one should also trust intergovernmental bargains to ensure that the *New York* entitlement will be transferred to the level of government, state or federal, that can make the best use of it. If one believes that elected officials, as a general matter, fairly represent their constituents, then one should also endorse *New York* and the intergovernmental bargains by which the *New York* entitlement is transferred. By contrast, if one distrusts elected officials' incentives to act as faithful agents of their constituents, then one *might* favor limits on the *New York* entitlement. One would need to go further, however, and identify precisely the type of agency cost that justifies such limits. If, for example, state and local governments systematically underrepresent racial minorities or other disadvantaged or disorganized constituencies even more than the national government, then it might make sense to allow the national government to commandeer

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tially a training ground for half of the U.S. Congress. See generally MICHAEL BERKMAN, *THE STATE ROOTS OF NATIONAL POLITICS: CONGRESS AND THE TAX AGENDA, 1978-1986* (1993).

264. See ANTON, *supra* note 2, at 111 (asserting that members of Congress tend to disfavor grant programs that diminish their opportunities to take credit for benefits delivered to their constituencies); CONLAN, *supra* note 164, at 38 (attributing congressional opposition to a proposed transportation block grant to Congress's "desire to retain control over pork barrel projects"); John Chubb, *Federalism and the Bias in Favor of Centralization*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 273, 284-85 (John E. Chubb & Paul E. Peterson eds., 1985).

265. Especially where Congress is using local officials to administer a program with the purpose of protecting the welfare of low-income persons, it might be essential to insulate such programs from state and local political control and develop an intergovernmental bureaucracy dedicated to the redistributive function of the program. See PETERSON ET AL., *supra* note 2, at 131-59 (describing how development of a state bureaucracy sympathetic to the purposes of federal redistributive programs can help assure that such programs are institutionalized and insulated from misdirection into developmental ends).

266. See Chubb, *supra* note 264, at 273.

the states and bypass the intergovernmental marketplace. Other sorts of agency costs, however, might lead one to strengthen *New York's* rule. For now, it is important only to see that the relation between agency costs and *New York* is complex and that, absent agency costs affecting the state but not the national governments, such costs are not a good reason to reject *New York*.

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It should not be surprising that the national government can acquire state and local regulatory services through voluntary exchange. This is how the national government normally obtains services from private persons. When the national government wishes private persons or companies to serve as defense contractors, mail carriers, FBI agents, park rangers, or cabinet secretaries, it does not conscript them but instead purchases the services with revenues generated by taxes. If conscription is unnecessary to obtain private services, then why should it be necessary to obtain state or local services? In both cases, there is a competitive marketplace in which to purchase such services, and, if a nonfederal seller's asking price is too high, the federal government can frequently, if not always, instead enforce federal law through a variety of other nonfederal and federal entities. In particular, unlike the sort of exclusive state entitlement to regulate private persons asserted by the Court in *E.C. Knight*, *Hammer v. Dagenhart*, *Schechter Poultry*, and *Carter Coal*, the *New York* entitlement need not lead to hold-out problems that would prevent the entitlement from moving to the level of government that can use it most effectively.

Thus, *New York* and *Printz* promote federalism by providing nonfederal governments with a valuable entitlement but without depriving the national government of any useful power. Assuming that one is willing to indulge even the weakest presumption in favor of federal regimes, *New York* and *Printz* make eminent functional sense.

### III. HOW COMMANDEERING LEADS TO INEFFICIENCY, DISTRIBUTIVE INJUSTICE, AND INVASION OF EXPRESSIVE AUTONOMY

One might not be willing, however, to presume that promotion of state and local governments' power is an intrinsically valuable goal. If one lacks such a minimum presumptive commitment to federal regimes, then the argument presented in Part II will be unpersuasive for two reasons.



First, Part II shows only that the allocation of entitlements provided by *New York* is one possible efficient allocation. But it does not show that the national government's commandeering of state and local governments' services is *inefficient*. After all, Coasean bargains might run either way. It is at least theoretically possible that state and local governments could ensure that Congress did not overburden their regulatory resources by offering Congress state-generated revenue — reverse grants-in-aid — for the right to forgo implementation of federal law. One might argue that, if Congress declined the state funds, this would provide conclusive evidence that Congress placed a higher value on nonfederal implementation than the state and local governments valued their autonomy.<sup>267</sup> What loss of efficiency, therefore, can result from allowing Congress to commandeer state and local regulatory processes?

Second, the argument in Part II does not address any concerns besides the smooth and efficient sale of the *New York* entitlement to the level of government that values it the most. But efficiency is not everything. One might also wish to consider the distributive consequences of *New York*. *New York*, after all, makes the national government pay nonfederal governments for the right to use their regulatory machinery. It makes the nonfederal governments relatively richer and the national government relatively poorer. If one generally favors diffusion of power in a federal regime, then this distributive consequence will seem self-evidently desirable and require no further defense, assuming that the distribution sacrifices no efficiency, as Part II argued. But, if one does not indulge such a presumption, then one will want further justification for this distributive consequence.

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267. The argument for such reverse grants-in-aid is highly speculative, because the device has never been tested. For practical reasons, nonfederal governments probably would have to buy their way out of federal mandates by offering revenue to federal administrative agencies rather than to Congress. There are, however, reasons to believe that federal agencies would prefer inefficiently continued control over nonfederal governments' personnel than additional revenue. The agencies might fear that Congress would reduce their appropriation by the amount of the revenue that they receive from nonfederal governments. Such a fear of an offset has made agencies reluctant to accept fees in other contexts. See Barry S. Read, *The Permit Fee Program of Title V of the Clean Air Act of 1990: Developing State Fee Programs*, 44 Sw. L.J. 1553, 1556 (1991) ("[T]he prospect that an agency's legislative appropriation might be reduced by an amount equal to the fees collected may reduce the agency's incentive to establish and implement a fee system."); see also Joyce M. Martin et al., *Funding State Environmental Programs: Indiana's Solution*, 1 ENVTL. LAW. 435, 444 (1995) (describing how the Indiana legislature reduced the Indiana Department of Environmental Management's budget by "the exact amount IDEM would have raised from municipal fees"). By contrast, Congress could not reduce easily an agency's budget by the value of the nonfederal officials' services that it receives, if only because such services are nonfungible and difficult to value. Agencies, therefore, might perversely prefer mandates on nonfederal officials over reverse grants-in-aid as a way to protect their budgets from congressional offsets.

Part III of this article addresses these two concerns by arguing that even those lacking a minimum presumptive commitment to federalism must embrace the functional theory to the extent they argue that the utility of commandeering depends on states *qua* states — independent governments established and maintained by subnational constituencies. Pervasive commandeering would render state governments indistinguishable from the various species of federal local government that advocates of commandeering feel are inadequate in the first place.

The analogy to private property is straightforward: a king desiring corn for his warehouses, yet unwilling to exert royal effort to grow corn, may firmly renounce any belief in private property and further state than any corn in the kingdom is his for the taking. But because corn is a type of property that depends on the efforts of others for its existence, such a policy would likely discourage farmers from devoting their efforts to producing corn. Thus, Part III suggests that commandeering is both inefficient and distributionally improper by drawing an analogy between state regulatory processes and private property. Section III.A explains that the inefficiency springs from the possibility that commandeering state and local institutions will tend to undermine voters' and politicians' incentives to participate in state and local government, just as confiscation of private property tends to undermine incentives of investors to invest in property likely to be confiscated. Sections III.B and III.C suggest that commandeering might also be distributionally unjust in some of the same ways that confiscation of private property and forced speech is conventionally regarded as unjust — because it inequitably distributes the costs of government and forces nonfederal policymakers to vote for federal policies with which they might disagree.

#### A. *Commandeering as Inefficient Demand for In-Kind Contributions of Goods and Services*

Why might it be inefficient for the national government to demand regulatory services from state and local governments? When the national government commandeers services from nonfederal governments, it essentially demands that such governments provide in-kind contributions to the national government. But such demands can inefficiently deter voters and politicians from participating in state and local politics. In effect, when the national government commandeers state and local regulatory processes, it

undermines the very institutions that the national government seeks to exploit.

To illustrate how commandeering can undermine the incentive to participate in state and local politics, consider why conscription of *private* services might be undesirable. Suppose, for example, that the national government wished to ensure that there were a sufficient supply of sites for the storage of low-level radioactive waste. In order to accomplish this goal, the national government might require certain private operators of landfills designated by the Environmental Protection Agency to "take title" to low-level radioactive waste generated by other persons and store such waste on their property.

Quite apart from the possible constitutional problems raised by such a scheme of waste disposal,<sup>268</sup> such conscription of property and services from private landfill operators might be an extremely inefficient method of financing landfill space. By demanding that landfill operators alone bear the cost of storing low-level radioactive waste, the hypothetical statute effectively would impose an excise tax on the production of landfill space. Depending on the elasticity of supply of such space, this "tax" on investment in landfill space might deter private investors from investing money in the creation of further space. Through conscription, then, the government might actually find itself confronted with an even more dire shortage of landfill sites than that which it wished to remedy. Such selective conscription of specific service-providers' labor or property, in short, functions as an inefficient excise tax.<sup>269</sup>

The national government's demands for state and local regulatory services can be analogized to such inefficient conscription of private services. When the national government commandeers the

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268. One might argue that such a measure might constitute a permanent physical invasion of private property and, therefore, a *per se* takings. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Given the grotesque formalism of takings doctrine, however, the Court might conceivably hold that, because the landfill owner takes title to the waste, there would be no physical invasion within the meaning of *Loretto*.

269. For an account of how excise taxes might lead to "excess burden" — inefficient disincentives to engage in the taxed activities — see KARL CASE, *ECONOMICS AND TAX POLICY* 142-43 (1986); JOSEPH A. PECHMAN, *FEDERAL TAX POLICY* 192-94 (5th ed. 1987). Confiscation of specific sorts of property can have similar effects. See William A. Fischel, *The Political Economy of Just Compensation: Lessons from the Military Draft for the Takings Issue*, 20 HARV. J.L. & PUB. POLY. 23, 26 (1996) (noting that "if the king did not pay for corn, horses, or boats for his army, then farmers, teamsters, and sailors would make them hard to find or be discouraged from producing them at all"). It is a familiar point that conscription can lead to a similar sort of deadweight loss, because the threat of conscription can lead potential conscriptees to engage in wasteful efforts to avoid conscription. See, e.g., Walter Y. Oi, *The Economic Cost of the Draft*, AM. ECON. ASSOC.: PAPERS AND PROCEEDINGS, May 1967, at 39, 59.

services of state or local governments, it necessarily reduces either the revenue or the policymaking discretion available to such governments' officers.<sup>270</sup> It is logical to infer that such erosion of the power, money, and prestige of nonfederal offices can only reduce the incentive of voters and politicians to expend time, energy, and money in voting, running for office, monitoring representatives, and otherwise engaging in political activities to control such offices.<sup>271</sup> Moreover, the (admittedly limited) empirical evidence concerning voters and politicians' incentives suggests that, as the real policymaking discretion of nonfederal office decreases, ambitious and civic-minded citizens would abandon nonfederal politics and instead substitute other activities where their public spirit and ambition can be satisfied more fully.<sup>272</sup> In this way, federal com-

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270. At first glance, this statement might seem incorrect. After all, state and local officials gain significant powers when they administer federal statutes. This factual observation is certainly correct — but also irrelevant. Nonfederal officials can obtain such federal responsibilities even if the national government lacked the power to demand their services. They merely would have to offer to assist the national government on mutually acceptable terms. By giving the national government the power to conscript nonfederal officials' services, one simply diminishes nonfederal officials' capacity to bargain for either greater amounts of policymaking discretion, nonsource revenue, or both. It is difficult to see how this loss of bargaining power would enhance the desirability of nonfederal office.

271. The intuition suggested here is more formally elaborated in Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEXAS L. REV. 1203, 1214 n.34 (1997); see also JACK H. NAGEL, PARTICIPATION 43 (1987) ("[P]eople are more willing to take part in decision making when there is more at stake.").

272. The evidence suggests that innovative policymakers, sometimes known as "public entrepreneurs," tend to emerge when there are offices with policymaking discretion — for example, "strong" mayor positions — that allow significant policy innovation. See MARK SCHNEIDER ET AL., PUBLIC ENTREPRENEURS: AGENTS FOR CHANGE IN AMERICAN GOVERNMENT 94-96 (1995). The loss of discretion might be an especially great deterrent to local officeholding, because an enormous number of local offices are volunteer positions that provide no salary. See Sydney Duncombe, *Volunteers in City Government: Getting More than Your Money's Worth*, 75 NATL. CIVIC REV. 291 (1986); William D. Duncombe & Jeffrey L. Brudney, *The Optimal Mix of Volunteer and Paid Staff in Local Governments: An Application to Municipal Fire Departments*, 23 PUB. FIN. Q. 356 (1995); Sandra Reinsel Markwood, *Volunteers in Local Government: Partners in Service*, 76 PUB. MGMT., April 1994, at 6. The only incentive for participation in such voluntary activities is the opportunity to "make a difference" — to exercise power. As the real power of such offices diminishes, one would expect that ambitious or civic-minded persons would direct their energy to other fora — private nonprofits, trade unions, and private corporations — where their longing for office, prestige, or an outlet for altruistic energy can be more easily satisfied.

There is also some evidence that voters and residents are more willing to engage in more time-consuming political activities — for example, contacting a politician or attending a hearing — if their city has neighborhood organizations with genuine policymaking power. See JEFFREY M. BERRY ET AL., THE REBIRTH OF URBAN DEMOCRACY 89-98 (1993). Moreover, citizens' willingness to engage in politics is related directly to the willingness of politicians and other politically active persons to "get out the vote." It is well established that the more resources that politicians invest in a political campaign — canvassing, advertisements, and so on — the higher the turnout. See, e.g., Gary W. Cox & Michael C. Munger, *Closeness, Expenditures, and Turnout in the 1982 U.S. House Elections*, 83 AM. POL. SCI. REV. 217 (1989); Gerald H. Kramer, *The Effects of Precinct-Level Canvassing on Voter Behavior*, 34 PUB. OPINION Q. 560 (1970); Samuel C. Patterson & Gregory A. Caldeira, *Getting Out the Vote:*

mandeering of state and local activities is analogous to an excise tax on state and local political activity. That is, federal commandeering would reduce the marginal incentive to invest in the burdened activity.

Of course, it is highly unlikely that a few minor demands of the Brady Act variety on nonfederal officers would affect the interest of voters and politicians in those offices. Only pervasive and draconian conscription of state and local services would diminish constituent and candidate interest in nonfederal office. One might, therefore, object that Congress never actually conscripts nonfederal offices so extensively as to deter political participation.

