

WHETHER ANCILLARY REGULATORY BURDENS IMPOSED BY THE CLEAN POWER PLAN UNCONSTITUTIONALLY COMMANDEER THE STATES

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I. INTRODUCTION

In *West Virginia v. EPA*,¹ the State of West Virginia, twenty-six other States, and a variety of power companies and affiliates are challenging the Environmental Protection Agency’s (EPA) “Carbon Pollution Emission Guidelines for Existing Stationary Sources”² on the grounds that, among other things, the rule unconstitutionally “commandeers” the States.³ The rule, known as the Clean Power Plan, seeks to reduce total carbon emissions from the power sector by 32% by 2030, relative to 2005 levels.⁴ States are encouraged to achieve the reductions through state regulations, but if they decline to promulgate their own regulations, the EPA will implement the Plan by regulating state electricity generators directly.⁵

West Virginia has argued that, even under the federal option, state officials would be forced to “facilitate the elimination or reduction of massive quantities of fossil-fuel-fired electric generation.”⁶ Because the EPA does not have the authority to regulate in these fields,⁷ the Clean Power Plan necessarily relies on

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1. *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015), filings and oral argument transcripts, <https://www.edf.org/climate/clean-power-plan-case-resources>.

2. 40 C.F.R. § 60 Subpart UUUU (2017).

3. See Brief for Petitioner at 78–84, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015), https://www.doj.state.wi.us/sites/default/files/solicitor_general/Final%20Opening%20Brief%20-%20Core%20Legal%20Issues.pdf.

4. Note: the Supreme Court has stayed the Clean Power Plan pending judicial resolution of the litigation. *Chamber of Commerce v. EPA*, 136 S. Ct. 999 (2016).

5. JONATHAN RAMSEUR & JAMES MCCARTHY, CONG. RESEARCH SERV., R44145, EPA’S CLEAN POWER PLAN: HIGHLIGHTS OF THE FINAL RULE 2–3 (2016).

6. Brief for Petitioner, *supra* note 3, at 80.

7. *Id.*

the labor of state regulators to accomplish its ends.⁸ This reliance on state action, according to West Virginia, unconstitutionally commandeers the States.⁹

Though the Clean Power Plan will likely be repealed,¹⁰ which would render the *West Virginia* lawsuit moot,¹¹ the anti-commandeering argument raised in *West Virginia* nevertheless bears further examination. Firstly, any future federal greenhouse gas regulation or legislation targeting the power sector will likely be subject to the same constitutional challenges. For instance, if Congress were to pass a carbon tax, it would likely create similar burdens on state regulators to monitor and enforce the provisions at power plants.¹² Secondly, many other environmental and non-environmental legislative and regulatory frameworks have similar incidental burdens on states.¹³ West Virginia's novel anti-commandeering argument, if valid, would substantially undermine the cooperative federalist framework of these programs. Thirdly, delineating the constitutional extent of the EPA's authority to issue regulations like the Clean Power Plan would heavily influence the viability of certain litigation strategies to address greenhouse gas emissions, including federal common law nuisance claims.¹⁴

8. I assume for the purposes of this Note that the arguments posed by *West Virginia* are true: that the Clean Power Plan does heavily burden state regulators, and that the EPA could not accomplish its objectives without placing these burdens on them, even if it implemented a federal plan.

9. Commandeering, as it is used in this context, is a legal term of art that refers to the Federal Government's cooption of state regulators or legislatures to implement federal initiatives, which violates the Constitution. *See infra* Part III.A.

10. *See Electric Utility Generating Units: Repealing the Clean Power Plan*, EPA (Oct. 10, 2017), <https://www.epa.gov/stationary-sources-air-pollution/electric-utility-generating-units-repealing-clean-power-plan-0>.

11. The D.C. Circuit has repeatedly granted the Trump administration's motions to hold the case in abeyance while the Administration seeks to repeal the rule. *See, e.g.*, Order Continuing Abeyance, *West Virginia v. EPA*, No. 15-1363, ECF No. 1703889 (Nov. 9, 2017). The court's willingness to grant the abeyances indicates that it will dismiss the challenge once the Administration has completed its decision-making process.