But such a confident assertion is supported by scant data. We have little evidence one way or another about whether or not Congress would refrain from conscripting nonfederal officers if there were no constitutional norm against such conscription. To be sure, Congress historically did not conscript nonfederal officers' regulatory services very extensively prior to 1970. But this abstinence proves little, given that Congress in the past has operated under the assumption that such conscription would be unconstitutional.<sup>273</sup> Given our uncertainty about Congress's incentives and the substitution rate between private and public activities,<sup>274</sup> one might think that it is at least unduly risky to allow Congress to conscript nonfederal officers' services and thus diminish the incentives of candidates and voters to produce such services. Undertaking such a risk is completely unnecessary if, as argued in Part II, the federal government can easily purchase the services of nonfederal officers through intergovernmental transactions. Maybe Congress will show self-restraint in conscripting nonfederal services. But, given that such conscription is unnecessary because Congress can

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*Participation in Gubernatorial Elections*, 77 AM. POL. SCI. REV. 675 (1983). Therefore, one would expect voter turnout to fall as politicians' interest in some elected office diminishes. Assuming that ambitious, innovative policymakers prefer to have more, rather than less, discretion when they assume office, one expects that such persons would invest fewer resources and less time to getting out the vote for offices rendered less desirable because of federal commandeering.

273. For an example of such congressional concern about the constitutionality of conscripting nonfederal officers to provide regulatory services, see the summary of debates over § 1983 in Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 257-66.

274. Clayton Gillette has pointed out to me that selective federal conscription of nonfederal officials' services simply might cause voters and politicians to redirect their attention away from services likely to be conscripted by the federal government to *other* governmental activities less likely to be so burdened. This is possible if federal conscription of nonfederal services is limited and predictable in scope. But given our uncertainty about the likely scope of federal conscription, it might seem unwise to assume such a limited effect on nonfederal incentives.

purchase nonfederal officers' "property rule" entitlement free from high transaction costs, why take the chance?

In sum, commandeering of state or local services seems inefficient in the same way that confiscation of private property or conscription of private services is inefficient; it places the burden for providing a service on persons who invest in the production of such services and thus discourages such persons from continuing to make the desired investment, at least whenever the supply of private goods and services responds elastically to increases in costs.

One might respond that commandeering nevertheless might be more efficient than the use of voluntary intergovernmental agreements, because purchasing nonfederal governments' services requires the national government to raise revenues through potentially inefficient taxation.<sup>275</sup> For example, income taxes might inefficiently induce taxpayers to substitute leisure for labor, while sales taxes might inefficiently deter taxpayers from consumption of taxed goods.<sup>276</sup> It is a familiar point that conscription of *private* services can be more efficient than purchase of such services through voluntary agreements precisely because such conscription reduces the need to use inefficient taxes.<sup>277</sup> Why is not conscription of *nonfederal governments'* services also a good way to avoid such tax inefficiencies?

The difficulty with such an argument is that, unlike the conscription of private individuals, the commandeering of nonfederal governments is neither necessary nor sufficient for avoiding the

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275. For a discussion of the deadweight losses resulting from taxation, see JOSEPH STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 375-76, 390-92 (4th ed. 1995); Charles L. Ballard et al., *General Equilibrium Computations of the Marginal Welfare Cost of Taxes in the United States*, 75 AM. ECON. REV. 128 (1985); Edgar K. Browning, *On the Marginal Welfare Cost of Taxation*, 71 AM. ECON. REV. 11 (1987); Charles Stuart, *Welfare Cost per Dollar of Additional Tax Revenue in the United States*, 74 AM. ECON. REV. 352 (1984).

276. See RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 297-303 (4th ed. 1984).

277. This argument applies regardless of whether the government conscripts personal services or confiscates property. For an application of the argument to conscription, see Milton Friedman, *Why Not a Volunteer Army?*, in *THE MILITARY DRAFT: SELECTED READINGS* 625, 626 (Martin Anderson ed., 1982); Thomas Ross, *Raising an Army: A Positive Theory of Military Recruitment*, 37 J.L. & ECON. 109, 114-15 (1994). For an application of the argument to regulation of real property, see Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 355-58 (1997) (noting the danger that the Endangered Species Act may induce farmers to overplow their land to discourage the presence of endangered species on their property). The argument works only if conscription functions as a lump-sum tax that one cannot avoid by changing one's behavior. As Ross notes, however, military conscription does not function in this way; the availability of exemptions for married persons, students, and so on encourages potential conscriptees to engage in wasteful draft avoidance such as enrolling in graduate school. See Ross, *supra*, at 114 n.14.

deadweight losses of inefficient taxes. Such commandeering is not sufficient to achieve tax efficiency because state and local governments must impose nonfederal taxes to finance federally mandated services, and state and local taxation might be every bit as inefficient as the federal taxation that it replaces. State and local governments, after all, raise money by imposing some mix of income, sales, or property taxes that can distort private choices just as much as the federal tax code. Therefore, to avoid inefficient taxation, it would not be sufficient for the national government to demand that state and local governments perform regulatory services. The national government would also have to demand that state and local governments finance such services with taxes approved by the national government.

But, if the national government can determine which state and local taxes are more efficient than federal taxes, then it is difficult to see why the national government could not simply enact such efficient taxes as federal revenue-enhancing measures. There does not seem to be any efficiency-based reasons for forcing state and local governments to enact taxes that the national government could simply impose directly as a matter of federal law. The national government would not necessarily have to administer this federal tax itself; instead, the national government could purchase the assistance of state and local governments by transferring some share of the revenue derived from such taxes to state and local governments in return for their administrative services.<sup>278</sup> Precisely such a funding mechanism was upheld in *New York*. Congress authorized the imposition of surcharges on the interstate transfer of waste and allocated the proceeds of the surcharge to those states that carried out the federal siting scheme.<sup>279</sup> In sum, unlike the conscription of private services, the commandeering of the state governments' regulatory machinery is unnecessary to provide any benefit such as tax efficiency.<sup>280</sup>

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278. State-federal cooperation in the collection of taxes is well established. See, e.g., GENERAL ACCOUNTING OFFICE, PUB. NO. GGD-86-8, TAX ADMINISTRATION: THE FEDERAL/STATE TAX INFORMATION EXCHANGE PROGRAM 1-11 (1985) (describing and evaluating the IRS's information exchange agreements with 49 states' tax collection agencies).

279. See *New York v. United States*, 505 U.S. 144, 171-73 (1992).

280. David Dana presents an interesting argument that state taxes might be systematically more efficient than *any* federal tax. By forcing state governments to implement environmental schemes exclusively with state tax revenue, such mandates ensure that the cost of environmental cleanup within each state will be born by the residents of that state. If the national government provided funding to each state for such cleanup, then there would be a likelihood of a cross-subsidy from clean, wealthy states with sophisticated regulatory agencies to poorer, dirtier states that lack such agencies. Wealthy states, after all, tend to pay more federal taxes for the same level of environmental regulation, simply because the federal gov-

One might make a second objection to the argument that commandeering is inefficient. One might reason that it proves too much, because it would seem to condemn preemption just as much as commandeering. As Publius noted, the federal government would diminish voters' interest in state and local politics simply by preempting state and local policymaking in interesting areas like war and trade and replacing them with federal legislation.<sup>281</sup> If it is somehow inefficient to reduce the influence of state and local offices, then why should not such preemption be just as suspect as commandeering?

Preemption can be distinguished from commandeering on two grounds. First, unlike commandeering, federal money cannot buy preemption. As argued in section II.B.2, it would be extremely costly for the federal government to purchase the power to regulate activities with interstate commercial effects from state and local governments, because any individual state's refusal to sell the power would necessarily prevent uniform enforcement of a federal regulatory scheme throughout the nation and thus affect other states' willingness to allow *their* laws to be preempted by national legislation. But federal efforts to purchase the use of state and local governments' regulatory processes do not present this danger, because the national government can bargain with each nonfederal government one at a time.<sup>282</sup> Therefore, even if commandeering and preemption impose exactly the same harm on state and local governments, commandeering is less necessary than preemption; the federal government can use its spending power to secure all of

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ernment relies on progressive taxation rather than fees. Likewise, if the federal government funds mandates, then dirtier states that lack an environmental bureaucracy will tend to receive more funds than states that have already cleaned up their environment. In short, residents of richer and cleaner states might actually prefer that state governments be forced to clean up the environment without federal funding, as such funding will cause them to export tax dollars to residents of poorer, dirtier states. See David Dana, *The Case for Unfunded Environmental Mandates*, 69 S. CAL. L. REV. 1, 26-35 (1995).

Dana's argument, however, presents a non sequitur. It does not justify mandates but rather a federal system of financing that does not depend on general revenues. If the United States wishes to finance environmental cleanup within each state only with funds derived from that state's residents, then it could easily do so simply by creating a federal scheme under which environmental regulation within a state would be financed exclusively by taxes, impact fees, or special assessments imposed exclusively on the state's residents. The financing mechanism upheld in *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), involved precisely such a system: if a state government did not adopt a system of unemployment insurance acceptable to Congress, then Congress imposed a special payroll tax only on employers within the state.

281. THE FEDERALIST NO. 17, *supra* note 50, at 118 (Alexander Hamilton) ("The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition.").

282. See *supra* notes 245-51 and accompanying text.



the advantages of commandeering, but it cannot use its spending power as easily to preempt state and local laws.

But quite apart from the necessity of preemption, preemption is generally less harmful to *useful* state and local political activity than commandeering legislation. So, for example, when Congress forbids state and local governments from enacting a collective bargaining law, a monetary policy, a tariff on out-of-state goods, or a bankruptcy code, Congress does so on the assumption that nonfederal interest in such topics would be counterproductive. Of course, lobbyists, voters, and aspiring politicians who are interested in these topics might have their interest in state and local government dampened by the preemption of nonfederal governments' jurisdiction, but that is the point. Congress essentially makes a declaration that such interest ought to be dampened, because state and local institutions should not meddle in what ought to be exclusively national concerns.

By contrast, when the national government demands regulatory services from state and local governments, Congress can hardly argue that state and local governments ought not to be involved in the regulatory field in question. The whole point of commandeering, after all, is to use state and local officials to regulate in some federal field, presumably because such officials are well-suited for such duties. By commandeering state or local regulatory processes, Congress effectively admits that the institutions that it exploits ought to be maintained and developed. The perversity of commandeering is that, by unconditionally demanding services from nonfederal governments, Congress undermines the very institutions that it seeks to exploit, by denying them the federal grant revenue that would otherwise be necessary to induce them to act.<sup>283</sup>

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283. This difference between preemption and commandeering legislation can be explained by an analogy to regulation of private persons. As Jed Rubenfeld notes, the U.S. Supreme Court generally allows the government to regulate private property to prevent specific uses of the property, even when the regulations impose large costs on private owners. It is only when the government regulates private property in order to exploit the value of such property — in Rubenfeld's phrase, to "use" the property — that the Court finds a violation of the Fifth Amendment and a duty to pay compensation. See Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993). The distinction between preemption and commandeering follows similar logic: when the government commandeers state governments for the purpose of exploiting the value of their services, then it makes sense for the government to compensate the state government so as not to deter persons from investing in the desired activity.

### B. *Commandeering as Distributionally Unjust Confiscation of Property*

So far, this article has raised questions about the efficiency of commandeering. But, quite apart from efficiency-based objections, one might worry about the distributional equity of federal laws that unconditionally demand state and local services. The inequity of such systems can be illustrated by the hypothetical statute requiring private landfill operators to provide storage space for low-level radioactive waste. One might object to the statute because it places the burden of storing low-level radioactive waste on private landfill operators without any ethically persuasive basis for the imposition. Landfill operators do not generate the waste being foisted upon them and therefore do not receive special benefits from the waste storage program. Landfill operators are distinguished only by their ability to deliver the service that the government desires. It is hard to see why this ability suggests a greater moral obligation to bear the costs of waste storage when such storage benefits society generally.<sup>284</sup>

One might generalize from this example and state that the government ought not to force private persons to bear the costs of delivering a service to the public merely because those persons happen to be most capable of delivering the service. The ability to provide the service might be distributed unevenly throughout the population, and there is no reason to believe that the distribution of this ability bears any relation to a morally plausible distribution of the costs of government. Such considerations of distributive justice might explain why the government generally does not obtain specialized services by conscripting them from private persons possessing such skills. When the national government wishes to secure the services of lawyers or tax collectors, it acquires their services through voluntary contract.

Similar reasoning might suggest that it is distributively inequitable for the national government to force state and local governments to bear the cost of implementing federal law. Nonfederal governments might be well-suited to delivering a service, but it hardly follows that they should bear the cost of providing it. So, for

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284. This point is frequently made concerning military conscription. See, e.g., *Comments of George Hildebrand*, AM. ECON. ASSOC: PAPERS & PROCEEDINGS, May 1967, at 63, 65 ("Why should servicemen be required to pay this special tax for the benefit of the rest of the taxpayers?"). Of course, conscription of private persons — for example, military service and jury duty — is generally randomly distributed across the entire population by lottery. One cannot so distribute the burden of other sorts of in-kind contributions that require specialized skills.

example, even if county sheriff departments are capable of providing background checks on gun purchasers, none of the standard theories of public finance would suggest that allocating the costs of such background checks to sheriff departments is equitable. If one wished to distribute the costs of background checks to the persons that create the need for such checks, then presumably one would finance the service by an excise tax on firearms manufacture or sale.<sup>285</sup> Likewise, if one wished to allocate the costs based on ability to pay, then one would use a steeply progressive income tax. But neither a "benefits received" theory nor an "ability to pay" theory suggests that county governments ought to be saddled with the cost.

One might respond to this argument against commandeering by complaining that it anthropomorphizes state and local government. According to this argument, state and local governments are different from, say, private landfill operators because, unlike private persons, nonfederal governments have the power to spread the costs of federal mandates across the general public through imposition of state and local taxation. The burden on the nonfederal government does not translate into any disparate burden on private persons. Therefore, when the national government commandeers state and local governments, there is no danger that any real person will be singled out to bear costs more properly borne by the public at large.

This response, however, exaggerates the difference between private firms and governmental organizations. It is certainly correct that state and local governments have the legal power to spread the costs of mandates among the public through broad-based state and local taxes. But private firms frequently also have the legal power to spread the costs of confiscatory regulations among their customers through increasing the prices of the goods or services that the firms sell. So, for example, in response to a demand that they provide landfill space to generators of radioactive waste, landfill operators can raise the price of the space for nonradioactive waste.

One might object that the capacity of private firms to pass along the added cost of mandates is limited practically by the consumers' elasticity of demand for the product that the firm sells; if demand responds elastically to price increases, then the firm will not be able

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285. The House Judiciary Committee's Report on the Brady Act unsurprisingly identified gun retail stores as a major source of firearms used in crimes. See H.R. REP. NO. 103-344, at 9 (1993), *reprinted in* 1993 U.S.C.A.N. 1984, 1986.

to increase its prices to cover the burden.<sup>286</sup> This is certainly true, but it does not distinguish private firms from governmental organizations, because governments also are constrained by limits on the taxpayers' demands for the governments' services. No government can raise taxes at will to cover costs resulting from federal mandates. Many state and local governments are constrained from raising additional taxes by charter and state constitutional provisions that require the taxes to be approved by a referendum.<sup>287</sup> Even governments that lack such plebiscitary devices are constrained practically in their ability to increase state and local taxes by voters' resistance to higher tax bills.<sup>288</sup> Thus, like private firms facing elastic consumer demand, nonfederal governments facing elastic taxpayer demand for public goods might find that they cannot distribute the costs of federal mandates broadly among taxpayers in the form of a broadly based increase in taxes.<sup>289</sup>

Instead, the federal mandate might force the nonfederal government to cut nonmandated services. Such cuts could, in theory, be broadly distributed across every state or local interest group and constituency, but, assuming that state legislators respond to normal electoral incentives, one would expect that legislators would target those programs favored by the least influential interest groups in the "benefits coalition" that control a particular level of government.<sup>290</sup> For example, it would be foolhardy for a legislator to fund a federal mandate by imposing equal cuts on popular programs like highways and less popular programs such as low-income housing. Instead, the rational legislator would target the programs with less powerful constituencies to bear the brunt of the cuts.

Thus, small and less influential interest groups may bear the real cost of the federal demands for state or local regulatory services,

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286. On businesses' ability to respond to product taxes by increasing prices, see MUSGRAVE & MUSGRAVE, *supra* note 276, at 251-53.

287. See Yuri Rozenfeld, *Developments in State Constitutional Law, 1993: Legal Limits on Taxing*, 25 RUTGERS L.J. 1265 (1994).

288. State legislators are notoriously fearful of raising their constituents' taxes. See WAYNE L. FRANCIS, *LEGISLATIVE ISSUES IN THE FIFTY STATES: A COMPARATIVE ANALYSIS* 11 (1967).

289. There is mixed indirect empirical evidence that elected officials will reduce services rather than raise taxes in the face of increased costs. One study indicates that, when confronted with reductions in federal aid, counties in Pennsylvania reduce expenditures rather than replace the lost aid with local taxes. See William F. Stine, *Is Local Government Revenue Response to Federal Aid Symmetrical? Evidence from Pennsylvania County Governments in an Era of Retrenchment*, 47 NATL. TAX J. 799, 810-12 (1994).

290. A "benefits coalition" is a coalition of interest groups that control a particular level of government and seek to use such control to extract benefits from the government. See ANTON, *supra* note 2, at 80-99.

because, if taxpayers resist higher state or local taxes, then nonfederal governments might finance compliance with the federal mandate by cutting the budgets of programs favored by the weakest interest groups. But it would be hard to argue that such targeted state or local budget cuts are a sensible or equitable way to finance federal services. There is no reason to suspect that the members of such groups receive more benefits from, or have a greater ability to pay for, the federal programs that they subsidize with the loss of their favored state or local programs. Rather, they are forced to pay simply because the weaker interest groups' programs are the most convenient source of revenue.

To be sure, precisely the same distributive consequence would arise from any federal budget cut that selectively eliminated funding for a program favored by a politically weak interest group. Thus, one might regard "commandeering" of nonfederal officials' services as no more alarming than, say, budget cuts eliminating subsidies for low-income housing. Apparently arbitrary fiscal decisions are the inevitable result of democratic dealmaking in Congress.

The distinction between arbitrary budget cuts and conscription of public or private services, however, is that neither nonfederal officials nor private persons have any *prima facie* claim to federal money, whereas both have a *prima facie* claim to their own services. Such a distinction requires a defense of a particular, controversial baseline of entitlement, an issue that I defer until section IV.A.2 below.

For now I wish to establish only that conscription of public and private services creates the *same* risk of distributional arbitrariness. One might believe that this risk is small, because arbitrary confiscation is indistinguishable from arbitrary budgeting, and arbitrary budgets are constitutional. The important point is simply that, to the extent that one regards confiscation of *private* services as distributionally arbitrary, one should have precisely the same reaction to confiscation of nonfederal officials' *governmental* services: the two stand or fall together.

In short, at least where the supply of private and public goods is not perfectly inelastic, federal demands for either nonfederal governments' or private services can impose concentrated costs on specific interest groups that are indefensible under either an "ability-to-pay" or "benefits received" principle of distributive justice. Such demands for in-kind contributions are defensible only on the theory that those who are practically capable of providing some service ought to bear the cost of providing it to the rest of the nation. To

the extent that such a theory seems morally arbitrary, the commandeering of regulatory services from state and local governments will seem just as morally arbitrary as confiscation of goods from private persons.

Indeed, one can view *Printz* and *New York* as extending protections to nonfederal government that are already enjoyed by private persons under the Fifth Amendment's Just Compensation Clause and the Fourteenth Amendment's Equal Protection Clause. As the Court has repeatedly noted, the Fifth Amendment's Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>291</sup> But, as explained above, any demand for specialized in-kind contributions based solely on the contributor's ability to render the service will tend to impose precisely such an inequitable burden: a demand that a private landowner take title to other persons' radioactive waste and store it on their land would certainly seem to be a regulatory taking.

To be sure, the Court has upheld many governmental demands that private persons perform various affirmative duties. But these duties tend to be distinguishable from the obligations that *New York* and *Printz* prohibit. First, the Court has upheld "certain civic duties" owed by *every* adult citizen to the state — for example, the duty to testify as a witness,<sup>292</sup> jury duty,<sup>293</sup> military conscription,<sup>294</sup> and so on. But, because such obligations are widely and randomly distributed across the entire population, they do not pose the same problem of distributive injustice as duties imposed on particular persons or organizations, and such universal obligations would probably be exempt from *New York* and *Printz* as generally applicable laws if imposed on nonfederal officials.

Second, the Court frequently has upheld legal obligations to perform various services as a condition of pursuing particular occupations. So, for example, several courts have upheld the obligation of lawyers to represent the indigent on the theory that lawyers are officers of the court who owe such duties as a price of exercising a

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291. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

292. *See Hurtado v. United States*, 410 U.S. 578, 589 n.11 (1973).

293. *See Butler v. Perry*, 240 U.S. 328, 332-33 (1916) (describing "services in the army, militia, in the jury" as outside the scope of involuntary servitude in the Thirteenth Amendment).

294. *See Selective Draft Law Cases*, 245 U.S. 366, 390 (1918).

public responsibility.<sup>295</sup> But, as explained in more detail in section IV.A, *New York* would permit such conditional duties under the exception allowing conditional preemption, at least if the condition bore some nexus to the special benefits enjoyed by the occupations' members. It is also worth noting that courts will strike down even such conditional obligations as unconstitutionally confiscatory if the obligation seems unrelated to the conscripted persons' profession<sup>296</sup> or commercial pursuit.<sup>297</sup>

In sum, government almost never unconditionally demands in-kind contributions from particular persons or organizations simply because they happen to have skills or property that would be useful to the government: any such demands would likely offend both distributive justice and constitutional doctrine.<sup>298</sup> One can regard *New York* and *Printz* as merely extending such norms to nonfederal governments, providing them not with special state rights but merely parity with private rights.

### C. *Commandeering as Forced Speech*

There is a third objection to commandeering legislation. Unlike preemption of state and local law, federal demands for nonfederal regulatory services force state and local politicians to advance federal policies with which they might disagree. The conventional ob-

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295. See, e.g., *United States v. 30.64 Acres of Land*, 795 F.2d 796, 800-01 (9th Cir. 1986); *Peterson v. Nadler*, 452 F.2d 754, 758 (8th Cir. 1971); *Dolan v. United States*, 351 F.2d 671, 672 (5th Cir. 1965); *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965).

296. An increasingly large number of state courts have stated that state legislatures cannot force lawyers to represent the indigent without payment of just compensation. See *DeLisio v. Alaska*, 740 P.2d 437, 443 (Alaska 1987); *Arnold v. Kemp*, 813 S.W.2d 770 (Ark. 1991); *White v. Board of County Commrs.*, 537 So. 2d 1376, 1379 (Fla. 1989); *Makemson v. Martin County*, 491 So. 2d 1109, 1112, 1114 (Fla. 1986); *State ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Jewell v. Maynard*, 383 S.E.2d 536, 547 (W. Va. 1989). See generally Jerry L. Anderson, *Court-Appointed Counsel: The Constitutionality of Uncompensated Conscripting*, 3 GEO. J. LEGAL ETHICS 503 (1990) (surveying cases).

297. So, for example, some state courts have been suspicious of rent control because it resembles a demand on landlords to provide the in-kind benefit of housing. See *Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1064 (N.Y. 1989) (holding that an ordinance establishing a moratorium, requiring rehabilitation of certain residential properties, and requiring rental at controlled rates is a facial physical taking). The U.S. Supreme Court has rejected the theory that rent control combined with restrictions against the eviction of tenants is a physical occupation taking under *Loretto*. See *Yee v. City of Escondido*, 503 U.S. 519 (1992). But even courts that do not reject rent control across the board recognize its potential to unjustly concentrate costs on landlords under particular circumstances. See, e.g., *Birkenfeld v. City of Berkeley*, 550 P.2d 1001 (Cal. 1976) (striking down a 12% cap on rent increases as denying a landowner a just and reasonable rate of return).

298. For an argument that nonmilitary conscription of civilians' services constitutes an unconstitutional taking of property, see Philip Bobbitt, *National Service: Unwise or Unconstitutional?*, in *REGISTRATION AND THE DRAFT* 323-24 (Martin Anderson ed., 1982).

jection to such forced association with federal policy is that it might undermine political accountability by confusing voters about the true positions of state and local politicians. Political accountability, however, is only part of the story. Even if no voters are actually misled about ultimate responsibility for federally mandated regulations, one might believe that it is objectionable for the federal government to force state and local politicians to promulgate federal policies at odds with their own ideological views.

It is well-established that the First Amendment bars the government from requiring *private* organizations to affirm specific political causes through speech or action. Since *West Virginia State Board of Education v. Barnette*,<sup>299</sup> the U.S. Supreme Court has construed the First Amendment to bar government from demanding any "involuntary affirmation"<sup>300</sup> of "what shall be orthodox in politics, nationalism, religion, or other matters of opinion."<sup>301</sup> *Barnette* barred the West Virginia Board of Education from forcing children to pledge allegiance to the American flag, but later cases extended *Barnette* to other contexts in which the government did not so directly demand specific endorsements from individuals.

So, for example, the Court has held that governments are barred from requiring drivers to carry specific messages on their automobile's license plates.<sup>302</sup> Likewise, the First Amendment constrains the government's ability to force private individuals to pay dues to unions, bar associations, or other private organizations for the purpose of subsidizing the organizations' lobbying activities and other political messages with which the contributor disagrees.<sup>303</sup> Along similar lines, the First Amendment limits the power of government to force a private organization to subsidize the messages of other groups through in-kind contributions such as place in a parade<sup>304</sup> or rebuttal space in a newspaper.<sup>305</sup>

How might these limits on *private* compelled speech be relevant for evaluating the national government's power to demand regulatory services from state or local governments? Quite simply, by de-

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299. 319 U.S. 624 (1943).

300. 319 U.S. at 633.

301. 319 U.S. at 642.

302. See *Wooley v. Maynard*, 430 U.S. 705 (1977).

303. See *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990); *Ellis v. Brotherhood of Ry., Airline, & S.S. Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

304. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 573-74 (1995).

305. See *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241, 249-58 (1974).



manding that nonfederal governments enact or enforce laws, the national government demands that state and local officials speak on behalf of the federal government by issuing commands to third parties. State or local legislation is, of course, speech; when a legislative body enacts a law, its members endorse a command addressed to the persons covered by the rule. Likewise, in any enforcement action, executive officials issue commands to regulated persons demanding that they do or cease to do something which the law commands or forbids. In either case, the government speaks to the citizenry. The national government's demand that nonfederal governments issue such commands, therefore, implicates worries about compelled speech suggested in *Wooley*, *Barnette*, *Abood*, and other First Amendment cases.

Of course, the law pervasively and quite properly requires private and public entities to speak. Persons are obliged to serve as witnesses when they are subpoenaed, manufacturers must frequently place warnings on their products, and employers must often notify employees about their statutory rights on company bulletin boards. But commands are an especially troubling sort of speech to demand from others, because, unlike disclosure of facts, commands inevitably are hortatory; they necessarily serve the purpose of requiring the compelled speaker to lend his or her authority to the proposition that the command ought to be obeyed.<sup>306</sup> This is not to say that factual statements, warnings, and so on, lack normative implications.<sup>307</sup> But demands that speakers utter commands or exhortations are unique in that one cannot intelligibly require the utterance of an exhortation or command without intending that the compelled speaker lend his or her authority to the utterance.

Such compelled endorsement of normative beliefs strikes at the heart of *Barnette's* and *Wooley's* rule against involuntary affirmation. This is intuitively easy to see with laws demanding exhortations from *private* organizations. For example, a federal law requiring the National Rifle Association to pass a resolution condemning gun ownership or endorsing gun control would seem to be a classic example of an involuntary affirmation of an ideological position forbidden by the jurisprudence condemning forced speech. But *a fortiori* a federal law demanding that county sheriffs issue

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306. For a subtle analysis of commands, or "exercitives," and their connotation of "advocacy that [something] should be so," see J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 155-56 (2d ed. 1975).

307. The statement "smoking causes lung disease," for example, obviously carries the connotation that one should not smoke.

commands barring felons from purchasing guns by performing background checks on gun purchasers effectively requires precisely the same exhortation from county officials; the county sheriff's commands differ from the hypothetical NRA resolution only in that the sheriff must back his or her words urging compliance with federal policies with actions.

Examining the purposes underlying the *Barnette* rule confirms this intuition that the federal government ought to be prohibited from demanding regulatory speech from nonfederal governments. For example, the rule against forced speech is often justified as an effort to prevent listeners from misattributing mandated speech to the sincere opinion of the coerced speaker.<sup>308</sup> Under such a "misattribution theory," the purpose of the *Barnette* line of cases might be to prevent the government from effectively censoring private speakers' messages by compelling them to utter governmental opinions that would be mistaken for the speakers' own views.<sup>309</sup> But Justice O'Connor's "political accountability" argument justifies *New York* in precisely the same terms as a way to prevent voters from misattributing compelled utterances as the sincerely held beliefs of the nonfederal politician.