12. *See* Jack Calder, *Administration of a US Carbon Tax*, in *IMPLEMENTING A US CARBON TAX: CHALLENGES AND DEBATES*, Chapter 3 (2015) (discussing the administrative challenges of implementing a downstream carbon tax).

13. *See* Respondent EPA's Initial Brief at 104–5, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015) (noting that federal regulatory programs that involve similar incidental burdens on states include state building permits issued pursuant to the Americans with Disabilities Act, utility regulation orders issued by the Federal Energy Regulatory Commission pursuant to the Federal Power Act, and many environmental programs, including the Resource Conservation and Recovery Act's hazardous waste permitting program).

14. *See* Zachary Hennessee, Note, *Resurrecting a Doctrine on its Deathbed: Revisiting Federal Common Law Greenhouse Gas Litigation After Utility Air Regulatory Group v. EPA*,

Accordingly, this Note considers whether West Virginia’s argument – that a federal regulation that cannot be implemented without placing ancillary regulatory burdens on state regulators unconstitutionally commandeers the States – has any merit in the case law or the Constitution. This Note proceeds in six parts. Following Part I, this introduction, Part II summarizes the regulatory mechanisms and requirements of the Clean Power Plan and analyzes West Virginia’s anti-commandeering challenge. Part III discusses the two main cases establishing the anti-commandeering principle: *New York v. United States* and *Printz v. United States*. Part IV analyzes the historical, doctrinal, structural, and prudential underpinnings of the anti-commandeering principle and concludes that, though they exist in some tension with each other, the doctrine is best understood as a cost-benefit analysis, balancing the pragmatic necessity of broad federal power against state procedural autonomy. Part V applies this understanding to West Virginia’s argument and concludes that West Virginia’s position is inconsistent with the prudential and doctrinal rationales behind the anti-commandeering principle. Part VI provides some concluding remarks.

II. BACKGROUND

A. Clean Power Plan

The EPA finalized the Clean Power Plan on August 3, 2015.¹⁵ The rule has not yet gone into effect because it was stayed by the Supreme Court in 2016,¹⁶ and the EPA recently published a proposal to repeal the rule.¹⁷ While the future of the Clean Power Plan itself is dim, a basic apprehension of the rule’s structural framework is still necessary to understand West Virginia’s anti-commandeering challenge to the rule, and ultimately, the constitutional validity of such a challenge.

67 D.L.J. (forthcoming, Feb. 2018) (arguing that doctrinal developments since *AEP v. Connecticut* have created a potential opening for federal common law nuisance claims targeting existing stationary sources’ greenhouse gas emissions, but that the viability of these claims depends in part on the extent of the EPA’s regulatory authority under Clean Air Act 111(d) – the authority EPA used to issue the Clean Power Plan).

15. 80 Fed. Reg. 64,662 (Oct. 23, 2015) (codified at 40 C.F.R. § 60 subpart UUUU (2017)).

16. *Chamber of Commerce v. EPA*, 136 S. Ct. 999 (2016).

17. *See Electric Utility Generating Units: Repealing the Clean Power Plan*, EPA (Oct. 10, 2017), <https://www.epa.gov/stationary-sources-air-pollution/electric-utility-generating-units-repealing-clean-power-plan-0>.

The Clean Power Plan targets carbon dioxide emissions from existing fossil-fuel-fired electric utility steam generating facilities and stationary combustion turbines.¹⁸ The goal of the Plan is to reduce carbon dioxide emissions from the utility power sector by 32% by 2030, relative to 2005 levels.¹⁹ Each State has a specified emission reduction goal based on its individual power mix and emission reduction potential.²⁰

The Clean Power Plan allows States to comply either by developing their own state plans, or by having the EPA implement a federal plan. Under the state plan approach, each State can select from two types of plans: (1) an “emission standards” approach where the State implements a federally enforceable emission rate standard directly on the targeted electric generating facilities and combustion turbines; or (2) a “state measures” approach where States attain the same level of carbon reductions through a mix of federally enforceable “emissions standards” coupled with other state law-based reductions like renewable energy and energy efficiency upgrades.²¹ The “state measures” approach must also include a federally enforceable backstop.²²

Though the Supreme Court’s stay indefinitely postponed the Clean Power Plan’s implementation deadlines, the Clean Power Plan would have required each State to submit a state implementation plan outlining the State’s compliance strategy by September 6, 2016, and a final plan by September 6, 2018.²³ Between 2022 and 2029, each State was to demonstrate incremental emissions reductions as outlined in the state plan.²⁴ If a State failed or declined to submit a satisfactory state plan, the EPA would have implemented a federal plan directly on the affected electric generating units in that State.²⁵

18. 80 Fed. Reg. 64,662.