Justice O'Connor's invocation of "political accountability," however, overlooks some other reasons to be wary of forced speech that are at least as powerful as the risk of misattribution. After all, if the only purpose of the doctrine against compelled speech were to prevent misattribution of government-mandated beliefs to private persons, then the purpose could be accomplished simply by accompanying every government-mandated message with a disclaimer explaining that the message was required by law and did not necessarily reflect the views of the speaker. Under such a theory, the government could require PruneYard Shopping Center to festoon its walls with the government's preferred messages praising

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308. So, for example, the Court stated in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980), that the owner of a shopping center could be forced by the State of California to provide pamphleteers with access to his customers and property because "[the shopping center is] . . . a business establishment that is open to the public to come and go as they please" so that "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner." Likewise, in *Turner Broadcasting v. F.C.C.*, 512 U.S. 622, 655 (1994), the Court suggested that the Federal Communications Commission could require cable television companies to provide broadcasters with access to the cable system because "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."

309. For such a characterization of the Court's doctrine concerning compelled speech, see Abner Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451 (1995). I discuss Greene's views *infra* note 311.

managed health care or condemning smoking so long as the owner could easily post signs "disclaim[ing] any sponsorship of the message,"<sup>310</sup> because then no member of the public would misattribute the beliefs to the owner.<sup>311</sup> Likewise, Congress could require county sheriffs to issue orders forbidding the sale of firearms on the theory that the sheriffs had adequate incentive and ability to inform voters about the true source of the command. The risk of misattribution seems, in either case, to be highly speculative.

There are other, equally powerful reasons for the *Barnette* doctrine that do not rest on risk of misattribution,<sup>312</sup> and there are likewise dangers to communication posed by "commandeering" besides loss of "political accountability." Consider, for example, the danger of governmental speech becoming overly *pervasive*. If government could force private persons to use their property, writings, and voice to carry government-mandated affirmations or assertions, then the government essentially would have the power to conscript all private property and persons into a vast information agency working to promulgate governmental views. It is a familiar point that governmental speech can be threatening to private expressive liberties.<sup>313</sup> But, whatever the dangers posed by governmental speech, they surely are exacerbated greatly if government could commandeer all private resources — voices, cars, walls, books, newspapers, front lawns, airwaves, and so on — in order to promote governmental officials' views. Unlike governmental speech that is funded entirely from general revenues, governmental conscription of private property to carry governmental messages lacks the limit imposed by constrained fiscal resources. To the extent

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310. *PruneYard*, 447 U.S. at 87.

311. Greene suggests that such a disclaimer itself would unconstitutionally force a private person to reveal his or her beliefs to the public. See Greene, *supra* note 309, at 474-75. But this is not true, because one does not reveal any of one's beliefs by simply stating that one's statement is compelled by law and does not necessarily reflect one's opinions. Such a disclaimer does not suggest that one does not, in fact, share the beliefs that the government requires one to announce. It simply provides a correct description of the law.

312. The Court has never upheld a law compelling speech simply because the law presented no danger of misattribution. While the Court mentioned that the risk of misattribution was low when it upheld the state and federal laws in *PruneYard* and *Turner Broadcasting*, the decisions' holdings seem to rest just as much on the fact that, in both cases, the government had never required the private owners to promote any *specific* viewpoint. In both cases, the right of access did not depend on the content of the message being promulgated. In *PruneYard*, the Court upheld the limit on PruneYard Shopping Center's rights by noting that, by granting access to all petitioners and pamphleteers, "no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message." *PruneYard*, 447 U.S. at 87. Likewise, the Court emphasized the content-neutrality of the "must carry" provisions in *Turner Broadcasting*. See 512 U.S. at 655.

313. See generally MARK YUDOF, *WHEN GOVERNMENT SPEAKS* (1983).

that one worries that government-favored views will enjoy an overweening advantage in the marketplace of ideas, one might object to giving government freedom from such fiscal constraint by allowing government to conscript in-kind communication services.<sup>314</sup> We would not want government to mandate portraits of Our Leader on every private house even if it were well-known that such portraits were present by order of the state, not the wish of the owner.

The same concern about the pervasiveness of Congress's speech would suggest *New York's* anticommandeering rule. The parallel between private and governmental entities here is well-stated by Mark Yudof: Just as the fragmentation of the national economy into "private economic entities . . . operat[es] as a constraint on government communications,"<sup>315</sup> so, too, "[f]ragmentation [of government] is inconsistent with the sort of single voice that appears to make government communications most effective."<sup>316</sup> By demanding that nonfederal officials legislate on behalf of the federal government, Congress essentially requires them to lend their authority to the federal policy. It is difficult to see how they could do so without compromising their ability to lead a rhetorically effective opposition to such policies. The anticommandeering rules of *Barnette* and *New York* both deprive the national government of the communicative capability of state and local governments — a limit that might be a healthy way to preserve political pluralism.

Aside from worries about overextension of governmental speech, governmental demands impose an especially demoralizing psychic cost on persons who are forced to promulgate views inconsistent with their own purposes. Quite apart from the possibility that such compelled speech might garble private persons' intended messages, it is simply insulting to have one's property and person used against oneself.<sup>317</sup> One might call this injury a burden on one's "integrity" — one's ability to have one's words and actions match one's beliefs. Some commentators have suggested that corporate entities lack this interest in integrity because corporations cannot feel demoralized or insulted.<sup>318</sup> But this view ignores the

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314. For an account of how fiscal limitations genuinely can confine governmental speech, see *id.* at 57 (noting financial constraints that limit governmental agencies' ability to run advertisements).

315. *Id.* at 114.

316. *Id.* at 115.

317. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-5 (2d ed. 1988) (describing infringement, in the right-not-to-speak setting, of the individual's interest in selfhood).

318. See Greene, *supra* note 309, at 482.

interest of an organization's members in maintaining the integrity of a corporation as a way of facilitating the integrity of their own speech.<sup>319</sup> The government, for example, surely would undermine the integrity of at least some members of the National Rifle Association by requiring the NRA to issue proclamations endorsing gun control because membership in the NRA is one important way in which individuals express their views about firearms. To the extent that an association provides a means by which its members' views and voices can be heard, federal policies that distort the organization's voice *pro tanto* distort the members' voice.

One might object to this analogy between forcing private persons to speak and governmental officials to issue commands by noting that governments force their employees and agents to speak all the time: police officers are required to issue commands to suspects, district attorneys are required to issue exhortations to juries, and county commissioners are forced to enact taxes for state programs. For that matter, federal agencies must surely carry out the will of Congress. If the state can force its agents and employees to speak as part of their governmental duties, then why cannot the federal government also force such officials to speak on behalf of the *federal* government?

The short and simple answer is that state and local officials have agreed to speak on behalf of their employer, the state governments; they have not agreed to speak on behalf of the federal government. Public or private organizations can certainly require *their* agents to speak as part of the agents' organizational duties: if the Tobacco Institute hires a spokesperson, then the spokesperson surely must say what the Institute tells him to say at a press conference and set aside his personal scruples about smoking, or else lose his job. Without such a power, an organization would cease to exist. It hardly follows, however, that organizations can force persons who have *not* voluntarily assented to act as the organization's agents to speak on behalf of the organization. One does not waive one's right to abstain from speech with respect to every organization just because one has done so with respect to one organization.

First Amendment doctrine reflects a distinction between government's power to control the speech of its own agents and government's inability to control the speech of persons who are not its employees. A government's restrictions on the speech of its own

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319. For an account of different ways in which a corporate entity might assert the autonomy interests of its members, see MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 60-77 (1986).

employees can be justified as a necessary concession to bureaucratic efficiency.<sup>320</sup> After all, the very idea of being an agent is that you speak not for yourself, but for your principal.<sup>321</sup> By contrast, nonfederal governments are not agents of Congress.<sup>322</sup> If Congress wishes to induce state or local officials to speak on their behalf, then Congress can do what it routinely does with private persons: it can induce them through voluntary contracts to waive their First Amendment rights.<sup>323</sup>

But a stubborn insistence on the public-private distinction might still lead one to object to the analogy between private persons' First Amendment rights and nonfederal officials' right not to issue or enforce federal commands. One might object that, unlike private organizations, governmental organizations cannot possess an interest in free expression. As Mark Yudof has noted, "[t]he First Amendment has been viewed historically as involving limitations on government, not as a source of government rights."<sup>324</sup> Several courts have echoed this view, stating that the First Amendment does not protect governmental speech.<sup>325</sup>

But this sharp distinction between private organizations' rights and governmental immunities is more a product of a habitual obsession with drawing sharp distinctions between public and private spheres rather than an accurate account of the law. As Akhil Amar has explained insightfully, the First Amendment was not enacted originally merely to protect individual rights; it was enacted to protect the *people's* collective right of self-government through petition

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320. See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

321. Cf. ROBERT POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* ch. 6 (1995) (arguing that the autonomy of governmental agents is necessarily curtailed for such managerial purposes when they play an instrumental role in an organization dedicated to accomplishing some specific goal).

322. See *Coyle v. Smith*, 221 U.S. 559 (1911).

323. The Court generally has affirmed conditions on government employment requiring employees to waive specific speech rights when such waiver is related to the job that the employees are hired to perform. See, e.g., *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (holding that a CIA agent may be required to waive his First Amendment right to publish an account of the agency's operations as a condition of employment).

324. YUDOF, *supra* note 313, at 44.

325. See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government."); *Muir v. Alabama Educ. Television Commn.*, 688 F.2d 1033, 1038 (5th Cir. 1982) (suggesting that it "may be essentially correct" that governmental speech lacks First Amendment protection); *Anderson v. City of Boston*, 380 N.E.2d 628, 637 (Mass. 1978) (stating that a state law forbidding municipal expenditures to promote a referendum issue could not violate the First Amendment because "we suspect that the First Amendment has nothing to do with this intra-state question of the rights of a political subdivision").

and public speech.<sup>326</sup> Doctrines of federalism, likewise, are not simply a matter of "structure," without relationship to "rights" of free expression. To the contrary, state immunities routinely are justified by the Court in terms of their power to protect free expression of nonfederal officials.

Consider, for example, the constitutional doctrine of legislative immunity. The Court justifies this doctrine by invoking arguments and rhetoric familiar from First Amendment jurisprudence. The U.S. Supreme Court has long held that state and local legislators cannot be held liable for their public statements or legislative actions — their speech, debate, and voting records.<sup>327</sup> This immunity bars liability even for what might otherwise violate the U.S. Constitution itself when such injuries are the result of legislative speech,<sup>328</sup> and it limits the power of the federal courts to remedy what are conceded to be violations of federal constitutional rights.<sup>329</sup> Although the Court has not cited the First Amendment as a justification for such immunity, the Court's reasons for the immunity invoke precisely the same sorts of interests that the First Amendment protects: the need to protect "the fullest liberty of speech" in the legislature<sup>330</sup> and thereby preserve "the rights of the people to representation in the democratic process."<sup>331</sup>

The Court's doctrine of legislative immunity suggests a view of state and local elected policymaking bodies as "expressive organizations" analogous to, say, the ACLU or the Sierra Club.<sup>332</sup> Such organizations are devoted to promulgating beliefs of the organizations' constituents by coordinating and amplifying that voice. Publius seems to share this view of nonfederal governments when he argues that, by providing "signals of general alarm," state legislative bodies would coordinate opposition to any attempt by the federal government to launch a coup d'état.<sup>333</sup> In Publius's

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326. See Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1152 (1991).

327. See, e.g., *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980); *Lake Country Estates, Inc. v. Tahoe Regl. Planning Agency*, 440 U.S. 391 (1979); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

328. See *Tenney*, 341 U.S. at 373 (invoking immunity to bar a claim under the U.S. Constitution that a state legislators' investigation deprived a person of his federal due process rights).

329. See *Spallone v. United States*, 493 U.S. 265 (1990).

330. See *Tenney*, 341 U.S. at 373.

331. *Lake Country Estates, Inc.*, 440 U.S. at 404-405.

332. The phrase is coined by Meir Dan-Cohen. See Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229 (1991).

333. See THE FEDERALIST NO. 46, *supra* note 50, at 298 (James Madison).

view, state and local governments serve the purpose that committees of correspondence served during the Revolutionary War. They "open a correspondence" and generally overcome collective action problems that might otherwise hinder opposition to federal policies through such mechanisms as hortatory resolutions and coordination of plans of resistance.<sup>334</sup> In short, the Court and Publius recognize what should be obvious: like the leaders of other expressive organizations, nonfederal politicians are paid to talk.

Such a role for state and local governments implies that such governments ought to enjoy an entitlement to withhold their voice and refuse to implement federal policies enacted by Congress. *New York* and *Printz* provide a right to silence analogous to the *Barnette* entitlement that private persons enjoy, a right to silence that is the mirror image of the protection for speech and debate protected by *Tenney* and its progeny. By allowing state and local legislators to refuse to vote for federally favored programs, *New York* prevents the federal government from compromising the legislator's independence from such policies. At least two courts have noted this connection between the implied right of free speech enjoyed by state and local policymakers under *Tenney* and the power to refuse to follow the command of the federal government to vote for federal programs.<sup>335</sup> In short, the same considerations of autonomous speech and silence that are used to support the speech rights of nongovernmental organizations such as newspapers,<sup>336</sup> political parties,<sup>337</sup> or corporations<sup>338</sup> can vindicate the *New York* entitlement.

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334. See *id.*; see also Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 360.

335. See *Clarke v. United States*, 886 F.3d 404 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990) (en banc); *Miller v. Town of Hull*, 878 F.2d 523 (1st Cir. 1989); see also Steven Sherr, Note, *Freedom and Federalism: The First Amendment's Protection of Legislative Voting*, 101 YALE L.J. 233 (1991). *Clarke*, however, is a deeply flawed opinion, because it fails to recognize that public officials, like private persons, can waive their First Amendment interests when they agree to act as the agents of a government. In *Clarke*, the D.C. Circuit held that Congress could not require the City Council of the District of Columbia to rescind a "gay rights" ordinance as a condition for receiving federal aid, because such a condition on the legislative speech of the council members violated their First Amendment rights. See *Clarke*, 886 F.2d at 417. But D.C. City Council members, like members of the other federal agencies, have agreed to act as federal agents. It is difficult to see why their acceptance of federal office should not waive their right not to carry out Congress's policies.

336. See *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241, 249-58 (1974).

337. See *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981).

338. See *First Natl. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).



IV. FOUR APPLICATIONS OF THE FUNCTIONAL THEORY:  
"GENERALLY APPLICABLE LAWS," CONDITIONAL PREEMPTION  
AND UNCONSTITUTIONAL CONDITIONS, MANDATES ON  
EXECUTIVE AND JUDICIAL OFFICIALS, AND FUNDED MANDATES

This article, relying on general intuitions about the cost of inter-governmental transactions and the propriety of forcing persons to make in-kind contributions to government, has argued so far that the states ought to have an entitlement to refuse to implement national law. Even if the general allocation of authority provided by *New York* is sensible, however, four more specific questions remain concerning *New York's* application. These are: (1) whether *New York* should be applied to so-called "generally applicable laws"; (2) the limits on conditional preemption that a doctrine of unconstitutional conditions ought to impose; (3) the application of *New York's* anticommandeering rule to executive and judicial officials; and (4) the possibility of allowing the federal government to impose *funded* mandates on nonfederal governments — that is, the possibility of protecting state and local governments from commandeering only with a liability rule. Using the defense of *New York* in Parts II and III as a benchmark, Part IV answers these four questions, refining and qualifying the case for *New York* and *Printz*.

A. "Generally Applicable Laws," Conditional Preemption, and  
the Problem of Unconstitutional Conditions

One might object to the arguments presented so far by noting that the government routinely and uncontroversially requires private businesses to comply with federal mandates. Consider some of the requirements imposed on business enterprises by the modern regulatory state that require economic enterprises to pay employees a minimum wage, pay unemployment insurance premiums, install safety devices on consumer products, install wheelchair ramps to provide reasonable access for the handicapped, bargain in good faith with collective bargaining units, install scrubbers in smokestacks, and otherwise provide dozens of in-kind contributions to protect the health and safety of consumers and employees. What distinguishes these sorts of duties that are routinely imposed on businesses from the sort of obligations forbidden by *New York*?

The majority in *New York* sidestepped any careful analysis of such regulatory burdens by simply exempting them from the scope of *New York* without any explanation. In a cryptic paragraph, the Court distinguished the minimum wage law imposed on a local gov-

ernment in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>339</sup> from *New York* on the ground that the minimum wage law in *Garcia* was “generally applicable” to both private and governmental organizations. By contrast, in *New York*, Congress had not “subjected a State to the same legislation applicable to private parties.”<sup>340</sup> The Court did not hazard any opinion as to why this distinction should matter, even in the face of Justice White’s complaint that the distinction was “an insupportable and illogical distinction,” because “an incursion of state sovereignty hardly seems more constitutionally acceptable if the federal statute that ‘commands’ specific actions also applies to private action.”<sup>341</sup>

Some commentators have attempted to make sense of the distinction between “generally applicable laws” and laws applicable to governments alone by arguing that the political process is more capable of preventing the former.<sup>342</sup> But, as this article noted in section I.A, such an argument is unpersuasive. Indeed, as explained below in section IV.A.1, the entire concept of general applicability should be mostly irrelevant to the scope of *New York*. “Generally applicable laws” should be exempted from *New York*, not because they apply to private persons as well as nonfederal officials, but rather because such laws typically have the form of conditional preemption rather than unconditional command; they give both private and governmental organizations the option of reducing their activity level — laying off workers, ceasing to emit air pollution, and so on — rather than complying with the standard of care imposed by the federal government.

As section IV.A.2 suggests, if such a power of conditional preemption were unlimited, *New York* would be rendered an empty formality. If the Court constrains conditional preemption with a doctrine of unconstitutional conditions, however, allowing conditional preemption of nonfederal policymaking only when the condition mitigates the costs of a preemptible nonfederal government’s activity, then all properly constrained conditional preemption — including generally applicable laws — ought to be exempt from the anticommandeering rule of *New York*.

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339. 469 U.S. 528 (1985).

340. *New York v. United States*, 505 U.S. 144, 160 (1992).

341. *New York*, 505 U.S. at 201-02 (White, J., dissenting).

342. See, e.g., Zelinsky, *supra* note 27, at 1384.

# 1. *Generally Applicable Laws and the Functional Defense of State Autonomy*

All governments frequently place conditions on private activities, prohibiting anyone from engaging in those activities unless such activities meet governmentally defined standards. So, for example, the federal government places a myriad of restrictions on economic enterprises: federal labor and employment law bars enterprises from hiring employees unless they meet federal standards regarding wages, hours, unemployment insurance, and workplace safety;<sup>343</sup> likewise, federal environmental laws bar manufacturers from burning fuel unless they meet federal air pollutant emission standards,<sup>344</sup> and federal consumer safety laws prohibit the sale of goods that do not meet consumer safety standards.<sup>345</sup>

As a formal matter, one need not invoke the notion of “general applicability” to explain why such regulatory duties can be extended to nonfederal officials: quite apart from their application to private persons, such laws are not formally covered by the *New York* doctrine because such laws are instances of conditional preemption rather than unconditional demands for goods or services. Such laws typically give both private and governmental organizations the option of either reducing the levels of some costly activity — for example, incinerating waste, dumping sewage into rivers, employing workers, or selling goods — or conducting such activity according to federal standards of care. In other words, the federal government “preempts” some activity unless the activity conforms to federal standards. One theoretically could uphold the application of minimum wage laws to state and local governments on the same theory that *New York* expressly permits other systems of conditional preemption such as the OSHA. Just as OSHA gives state governments the option of either getting out of the business of regulating workplace safety or regulating according to federal standards, so, too, the Fair Labor Standards Act gives state governments the option of getting out of the business of employing persons in covered occupations or employing them according to federal standards.

Of course, the fact that such laws formally give regulated organizations the “option” of reducing activity levels might seem trivial, given that such an “option” might require the abolition of the or-

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343. See, e.g., 29 U.S.C. § 654 (1994).

344. See, e.g., 42 U.S.C. § 7412 (1994).

345. See, e.g., 15 U.S.C. § 2071 (1994).

ganization itself. There are, however, two reasons to believe that such an option is less trivial than one might believe at first glance.

First, many such conditional duties can be described as efforts to preempt undesirable activities by requiring private or governmental entities to mitigate the costs of their own socially harmful activities. So, for example, consumer product safety standards, environmental laws, workers compensation, disability insurance, and a plethora of other social welfare legislation are all analogous to tort duties of care. Like Pigouvian taxes, they ensure that governmental and private enterprises internalize the costs of their own costly activities by requiring them either to reduce activity levels, take precautions against hazards, or offer insurance to cover the likely costs of such hazards. The option provided by such laws to reduce activity levels is not a trivial formality but rather a central mechanism by which the purpose of such laws is realized.<sup>346</sup>

Thus, when federal environmental laws bar a municipal sewage treatment plant from dumping sewage into a river unless the sewage is treated according to federal standards, the federal government is not conscripting the municipality into providing clean water, but rather barring ("preempting") it from injuring the public through water pollution. Likewise, the federal government is not conscripting states when it forces states to provide a state judicial forum to hear complaints that their own officers violated a complainant's federal constitutional rights<sup>347</sup> because the state can avoid the duty to provide a forum simply by abstaining from the preemptible conduct. In all such cases, federal laws serve the same purpose as simple preemption — elimination of preemptible activities — but do so by giving the nonfederal government an option to reduce the activity levels *ex ante* — for example, by reducing sewage output or civil rights violations — or remedying them *ex post* — by treating the sewage or providing state courts to hear constitutional violations.

Moreover, to the extent that "generally applicable laws" serve the purpose of mitigating the social costs of state and local governments' own activities, it is not difficult to see why such laws are consistent with the functional defense of *New York* and *Printz* that Parts II and III of this article presented. Recall the argument in section III.A concerning efficiency. According to this argument,

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346. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 66-71 (1987) (discussing how a reduction in activity levels is an option for reducing tort liability under a strict liability regime).

347. See *General Oil Co. v. Crain*, 209 U.S. 211 (1908).

the federal government's *unconditional* demands for nonfederal governments' regulatory services tend to be inefficient because such demands for in-kind contributions tend to discourage investment in the goods or services that the federal government demands.<sup>348</sup> But such an argument based on efficiency has less application to federal laws that force state and local governments to internalize the costs of their activities. Such laws certainly discourage nonfederal governments' activities, but, if the activities impose costs on society, then they ought to be discouraged. Compare the mandate to an excise tax on a harmful activity like smoking, gas consumption, or gambling. To the extent that the taxed activity really imposes costs on society, the disincentive to engage in the taxed activity is needed to ensure an efficient level of the harmful activity.<sup>349</sup>

Likewise, as noted in section III.B, it may be distributively unjust to force state and local governments to pay for some public service if those nonfederal governments do not create any special need for the service, derive no special benefit from the program, or have no special ability to pay for the program. This objection, however, is inapplicable to federal demands that nonfederal governments mitigate the costs of their own actions. It is intuitively obvious that such governments — like private organizations — ought to pay for the costs that they impose on society.

Not all conditional prohibitions, though, can be described as efforts to force actors to internalize the costs of their activities. It would be difficult, for example, to characterize minimum wage laws as having such a purpose. Instead, such regulatory burdens are typically justified as efforts to prevent employers or producers from reaping "exploitative" profits by engaging in "unfair" commercial practices. In effect, such statutes prohibit the regulated entities from forming "unconscionable" contracts with their employees, customers, etc.<sup>350</sup>

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348. See *supra* section III.A.

349. For the conventional case in favor of excise taxes to discourage costly activities, see JOSEPH PECHMAN, *FEDERAL TAX POLICY* 195 (5th ed. 1987).

350. Consider, for example, the Senate's justification for the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, 2611-2619, 2631-2636, 2651-2654 (1993):

A central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers.

S. REP. NO. 103-3, at 7 (1993); see also *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act on the theory that the statute was a reasonable means of preventing low-wage paying employers in states lacking employment regulations from depressing wages in other states through "unfair competition").

Like Pigouvian taxes, such limits on “exploitative” contracts are entirely consistent with the functional defense of the *New York* entitlement presented in this article. The presumption of regulations barring some contractual relationship — say, employment contracts that pay the employee wages beneath the statutory minimum — is that such agreements do not represent welfare-maximizing bargains because of inadequate information or other impediment to fair bargaining. Such regulations also presume that the gains from such “exploitative” trade represent ill-gotten gains from “unfair competition.” Depriving the parties of such gains, therefore, is not distributionally unjust.

None of these arguments in favor of generally applicable laws depend on the notion that such laws are applicable to private as well as governmental organizations. It is true as a matter of fact that most generally applicable laws — that is, environmental regulations, regulations of employees’ working conditions, and so on — can be defended as conditional preemption of what legislators regard as socially costly activity. But whether a law is “generally applicable” is a distraction that confuses the real normative issue raised by such laws — whether the federal regulation requires the regulated entity to mitigate or insure against the costs of the entity’s own activity or disgorge profits from inefficient or unconscionable contracts. If it does, then the functional argument suggests that *New York* and *Printz* should interpose no barrier to such a federal demand.

## 2. *Conditional Preemption and the Doctrine of Unconstitutional Conditions*

Invoking *New York*’s exception for conditional preemption to uphold generally applicable laws, however, raises some difficult questions that *New York* does not attempt to answer. If there are no limits on Congress’s power to use conditional preemption, then *New York* is a meaningless formality, because the national government could always require that state and local governments either make policy according to federal standards or disband themselves.

If such a broad use of conditional preemption seems fanciful, consider the Court’s decision in *FERC v. Mississippi*.<sup>351</sup> In *FERC*, Mississippi challenged Titles I and III of the Public Utility Regulatory Policies Act (“PURPA”). These provisions required the Mississippi Public Service Commission to “consider” the adoption and

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351. 456 U.S. 742 (1982).

implementation of specific rate designs and standards of regulation for the purpose of encouraging the conservation of energy.<sup>352</sup> In upholding these provisions, the *FERC* Court characterized these provisions as conditional preemption, asserting that "[t]here is nothing in PURPA 'directly compelling' the States to enact a legislative program."<sup>353</sup> Rather, the Court reasoned that, because "Congress could have pre-empted the field [of utility rate-making]," Titles I and III of PURPA "simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals."<sup>354</sup> The Court acknowledged that it would be difficult for the states to abandon the field of utility regulation given that "Congress . . . has failed to provide an alternative regulatory mechanism to police the area in the event of state default."<sup>355</sup> The Court stated, however, that "in other contexts the Court has recognized that valid federal enactments may have an effect on state policy — and may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority."<sup>356</sup> To support this statement, the Court cited *Oklahoma v. United States Civil Service Commission*,<sup>357</sup> observing that Congress has the power to attach conditions to federal funds that, if imposed unconditionally, would be beyond Congress's power to regulate.<sup>358</sup>

The *FERC* Court's analogy between the power of conditional preemption and conditional spending, however, uncritically abdicates any responsibility for defining a baseline of state entitlements by which to define federal coercion of state governments. It certainly may be true that Congress can attach any conditions to federal funds without depriving state governments of autonomy.<sup>359</sup> It hardly follows that they can attach any conditions to denial of preemption. When Congress refuses to provide a grant-in-aid to state governments, it denies them an asset that, absent federal efforts to raise and appropriate revenue, would not be available to the state governments.<sup>360</sup> In other words, the federal government is denying

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352. See 456 U.S. at 746-48.

353. 456 U.S. at 765.

354. 456 U.S. at 465-66.

355. 456 U.S. at 766.

356. 456 U.S. at 766.

357. 330 U.S. 127 (1947).

358. *FERC*, 456 U.S. at 766.

359. The Court seems to have come close to such a position, over Justice O'Connor's objections. See *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (O'Connor, J., dissenting).

360. This is not to deny that the federal taxation required to fund a grant-in-aid makes state taxation more difficult by decreasing the tax base available to the state. But a reduction of federal taxes by the amount of the federal grant program certainly would not increase

the state governments a "benefit" that is largely the product of Congress's legislative effort. By contrast, when the federal government preempts existing state laws, the federal government deprives state governments of something that, absent federal action, state governments would retain. In conventional terms, the federal government is imposing a "cost" or "harm" by destroying something that is largely the result of state legislative effort. Conflating the two regulatory techniques is as illogical as arguing that, when a local government downzones a private parcel of land to reduce its purchase price, it acts no more improperly than when it simply purchases the lot with its revenues.<sup>361</sup>

To be sure, one need not accept uncritically such a distinction based on conventional understandings of "harms" and "benefits."<sup>362</sup> But, while no baseline can be described as natural, some are less arbitrary than others.<sup>363</sup> One plausibly can argue that Congress's spending power should not be constrained by a doctrine of unconstitutional conditions because, as section II.A suggests, the federal government has no monopoly over the power to generate revenue.<sup>364</sup> By contrast, Congress does have a monopoly over the power to waive preemption of state or local policies; no other institution can reinstate nonfederal policies that Congress has pre-

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state governments' revenue by the same amount as the bestowal of a federal grant-in-aid. See WRIGHT, *supra* note 1, at 144-46. The benefit of the federal grant to the state, therefore, is the amount of the grant minus the revenue loss to the state resulting from the increase in federal taxes necessary to fund the grant and consequent loss of tax base available for state taxation.

361. The former technique is generally condemned as unconstitutional by state courts. See, e.g., *Kissinger v. City of Los Angeles*, 327 P.2d 10 (Cal. Dist. Ct. App. 1958); *City of Miami v. Silver*, 257 So. 2d 563 (Fla. Dist. Ct. App. 1972); *Grand Trunk W. Ry. Co. v. City of Detroit*, 40 N.W.2d 195 (Mich. 1949).