19. *Id.* at 64,665.

20. *Id.* at 64,664.

21. *Id.* at 64,667–68; *see also* RAMSEUR & MCCARTHY, *supra* note 5.

22. 80 Fed. Reg. 64,667–68 (Oct. 23, 2015) (codified at 40 C.F.R. § 60).

23. 80 Fed. Reg. at 64,669.

24. *Id.*

25. RAMSEUR & MCCARTHY, *supra* note 5, at 3. The EPA has proposed a generally applicable federal plan but it has not been finalized. *See* Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units, Proposed Rule, 80 Fed. Reg. 64,966 (Oct. 23, 2015).

B. *West Virginia’s Anti-Commandeering Argument*

West Virginia and its co-petitioners have levelled a bevy of constitutional and statutory challenges to the EPA’s Clean Power Plan.²⁶ The focus of this Note is West Virginia’s claim that the federal regulation unconstitutionally commandeers state governments and their officials.²⁷ West Virginia claims that:

Whether implemented by the States or the federal government . . . States will be required in both instances to facilitate the elimination or reduction of massive quantities of fossil-fuel-fired electric generation as there is no federal means of carrying out the numerous planning and regulatory activities necessary to accommodate the retirement of existing sources and the construction and integration of new capacity.²⁸

Thus, even if States opt out and the EPA implements its federal plan directly on electric utilities, “state actors will be the ones to account for the Rule’s impact on electric reliability, through such means as ‘[public utility commission] orders,’ and ‘state measures’ that make unregulated renewable energy generators ‘responsible for compliance and liable for violations’ if they do not fill the gap.”²⁹ This would result in significant incidental burdens on state regulators, requiring them to “review siting decisions, grant permit applications, and issue certificates of public convenience for the EPA’s preferred generation sources and for the associated new transmission lines that the EPA’s transformation of the power sector will require.”³⁰

West Virginia argues that the EPA relied on state governments’ “responsibility to maintain a reliable electric system”³¹ in developing its Plan. Therefore, states have no choice but to participate in the

26. See LINDA TSANG & ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44480, CLEAN POWER PLAN: LEGAL BACKGROUND AND PENDING LITIGATION IN *WEST VIRGINIA V. EPA*, 10–16 (2017). The major arguments in *West Virginia v. EPA* can be broken into three categories: 1) the EPA violated the Clean Air Act § 111(d) by establishing emission reduction goals that included reductions “beyond the fence line” of the actual electric generating units; 2) the sources which are already regulated under Clean Air Act § 112, which include power plants, cannot also be regulated under § 111(d); and 3) the Clean Power Plan unconstitutionally commandeers and coerces the States. *Id.*

27. Brief for Petitioner, *supra* note 3, at 80.

28. *Id.*

29. *Id.* at 81–82 (quoting 80 Fed. Reg. at 64,848 and 40 C.F.R. § 60.5780(a)(5)(iii)) (in-text citations omitted).

30. *Id.* at 82.

31. *Id.* (quoting 80 Fed. Reg. at 64,678).

implementation of the Clean Power Plan, even if they would prefer to opt out. The only way for them to avoid assisting in implementing the Plan would be for them to entirely remove themselves from the electricity sector – “one of the most important of the functions traditionally associated with the police power of the States.”³² For West Virginia, the choice between facilitating the implementation of the Clean Power Plan or declining to provide electric service for the State’s citizens “is no choice at all; it is an unconstitutional ‘gun to the head.’”³³

According to West Virginia, these burdens will frustrate state officials’ political accountability and exhaust their resources. West Virginia cautions that state officials “‘will bear the brunt of public disapproval’ for increased costs and lost jobs, because they appear to retain exclusive authority under state law over electricity generation.”³⁴

Before evaluating the question posed in *West Virginia*, a deeper understanding of the case law and constitutional underpinnings of the anti-commandeering principle is needed.