362. The judicial decisions and academic literature dealing with regulatory takings have repeatedly criticized the distinction. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1024 (1992) ("[T]he distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."); Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 FORDHAM ENVTL. L.J. 433 (1995). *Lucas* itself invokes the distinction, however, just before criticizing it. See *Lucas*, 505 U.S. at 1018 ("[R]egulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."). The conflation of harms and benefits certainly makes sense from an economic perspective. But, as William Fischel, an economist, has observed, "[i]t is cleverness of this sort by which economists read themselves out of the takings debate." WILLIAM FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 354 (1995).

363. The literature on the definition of baselines for defining unjustified coercion is rich and large. See, e.g., EPSTEIN, *supra* note 179, at 3-103; CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1351-78 (1984); Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421 (1989).

364. See *supra* notes 179-84.



empted. Therefore, following one frequently defended theory of unconstitutional conditions, one might wish to constrain Congress's conditional preemption of nonfederal policies in order to prevent abuse of monopolistic power.<sup>365</sup>

By conflating conditional preemption and conditional spending, the *FERC* Court essentially abandoned any effort to define a doctrine of unconstitutional conditions that might be invoked for the defense of federalism. While this sort of formalism has been used by both academic commentators and judicial opinions to deprive state governments of meaningful constitutional protection, it is hard to see why the notion of unconstitutional conditions should be repudiated when applied to federalism doctrines but accepted in other contexts.<sup>366</sup>

How might one avoid such a result and yet preserve the tool of conditional preemption for Congress's use? Following the Court's theory of unconstitutional conditions suggested in *Nollan v. California Coastal Commission*,<sup>367</sup> one might prohibit conditional preemption of state or local policies whenever (1) the condition that the nonfederal government must meet would, if imposed unconditionally, be unconstitutional, and (2) Congress threatened preemption of nonfederal policy merely to gain leverage to extract compliance with the condition. *Nollan* provides an illustration of how such a theory would operate in practice. The Court struck down the Cali-

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365. For arguments that the theory of unconstitutional conditions is well-suited to constrain the monopoly power of the government, see EPSTEIN, *supra* note 179, at 52-58; Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3 (1983).

One also might argue that the "normal" entitlement enjoyed by nonfederal organizations in the United States ought to define nonfederal governments' baseline of entitlement. Robert Ellickson has argued that, in the context of land-use regulation, the "normal behavior" within a community ought to define the landowners' baseline of entitlement against the state. See Robert Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 419-21 (1977). Reasoning by analogy, one might argue that nonfederal governments ought to enjoy a baseline of entitlement rooted in the normal behavior expected of other organizations within the United States. That is, like private organizations, nonfederal governments should not be required to make in-kind contributions of goods and services to finance federal operations.

366. The Supreme Court, for example, rejected the notion that Congress's power to block the movement of goods and services across state boundaries is constrained by a doctrine of unconstitutional conditions in *United States v. Darby*, 312 U.S. 100 (1941). Professor David Engdahl has applauded this decision, asserting that Congress should be free to pursue any purpose whenever it uses a regulatory technique enumerated in Article I. See David Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 17-21 (1994). Engdahl, however, presents no sustained argument for why such a view of the Article I either makes any functional sense or even is required by the text of Article I. For a criticism of *Darby*, see Donald Regan, *How to Think About the Federal Commerce Power and Incidentally Re-Write United States v. Lopez*, 94 MICH. L. REV. 554, 576-77, 589 (1995).

367. 483 U.S. 825 (1987).

fornia Coastal Commission's conditional denial of a building permit because, according to the Court, the denial of the Nollans' application for a building permit was nothing more than a way to pressure the Nollans into donating a lateral easement across their private beach to the public.<sup>368</sup> The Court reasoned that an unconditional demand for such an easement would certainly constitute a regulatory taking.<sup>369</sup> But, if the denial of the permit served no purpose except as a device by which to punish the Nollans for refusing to donate the easement, then the denial of the permit was just as unconstitutional as an unconditional demand for the easement.<sup>370</sup>

The analogy to conditional preemption is straightforward: if the only purpose of preemption of state or local policy is simply to pressure state or local governments into enacting regulations according to federal standards, then the preemption would be just as unconstitutional as an outright demand for the regulatory services. In such a case, the threat of preemption would be no more than a sanction, akin to a fine or prison sentence, with which to enforce an admittedly unconstitutional demand.

If one applies such *Nollan* analysis to *New York*, then the crucial question becomes determining the purpose of a federal threat to preempt state or local policy. Following *Nollan*, one might make this determination by asking whether there is a "nexus" between the threatened preemption and the condition that the nonfederal government must meet to avert preemption. If the government genuinely believes that the activity threatened with preemption imposes a cost on society and if the government also believes that the condition tends to mitigate that cost, then one might uphold the conditional preemption as a more refined effort to achieve what the government is entitled to achieve through outright preemption. On the other hand, if there seems to be no similarity — no "nexus" — between the purposes served by preemption and those served by the nonfederal governments' compliance with the condition, then one might suspect that the threat of preemption is nothing more than a convenient sanction with which to exert leverage over state and local governments and induce them to yield their *New York* entitlement.

Using this test of unconstitutional conditions, the system of conditional preemption upheld in *FERC* would seem to be at least sus-

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368. 483 U.S. at 841.

369. 483 U.S. at 831.

370. 483 U.S. at 840-41.

picious. The *FERC* Court reasoned that, because the United States could preempt all state regulations of public utilities, the United States' demands that state public utility commissions consider various energy-saving proposals could be regarded simply as implicit preemption of all state utility regulations that did not meet federal standards.<sup>371</sup> But this reasoning does not explain how the implicit threat of preemption has any nexus to the goal of insuring that utilities implement federal energy-saving standards. After all, unless unregulated utilities are somehow more inclined toward conservation of energy than regulated utilities, the preemption of utility regulation does nothing to advance, and might even impede, PURPA's purpose. Like the California Coastal Commission's denial of a building permit, the preemption of state utility regulation resembles nothing more than an effort to exert pressure on state governments to comply with federal regulatory standards. Knowing that it is politically infeasible for states simply to cease regulating utilities, Congress threatened to eliminate ratemaking as a way to induce compliance with the federal regulatory scheme.

Most conventional systems of conditional preemption avoid the suspect character of PURPA by calling for federal agencies to impose federal regulations if the nonfederal government decides to withdraw from the regulatory field. The willingness of the federal government to occupy the field with its own regulations suggests that the national government really regards nonfederal law as imposing costs that can be mitigated either by federal preemption or by the nonfederal governments' regulation according to federal standards. Overruling *FERC*, in short, would not entail judicial disruption of many other established regulatory programs.

What about generally applicable laws — regulations of wages and hours, employment discrimination, worker safety, emissions of pollutants, and so on — that are frequently applied to state and local governments? As suggested above, such federal standards seem rationally defensible as efforts to mitigate the costs of private or governmental activities by requiring the regulated organizations either to reduce their own activity levels or to conduct the activity according to federal standards. But these characteristics would also allow such laws to survive the unconstitutional conditions analysis suggested here.

Take, for example, the application of the Fair Labor Standards Act to a local government in *Garcia v. San Antonio Metropolitan*

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371. See *FERC v. Mississippi*, 456 U.S. 742, 763-66 (1982).

*Transit Authority*.<sup>372</sup> As observed above, such a law has the form of conditional preemption. The statute gives state and local governments the option either of ceasing to employ persons covered by the statute or of setting wages and hours in conformity with federal standards. The law arguably imposes no unconstitutional condition, because both options provided by the statute serve the same purpose; they both prevent unscrupulous employers from forcing their competitors to impose harsh working conditions on employees in response to unfair competition. If the transit authority pays the minimum wage, then there is no danger that transit authority wages will drive down the wages of competitors. But, if the transit authority stopped paying substandard wages by simply ceasing its operations altogether, then the danger of unfair competition would also be averted, albeit at greater cost.

The same case can be made for virtually all common-law or regulatory standards — such as OSHA, the Clean Water Act, or the common law rule against negligence — imposed on nonfederal governments. So long as the federal government genuinely imposes conditions on the activity to reduce or insure against costs arising out of the activity, the conditions bear a sufficiently close nexus to the complete prohibition of the activity. As section III.D.1 noted, such conditional preemption also would be consistent with the functional defense of *New York*. In this sense, the test for unconstitutional conditions that *Nollan* suggests in the context of governmental regulation of private actions also is suggested by the functional argument in Part III of this article for federal regulation of nonfederal governments' activities.

#### B. *The Functional Theory and Federal Laws That Commandeer Nonfederal Judicial and Executive Officers*

Aside from the exception for generally applicable laws, a second important qualification to the *New York* entitlement has inspired controversy in the Court and among commentators — the exception allowing Congress to impose duties upon state courts and, more controversially, state and local executive officials. Since the Court first announced the doctrine of state autonomy in *Dennison*,<sup>373</sup> it has been suggested that the doctrine ought not to

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372. 469 U.S. 528 (1985).

373. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861).

apply to "ministerial duties" of executive officials,<sup>374</sup> and, since the Court's decision in *Testa v. Katt*,<sup>375</sup> the doctrine has provided that Congress can force state courts to adjudicate federal cases, at least when the federal issue is "similar" to state law issues that such state courts resolve.

The *Printz* decision and numerous scholars canvass the questions raised by *Testa* and analogous issues of executive duties to implement federal law. This section shall explore a much more limited issue: what does this article's functional argument suggest concerning the propriety of such exceptions?

### 1. *Testa v. Katt and the Federal Commandeering of State Court Judges*

In *Testa*, the U.S. Supreme Court held that the state courts of Rhode Island could not refuse to enforce the Emergency Price Control Act, a federal wartime measure allowing buyers of goods to sue sellers in state court for selling goods above the federally imposed price ceiling.<sup>376</sup> The Rhode Island Supreme Court applied the traditional rule that state courts do not enforce the penal laws of the United States or sister states. But the *Testa* Court rejected the Rhode Island court's premise that the state courts have "no more obligation to enforce a valid penal law of the United States than [they have] to enforce a penal law of another state or a foreign country."<sup>377</sup>

*Testa's* ambiguous character has long been recognized. The case can be read either as suggesting that state courts have only a duty of nondiscrimination against federal law or as implying a broader unconditional obligation on the part of state courts to hear federal claims and cases. In favor of the former "nondiscrimination" theory, one can cite the *Testa* Court's statement that the case presented the question of whether Rhode Island courts could refuse to adjudicate federal questions "though their jurisdiction is adequate to enforce similar Rhode Island 'penal' statutes."<sup>378</sup> This language suggests that *Testa* amounts to nothing more than a specific application of the rule that states may not discriminate against federal in-

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374. See 65 U.S. (24 How.) at 80 (relating the suggestion by counsel for Kentucky that the rule against forcing state officials to assume federal duties does not apply to the "ministerial" duty of extraditing a fugitive from justice).

375. 330 U.S. 386 (1946).

376. See 330 U.S. at 394.

377. 330 U.S. at 389.

378. 330 U.S. at 388.

stitutions and laws<sup>379</sup> — a norm first suggested in dicta from *McCulloch*<sup>380</sup> and developed in both case law and federal statutes expounding the doctrine of federal tax immunity.<sup>381</sup> Indeed, this is how Justice O'Connor interprets *Testa* in her dissent in *FERC v. Mississippi* when she describes *Testa* as holding that "a State may not exercise its judicial power in a manner that discriminates between analogous federal and state causes of action."<sup>382</sup> On the other hand, commentators have noted that *Testa* also seems to give Congress an unconditional right to demand that state courts hear federal causes of action.<sup>383</sup> Such a view is suggested by *Testa's* approving quotation of language from *Mondou v. New York* stating that the policies chosen by Congress were deemed to be the policy of all states — "'as much . . . as if the act had emanated from [the states'] own legislature.'" <sup>384</sup>

Other writers have thoroughly canvassed the doctrinal case for a nondiscrimination rule.<sup>385</sup> This article asks a narrower question: Which view of *Testa* — the nondiscrimination view or the broader duty-to-hear-all-federal-claims view — makes more functional sense in light of the arguments already presented in Parts II and III? Part II suggested that a congressional power unconditionally to conscript state courts is utterly unnecessary. Congress probably can obtain the services of state courts simply by paying the costs of such service to state legislatures. Moreover, the considerations of distributive justice that section III.B discussed suggest that Congress should pay for the services that it receives from state govern-

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379. See *McNett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 233-34 (1934) ("A state may not discriminate against rights arising under federal laws."); Lea Brilmayer & Stefan Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 V.A. L. REV. 819, 838 (1983) (stating that "[s]tates may refuse to adjudicate federal claims when the jurisdictional restriction applies neutrally"); Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 350 (1976) (summarizing the nondiscrimination position).

380. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (suggesting the rule requiring nondiscrimination when taxes fall on private persons holding beneficial interests in federal property).

381. See, e.g., *United States v. County of Fresno*, 429 U.S. 452, 462-63 (1977) (describing the basic doctrine forbidding state taxes that discriminate against federal interests).

382. *FERC v. Mississippi*, 456 U.S. 742, 776 n.1 (1981) (O'Connor, J., dissenting).

383. Professor Sandalow notes that the *Testa* Court's reliance on *Mondou v. New York*, 223 U.S. 1 (1911), suggests that *Testa* imposes an unconditional duty on state courts to hear federal claims. See Terrance Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 205-06.

384. *Testa v. Katt*, 330 U.S. 386, 392 (1946) (quoting *Mondou*, 223 U.S. at 57). Professor Caminker relies heavily on *Testa's* invocation of this language from *Mondou* to support the argument that, because federal law is the supreme law of the land, it is also the supreme "in-state" law as far as the state government is concerned. See Caminker, *supra* note 31.

385. See Collins, *supra* note 99, at 42 n.6.

ments just as it pays for the services that it receives from private contractors. As Chief Judge Judith Kaye of the New York Court of Appeals recently has noted, state courts' dockets overflow with the judicial business of the nation.<sup>386</sup> Why should the federal government not pay for these costs in an intergovernmental transaction? Is there any sensible reason why such costs should be borne by the consumers of state-provided services — the frustrated state-court litigants who suffer delay as a result of state courts' preoccupation with federal claims?<sup>387</sup>

The traditional response to such objections invokes the so-called "Madisonian Compromise" — the view that Congress implicitly has the power to demand that state courts hear federal questions, because Congress was given the option not to create lower federal courts by Article III, section 1.<sup>388</sup> Such a view implicitly assumes that, if Congress lacked the power to conscript state courts to hear federal claims, then some Article III business would go unheard unless Congress could conscript the services of state courts. Whatever the grounds for such a view in precedent or original understanding,<sup>389</sup> the view makes little functional sense because it assumes that, if Congress cannot conscript state courts' services, then it cannot obtain such services at all. But this premise is as groundless as the assumption that Congress must have the power to confiscate private property in order to construct federal buildings.<sup>390</sup> The end of cooperative federalism simply does not justify the means of conscription, for the latter is unnecessary for the former. As Part II explained, a lively intergovernmental market exists through which the federal government can purchase state court services.

The functional argument outlined in Parts II and III, therefore, suggests that conscription of state courts is unnecessary and improper. But what about a duty of nondiscrimination that *Testa* also

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386. See Judith S. Kaye, *Federalism Gone Wild*, N.Y. TIMES (Late New York Edition), Dec. 13, 1994, at A29.

387. Justice Story relied on precisely such a consideration of distributive justice when he stated that the state legislature "may refuse to allow suits to be brought [in state courts] 'arising under the laws of the United States'" because such adjudication of federal cases "may most materially interfere with the convenience of their own courts, and the rights of their own citizens, and be attended with great expense to the state, as well as great delays in the administration of justice." *Mitchell v. Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 499 (C.C.D. Me. 1843) (No. 9662) (Story, Circuit Justice).

388. See Collins, *supra* note 99, at 42-43 (summarizing the argument based on the Madisonian Compromise).

389. See *id.*

390. See Amar, *supra* note 326, at 1168 (noting that inferences of congressional power to conscript state courts from the congressional option to use them is just as illogical as inferring power to conscript tax collectors from the power to collect taxes).

suggested? Is such a duty also improper, or is it justifiable in functional terms?

The answer to this question is ambiguous, because the concept of discrimination depends on ambiguous notions of the baseline entitlement by which "equal" treatment is measured. As a general matter, some sort of state governmental duty not to discriminate against the federal government is perfectly consistent with the functional theory. As argued in Part II, the functional theory concedes that the national government needs to preempt state law and carry out federal tasks with purely federal institutions: the federal government would likely be unable to purchase preemption of state laws with its spending power. Such a power of preemption presupposes, however, that the state governments cannot interfere with the federal government by harassing or intimidating federal officials.

"Discrimination" against the federal government might constitute precisely such a form of harassment. So, for example, if a municipal police force generally protected all other persons from burglary within a city but refused to protect the U.S. Post Office building from such crimes, it would be obvious that the discriminatory inaction formed a sort of harassment of a federal agency. Likewise, if the state courts within a jurisdiction generally adjudicate disputes arising under the laws of other jurisdictions but refuse to hear federal claims, then such refusal to hear the federal claims can be viewed as a sort of attack on the federal government.<sup>391</sup>

The functional theory, therefore, does not condemn the general duty of state officials not to discriminate against federal interests, and such a duty can be invoked to prevent state courts from discriminating against federal law. A familiar difficulty arises, however, because nondiscrimination norms depend on a concept of "equality," and the notion of equality notoriously depends on complex and often inarticulate definitions of a baseline by which equal treatment is to be measured.<sup>392</sup> The duty not to discriminate against the federal government easily mutates into a duty to give federal interests the same benefits and services that the state pro-

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391. Certainly, such a refusal can impose costs on the federal government just as surely as a refusal to provide police protection to federal officials. If claimants asserting both state and federal claims arising out of the same transaction are barred from pressing both in state court, then they will be forced either to forfeit their federal claim or instead file both claims in federal court, taking advantage of the federal court's supplemental jurisdiction. In effect, the state would be forcing the federal court to hear state business by depriving federal litigants of a state forum for related federal claims.

392. See generally PETER WESTEN, *SPEAKING OF EQUALITY* (1990).



vides to its own interests, simply because the Court will often take a state's treatment of its own interests to be the relevant baseline by which to measure whether federal interests are receiving equal treatment.

*Testa* provides a case in point. In *Testa*, the Court rejected the notion that the Rhode Island courts afforded equal treatment to federal law by treating federal law exactly as they treated the law of other foreign states. Instead, the Court insisted that the proper baseline was the state courts' treatment of its own state legislature's analogous laws. As other scholars have noted, this moves *Testa* very close to being an unconditional duty to enforce federal law, because the concept of an analogous law is nebulous and expansive.<sup>393</sup>

The potential expansiveness of nondiscrimination norms is not peculiar to the *Testa* doctrine or state court duties to hear federal claims. The Court has also expanded the duties of state legislatures in precisely the same way. So, for example, in *Davis v. Michigan Department of the Treasury*,<sup>394</sup> the Court held that Michigan must exempt pensions paid by the federal government from state taxation just as Michigan exempted pensions paid by the Michigan government from such taxation. Michigan's tax policy actually subjected federal pensioners to the same tax obligations as the vast majority of pensioners in Michigan, because the state only exempted the pensions of its own employees from state taxation as a sort of additional form of deferred compensation.<sup>395</sup> But the Court reasoned that the proper baseline of comparison was Michigan's tax treatment of its own former employees, not Michigan's tax treatment of the majority of state residents, and so it ordered the state to provide tax refunds to federal pensioners residing in Michigan.<sup>396</sup>

There are reasons to object to both the *Davis* and *Testa* baselines for measuring discrimination. The notion that a state government cannot use state-funded institutions to advance its own policies is a bit odd. It is difficult to see how Michigan is somehow taxing federal interests because it does not provide the same subsidy to former federal officers that it provides to state officers. It is not the state governments' job to provide compensation, deferred

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393. See, e.g., Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 750-66 (1981).

394. 489 U.S. 803 (1989).

395. See 489 U.S. at 805.

396. See 489 U.S. at 815 n.4, 817-18; see also Robert Mueller, *Rejection of the "Similarly Situated Taxpayer" Rationale: Davis v. Michigan Department of Treasury*, 43 TAX LAW. 431 (1990) (noting that *Davis* departs from the traditional rule for defining discrimination).

or otherwise, to federal employees. Likewise, the notion that Rhode Island is somehow impeding the federal government because it wishes to use its own courts for its own claims seems strained. In either case, the Court defined the federal government's baseline of entitlement in such a way that the state was forced to give extraordinary fiscal and judicial preference to federal policies. An antidiscrimination norm that is defined so expansively might be viewed as contradicting the argument in Part III that the federal government should pay for the services that it receives.

## 2. *The Commandeering of State Executive Officials*

Nondiscrimination norms apply with less force to state and local executive officials who typically do not enforce laws or policies other than those of their own state or local policymakers. Moreover, any mechanical rule giving Congress the power to demand services from certain categories of state officials is likely to founder on the fact that state and especially local law does not permit neat distinctions between legislative, judicial, and executive offices. Even state courts have some legislative functions.<sup>397</sup> Likewise, the same local agencies are sometimes considered to be acting quasi-judicially and sometimes considered to be acting legislatively.<sup>398</sup> It is a perennial question whether a local legislature's decision to re-zone a single parcel is legislative, quasi-judicial, or both simultaneously.<sup>399</sup>

Nevertheless, there might be good reasons for allowing the federal government to demand some sorts of services from nonfederal executive officials. The functional theory suggested in Parts II and III suggests two circumstances that indicate when such conscription might be proper.

First, if certain services only can be provided by specific state or local officials and cannot be duplicated by federal officials, there might be greater dangers of holdout problems absent a federal abil-

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397. See *Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731-34 (1980) (holding that the state supreme court enjoys legislative immunity in rulemaking for the state bar).

398. See Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on 'Monarchism' to Modern Localism*, 84 Nw. U. L. Rev. 74, 96 (1989) (describing local governments' rejection of many federal constitutional principles, including separation of powers).

399. See, e.g., *Fasano v. Board of County Commrs.*, 507 P.2d 23, 26 (Or. 1973) (holding that small-scale rezoning is quasi-judicial); *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 566-67 (Cal. 1980) (holding that small-scale rezoning is not quasi-judicial); *Margolis v. District Ct.*, 638 P.2d 297, 305 (Colo. 1981) (holding that small-scale rezoning is quasi-judicial for purposes of judicial review but legislative for purposes of eligibility for plebiscites).

ity to demand such services. The best example is the state and local provision of unique records or information to the federal government. Assuming that only one state or local government has access to such information, the normal competitive framework for inter-governmental relations described in Part II is missing, and federal demands for state or local assistance might be necessary to accomplish legitimate federal purposes.

Second, the national government might have a greater entitlement to demand services that do not require state or local officials to issue commands to third parties. As noted in section III.C, such demands for local officials to enforce federal policies by commanding third parties to obey such policies strongly resembles a demand that such nonfederal officials endorse federal policy with their office. Such forced speech might be objectionable for the same reasons that demands for private organizations' speech are widely regarded as unconstitutional. But such worries about forced affirmation of belief do not apply to federal demands that state officials undertake other services that do not require them to issue commands. Again, a federal demand for state officials to turn over unique records would not offend any rule against forced speech, any more than the normal rule that witnesses can be forced to testify would constitute either a regulatory takings or involuntary servitude.<sup>400</sup> Like analogous rules applicable to private persons — for example, the rule that private witnesses can be forced to testify in court — such demands enable the federal government to obtain services that it can get no other way, at a relatively modest cost to state or local autonomy.

### C. *The Impracticability of Protecting Nonfederal Governments' Autonomy with a Liability Rule*

Even if one accepted all of this article's arguments made so far in favor of the anticommandeering rule in *New York* and *Printz*, one still might have reservations about protecting nonfederal governments' power over their regulatory processes with a property rule. One might agree that it is inefficient, distributionally unjust, and an unwarranted invasion of expressive autonomy for the federal government to force nonfederal governments to implement federal policy. But one might also believe that, if the national government is willing to pay the objective cost of a federal mandate to

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400. See *Hurtado v. United States*, 410 U.S. 578 (1973) (upholding the power of the government to force a witness to testify against a Thirteenth and Fifth Amendment regulatory takings challenge).

a state or local government, then the national government should be entitled to receive the services of that nonfederal government. In effect, such a doctrine would give the national government a power of eminent domain over nonfederal governments' regulatory processes.

Justice Souter seems to have endorsed precisely such a rule when the national government commandeers the services of state or local executive officers.<sup>401</sup> In theory, such a rule would have several advantages. It presumably would mitigate any distributive inequities caused by commandeering, and it would eliminate any inefficient tendency of federal mandates to undermine incentives to participate in state and local politics. Such a rule could even reduce the danger of unjust invasions of expressive autonomy.<sup>402</sup>

Justice Souter's proposal seems especially attractive if one is not completely convinced by this article's argument in section II.B.2 that intergovernmental transactions are free from transaction costs. Such a skeptic about intergovernmental transactions might prefer a rule that allows the national government to bypass voluntary markets when transaction costs are high. Moreover, such a rule is suggested by the analogy to private organizations, which are only very rarely protected from governmental condemnation of their property.<sup>403</sup> Why give public organizations more protection for their regulatory processes? Such deference to governmental decisions to use eminent domain arguably makes sense, because, as Professor Merrill notes, such decisions may be self-policing: the costs of litigating "just compensation" are so high that prudent politicians generally use condemnation only when voluntary transactions are impractical because markets are thin and there are significant risks of private strategic behavior.<sup>404</sup>

Therefore, Justice Souter's "liability rule" proposal appears to represent an ideal compromise position, one that protects state autonomy but also protects national supremacy. But Souter is wrong. Justice Scalia is perfectly correct to note that such a rule would be

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401. See *Printz v. United States*, 117 S. Ct. 2364, 2404 (1997) (Souter, J., dissenting) ("I do not read any of *The Federalist* material as requiring the conclusion that Congress could require administrative support without an obligation to pay fair value for it . . . . If, therefore, my views were prevailing in these cases, I would remand for development and consideration of petitioners' points, that they have no budget provision for work required under the Act and are liable for unauthorized expenditures.").

402. Professor Rubenfeld notes that the liability rule provided by the Fifth Amendment's Just Compensation Clause has such a tendency to prevent the instrumentalization of persons. See Rubenfeld, *supra* note 283, at 1139-47.

403. See Merrill, *supra* note 157, at 63.

404. See *id.* at 74-81.

completely impractical in that it would "create a constitutional jurisprudence [for determining when the compensation was adequate] that would make takings cases appear clear and simple."<sup>405</sup>

The difficulty with Justice Souter's proposal is that the cost of implementing federal policy is *not* simply the fiscal outlay necessary to fund such implementation. Such a measure would grossly overcompensate some jurisdictions and undercompensate others. Federal law can impose what appear to be costly demands on state and local officials that, in fact, are costless, because the federal policy might be no different than the preexisting state policy.<sup>406</sup> By contrast, one can imagine fiscally cheap demands — say, a demand that sheriffs perform background checks on local inhabitants — that would be extremely costly in practice because local residents experience high nonfiscal costs as a result of the program.

Therefore, in order to determine the real, as opposed to nominal, cost of a federal mandate, courts would have to calculate the size and matching formula of a hypothetical grant that a state would have to be offered to implement the particular program imposed on them by the federal government. It defies credibility to believe that judges are capable of managing such a counterfactual inquiry.<sup>407</sup>

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405. *Printz*, 117 S. Ct. at 2374 n.7.

406. So, for example, detailed federal restrictions requiring localities to spend categorical grant money on developmental purposes — say, downtown redevelopment — might impose no costs on the locality, because the locality probably wants to spend money for precisely such a purpose. See PETERSON, *supra* note 32, at 23-27.

407. Indeed, both federal and state efforts to make such hypothetical calculations in other contexts have not been notable successes. In the state context, some state constitutions require state legislatures to provide a "fiscal note" with mandates imposed on local governments estimating the cost of the mandate. As Edward Zelinsky notes, these requirements have imposed no serious restriction on state mandates, because no court can assess whether fiscal notes are accurate. See Zelinsky, *supra* note 27, at 1366-67.

In the federal context, many federal grants have "nonsupplanting" or "maintenance-of-effort" conditions attached to them requiring state governments not to supplant state dollars devoted to a federal purpose with federal grant money designed to supplement those dollars. See Mark Greenberg, *HHS Policy Guidance on Maintenance of Effort, Assistance, and Penalties: Summary and Discussion*, 4 GEO. J. ON FIGHTING POVERTY 315 (1997) (describing maintenance-of-effort provisions). But federal administrative efforts to enforce such provisions often have been mechanistic and incomplete — in part due to the almost metaphysical difficulty of the inquiry of calculating what state contributions would have been absent the federal grant. See, e.g., Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POLY. & L. 3, 102 (1996) (arguing that maintenance-of-effort rules do not take into account depreciation of state effort due to inflation); Peter H. Schuck, *Introduction: Some Reflections on the Federalism Debate*, 14 YALE L. & POLY. REV. 1, 19 (1996) (arguing that maintenance-of-effort rules may "lock[] the state into an outdated and undesirable pattern of expenditure"). Such enforcement efforts also have been hotly controversial. See, e.g., Robert Pear, *States Bristle at U.S. Welfare Spending Rules*, SAN DIEGO UNION-TRIB., Dec. 29, 1996, at A1, available in 1996 WL 12584353 (noting that a federal suggestion that state expenditures on legal immigrants might not satisfy the maintenance-of-effort requirement under federal law has sparked a national controversy). Justice Souter's proposal essentially

But even if courts could manage the empirical difficulties of Justice Souter's proposal, there are conceptual problems with liability rules in this context that are even more daunting. Consider, for example, how courts should define the proper measure of compensation: Should this measure be based on the mandated jurisdiction's costs of implementing national programs or on the national government's benefit from nonfederal implementation? These two definitions might produce quite different results. For example, it might cost the states very little to use their sheriffs and municipal police chiefs to process applications for firearms, while it might cost the national government an enormous amount to expand the ATF or FBI to undertake such mundane administrative duties. In such a case, there is a question about how to divide the gains from trade.

Conventional wisdom in eminent domain regards such gains as "rents" to which the condemnee has no entitlement. The condemnor ought to get all gains from trade, while the condemnee deserves only its opportunity costs.<sup>408</sup> But such a convention might be based on the case of condemnations of real estate, where the condemnee supplies the asset of land to some regulatory project conceived by the condemnor. Following some sort of Georgist intuition of distributive justice,<sup>409</sup> one might argue that the condemnee ought to receive nothing more than its opportunity costs for passively contributing an asset like land that the condemnee did nothing to create.<sup>410</sup>

Such an intuition fails when one is dealing with the "condemnation" of the state's regulatory machinery. Unlike land, the creation of regulatory processes take political energy and creativity. Whether a police force is honest or crooked, efficient or overstaffed, trusted by the public or despised as an occupying army, all depends in part on the political courage and energy of civilian review boards, mayors, activists, city council persons, and so on. If the federal government decides to use such a force to implement federal law, why should the federal government get to retain all the budget savings that such an efficient and trustworthy force creates?

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would require that the Court constitutionalize an analogous controversial and policy-laden inquiry.

408. See Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 736-38 (1993) (describing the controversy in courts about whether to award gains from trade to condemnee based on the principle of restitution).

409. See HENRY GEORGE, *PROGRESS AND POVERTY* (Modern Lib. ed. 1938).

410. See Merrill, *supra* note 157, at 85-86. Richard Epstein makes a similar point when he argues that the gains from trade ought to be allocated to those persons who initiate the transactions that create the gains. See EPSTEIN, *supra* note 179, at 95.

Under any sort of Lockean intuition of distributive justice, the state politicians and their constituents who contribute their political labors to forge such a force ought to get at least some of the gains from intergovernmental trade.<sup>411</sup>

This is not to say that such a Lockean theory is necessarily compelling. It has become conventional wisdom to argue that such a theory is indefensible.<sup>412</sup> We have no uncontroversial way to divide up gains from trade, and there is no reason to assume that the national government should get all of them. Moreover, if the nonfederal governments get only their opportunity costs and no share of the rents derived from creating a valuable resource, then the national government can be expected to overuse forced sales in order to capture all of the gains from intergovernmental trade. Allowing Congress to force the states to accept funded mandates, in short, might encourage Congress to engage in "secondary rent-seeking" in order to confiscate all gains from cooperative federalism.<sup>413</sup>

In short, while there is no reason in principle why one could not protect adequately the states' *New York* entitlement with a liability rule, a property rule seems preferable for practical reasons. Because the danger of holdouts is low, it is wisest to let Congress fend for itself in the intergovernmental marketplace and keep the courts from being drawn into a practically impossible inquiry into the costs of cooperative federalism.

#### V. BEYOND NATIONALISTIC DUAL FEDERALISM: PROTECTING NONFEDERAL GOVERNMENTS' ROLE IN THE NATIONAL ADMINISTRATIVE STATE

This article has argued that the doctrine of state autonomy announced in *New York* and *Printz* makes good functional sense. Yet the Court's decisions expounding the doctrine of state autonomy have not provided a functional basis for the doctrine. Instead, as explained in section I.B, the Court has relied either on palpably untrue statements that the federal and state governments operate in separate, independent, and mutually exclusive spheres or on conclusory assertions that commandeering legislation deprives states of

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411. See JOHN LOCKE, SECOND TREATISE ON GOVERNMENT ch. 5 (Thomas Peardon ed., 1952). For a modern restatement of Locke's labor theory of value, see LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 2-4 (1977).

412. For one such prolonged effort, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY ch. 6 (1988).

413. See Merrill, *supra* note 157, at 85-88 (describing "secondary rent-seeking").

sovereignty. In short, we have a useful rule without a persuasive reason in the judicial precedents.

Is there any persuasive way to show that the functional argument that I proposed actually fits into the text and constitutional traditions of the U.S. Constitution? This final section provides a preliminary outline for how the functional arguments really are reflected in constitutional tradition. But the tradition is not the bankrupt theory of dual federalism as reflected in *Dennison* and *Day*. Rather, it is the tradition of individual and organization rights reflected in the jurisprudence of takings and free speech under the First and Fifth Amendments. The crucial consideration is not to ensure that federal and nonfederal governments operate in mutually exclusive spheres. Rather, the doctrine presupposes plentiful intergovernmental bargaining and instead seeks to ensure that such transactions occur in the same spirit of fairness as bargains between private organizations and the federal government, a spirit that precludes resort to conscription or confiscation unless there is some clear necessity for such extreme measures.

Consider, first, how the functional argument maps on to the Necessary and Proper Clause of Article I, section 8. The general power to demand regulatory services from state and local governments nowhere is granted expressly to the national government. Congress, therefore, has the power only if it is "necessary and proper for carrying into Execution" Congress's other enumerated powers.<sup>414</sup>

Part II suggests why such a commandeering power is not necessary. Congress can obtain the services of nonfederal officials simply by entering into an intergovernmental agreement with them. It has no need to conscript them any more than it needs to conscript janitors or secretaries or FBI agents. This is not to say that nonfederal governments will never turn down federal proposals to implement federal programs. But, given the degree to which nonfederal governments compete with each other for federal funds, they rarely will decline such revenue if it covers the real fiscal and nonfiscal costs of assisting the federal government.

This view of necessity echoes Justice Story's argument in *Houston v. Moore*,<sup>415</sup> except that Justice Story implied that *all* state implementation of federal law was unnecessary, because the federal government can create its own tribunals. By contrast, the argument

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414. U.S. CONST. art. I, § 8.

415. 18 U.S. (5 Wheat.) 1 (1820).



in Part II of this article suggests only that coercion of state governments is unnecessary, because the assistance of state officials can be obtained without direct orders. Put in the terms of Calabresi's and Melamed's system of entitlements, Story would protect state autonomy with an inalienability rule, whereas the functional theory here would protect it with a property rule, allowing state governments to sell the entitlement for federal revenue.

One might respond that such a constrained view of "necessity" contradicts the broad discretion enjoyed by Congress under *McCulloch* to choose the means by which it attains legitimate purposes. As suggested in section I.B, however, *McCulloch* provided Congress with such discretion in order for Congress to make itself *independent* from state governments by fashioning its own federal bureaucracy. The deep purpose of the opinion was to give Congress the power to fashion its own institutions so that it would not have to rely on state officials. Nothing in *McCulloch* suggests that Congress should also have the power to demand assistance from state and local institutions that it did not create.

Ironically, it is the very nationalism of *McCulloch* that provides the practical basis for a vigorous doctrine of state autonomy. The tradition of nationalistic dual federalism has forced the United States government to develop its own institutions — federal trial courts, field offices, and administrators — rather than rely on state officials. As a result, the United States is blessed with regulatory redundancy — two sets of officials capable of performing identical tasks. Such redundancy undercuts the capacity of state officials to "hold out" when Congress seeks their services. In other words, the tradition of dual federalism has fortuitously created the conditions necessary for a purely voluntary system of intergovernmental relations: precisely because the United States has slowly developed an independent regulatory capacity, it is not necessary for the United States to conscript nonfederal officials' services.

Part III suggests why the national government's demands for nonfederal governments' services also is not proper. First, as section III.B suggests, such demands are analogous to the confiscation of private property in that they force state and local governments to bear the costs of federal programs that serve needs that nonfederal governments do not create and that create benefits for which nonfederal governments have no special ability to pay. Second, as section III.C suggests, such programs force state and local officials to act as the spokespersons of the national government, requiring them to issue commands to third parties with which the officials

might disagree. Both of these consequences suggest that federal commandeering of federal governments is analogous to both regulatory takings forbidden by the Fifth Amendment's Just Compensation Clause and a deprivation of the freedom of speech protected by the First Amendment.

The impropriety of such demands suggests a second reason why *McCulloch* would not give Congress the discretion to demand regulatory services from state and local governments. As Professors Lawson and Granger argue, the original understanding of the Necessary and Proper Clause suggests that Congress would not have broad discretion to judge the propriety of its own actions. Rather, the definition of "proper" action set jurisdictional limits on Congress's power reflecting concerns about individual rights, separation of powers, and federalism.<sup>416</sup>

As Lawson and Granger admit, their analysis provides little guidance about what sorts of burdens on state power would be improper burdens.<sup>417</sup> The analysis provided in Part III, however, provides the beginnings of an answer; one might model states' rights on the rights of private organizations such as political parties, nonprofit corporations, and business enterprises. One could argue that federal burdens upon state and local governments are improper if they deprive state and local officials of rights extended to private organizations by the Bill of Rights. By using the Bill of Rights as a standard by which to measure the institutional rights of state and local governments, one can provide content to the Necessary and Proper Clause that it otherwise lacks and that is consistent with its original jurisdictional purpose.

This is not to say that one mechanically would extend to all nonfederal governments all of the rights enjoyed by private persons under the Bill of Rights. To the contrary, there are at least two good reasons to provide fewer protections to nonfederal governments than to private individuals or organizations. First, governments are organizations with involuntary members; by giving government officials constitutionally protected powers, one can sometimes endanger the rights of their captive constituents. For example, one could not give government officials the right to use tax dollars to advance those officials' or the majority of the constituents' free exercise of religion without establishing religion in viola-

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416. See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

417. See *id.* at 331.

tion of the constituents' First Amendment rights.<sup>418</sup> Second, one should not anthropomorphize *any* organization, whether private or governmental; a constitutional right is not necessarily endangered just because an organization lacks the same immunities enjoyed by individual persons. For example, freedom of speech would not obviously be endangered if private, for-profit corporations were denied the same right to contribute money to political campaigns that private individuals enjoy.<sup>419</sup>

But, despite these qualifications, there is no reason to exclude categorically nonfederal governments from enjoying at least some of the rights protected by the U.S. Constitution.<sup>420</sup> The trick is to discover the purpose of the particular right and determine whether that purpose would be well-served by extending the right to cover nonfederal governments. Indeed, the Court has already made such an extension, holding, for example, that the Fifth Amendment's Just Compensation Clause bars the federal government from taking nonfederal governments' property without paying just compensation.<sup>421</sup> Similar considerations suggests that federal demands for nonfederal governments' regulatory services should be regarded as so distributionally improper as to be precluded by the Necessary and Proper Clause.

By analogizing a theory of states' rights to the constitutional rights enjoyed by private individuals and organizations, the Court would depart from an unpromising tradition of dual federalism and instead embrace a theory of *administrative federalism*. By administrative federalism, I mean a theory of nonfederal governments' entitlements that assumes that such governments will administer

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418. For an account of how organizations with involuntary members ought to have constrained rights of expression under the First Amendment, see Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL RTS. J. 1 (1995).

419. See, e.g., *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) (holding constitutional a statute prohibiting corporations from making expenditures from their general treasuries).

420. Indeed, such an application of the Bill of Rights may be more consistent with the spirit in which they were originally enacted. As Professor Akhil Amar argues, the Bill of Rights was not originally understood to be concerned exclusively or even primarily with the protection of people as individuals. Rather, the Bill of Rights protected the collective "people's" right of self-government. See Amar, *supra* note 326, at 1133 ("The essence of the Bill of Rights was more structural than not [in 1791]."). The essence of the proposal in this article is to treat state and local governments as vehicles through which this collective right is realized — one of the "various intermediate associations" similar to the "church, militia, and jury" through which "an educated and virtuous electorate" is created. See *id.* at 1132. As Amar argues, this was not a peripheral purpose of the Bill of Rights in 1791; it was a central purpose.

421. See Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829 (1989).

federal law but then ensures that they will enjoy a certain minimum of discretion in such implementation. Such a theory of administrative federalism animated the Articles of Confederation, which entitled the states to administer the Continental Congress's requisitions for troops and revenue. Articles 83-89 of the German Grundgesetz (Constitution) also embody such a theory of administrative federalism, because the *länder* (the German analogue to states) enjoy the constitutionally protected prerogative to administer the laws enacted by the federal government.<sup>422</sup>

As Justice Breyer noted in his *Printz* dissent, such systems enhance rather than denigrate the position of their subnational jurisdictions by giving them responsibilities to administer the national government's law. Breyer concluded that, when the national government demands regulatory services from state governments, it also enhances the influence of the state governments in a similar way.<sup>423</sup>

But Justice Breyer's contention overlooks a critical difference between genuine systems of administrative federalism in Germany or under the Articles of Confederation and the system provided by the commandeering of nonfederal governments by Congress. In the former, there are constitutional rules requiring the national government to respect the administrative autonomy of the subnational jurisdictions. In the latter, Congress has constitutionally unlimited power to control the state and local governments in the execution of their federal duties.

By giving state and local governments an entitlement to withhold from the federal government, *Printz* and *New York* enhance the bargaining position of such governments and allow them to extract a degree of discretion or revenue for the implementation of federal law that such governments would otherwise lack. Contrary to the repeated assertions of the dissents in *Printz*, this entitlement hardly suggests that national law will be administered exclusively by a national bureaucracy. One might as well argue that McDonnell Douglas's ability to withhold their warplanes from the Pentagon will lead the Pentagon to produce aircraft in-house. Rather, the entitlement extended by *Printz* and *New York* simply allows nonfederal governments to extract a fair price for their services —

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422. I borrow the term "administrative federalism" from the German context. Under a system of administrative federalism, the central government is forced to use the bureaucracy of the local governments to implement national law. See ARTHUR B. GUNLICKS, *LOCAL GOVERNMENT IN THE GERMAN FEDERAL SYSTEM* 203 (1986).

423. See *Printz v. United States*, 117 S. Ct. 2365, 2404-05 (1997) (Breyer, J., dissenting).

an entitlement already enjoyed by private persons and organizations when they deal with the national government. In this way, *Printz* and *New York* provide a mechanism to produce the sort of system of administrative federalism that Justice Breyer rightly praises.