III. THE CASE LAW

Two Supreme Court cases lay out the foundation of the anti-commandeering principle, *New York v. United States* and *Printz v. United States*.³⁵ Taken together, these cases prohibit the Federal Government from requisitioning the legislatures and executive officials of the States.³⁶ Below are the facts and holdings of both cases.

A. *New York v. United States*

In *New York v. United States*, the Supreme Court addressed the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.³⁷ The Act provided three sets of incentives to encourage the States to manage the country’s

32. *Id.* at 24 (quoting *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983)).

33. *Id.* at 79 (quoting *Nat’l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (Roberts, C.J.) (plurality opinion)).

34. *Id.* at 82 (quoting *New York v. United States*, 505 U.S. 144, 169 (1992)).

35. See *infra* Part IV.B for a discussion of the doctrinal roots of *New York* and *Printz*.

36. See *Printz v. United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”); *New York*, 505 U.S. at 178 (“[T]he Constitution simply does not give Congress the authority to require the state to regulate.”).

37. 42 U.S.C. § 2021b et seq. (1986).

radioactive waste.³⁸ While all three incentives were challenged, only the third – the “take title” provision – was found to be unconstitutional.³⁹ The take title provision provided that States that did not arrange for the disposal of all internally generated radioactive waste could be forced to take title to wastes generated within their States, which in turn would require the State to assume liability for any damages the waste might cause.⁴⁰

Writing for the majority, Justice O’Connor found that the fatal flaw of the take title provision was that it forced the States to “choose” between two coercive options: either the States regulate according to Congress’s direction and facilitate the implementation of federal legislation, or they assume ownership and liability for non-state generators’ wastes.⁴¹ The Court stressed, “[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all.”⁴² The Court noted that Congress is competent to enact regulation respecting radioactive waste and to preempt state regulations to the contrary and that it may use its spending powers to encourage States to adopt regulatory regimes.⁴³ Nevertheless, “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.”⁴⁴ Accordingly, Justice O’Connor concluded, “the Act [unconstitutionally] commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”⁴⁵

B. *Printz v. United States*

The issue in *Printz v. United States* was whether a provision of the Brady Handgun Violence Prevention Act that temporarily required local law enforcement officers to perform background checks on handgun purchasers unconstitutionally commandeered the

38. *New York*, 505 U.S. at 149.

39. *Id.* at 177.

40. *Id.* at 175.

41. *Id.* at 176.

42. *Id.*

43. *Id.* at 188.

44. *Id.*

45. *Id.* at 176 (quoting *Hodel v. Va. Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)). Justice O’Connor was careful to distinguish Congress’s power from the Article III Courts’ power to order state officials to comply with state law and Congress’s ability to “direct” state judges to enforce state law, which she said were mandated by the text of the Supremacy Clause and Article III. *New York*, 505 U.S. at 178–79. *See also* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816).

States.⁴⁶ The Brady Act provision was arguably a softer form of commandeering than the take title provision in *New York*; it only acted on local officials and required them to assist in the application of federal law to private parties,⁴⁷ whereas the legislation at issue in *New York* essentially required the state legislatures to enact state regulation.⁴⁸

Justice Scalia, writing for the Court, disputed the appropriateness of any balancing test, writing that:

There is considerable disagreement over the extent of the burden, but we need not pause over that detail. Assuming all the mentioned factors were true, they might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments. But where, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a “balancing” analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.⁴⁹

In reaching this conclusion, *Printz* noted that the “[p]reservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than . . . by ‘reduc[ing] [them] to puppets of a ventriloquist Congress.’”⁵⁰ The fact that the law declared unconstitutional in *New York* addressed the whole State instead of individual officials, as in the Brady Act, was constitutionally insignificant.⁵¹ Accordingly, Justice Scalia held that “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. . . . [S]uch

46. 521 U.S. 898, 903 (1997).

47. *Id.*

48. 505 U.S. at 174–75.

49. *Printz*, 521 U.S. at 932 (citations omitted).

50. *Id.* at 928 (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975)).

51. *Id.* at 930. In so holding, *Printz* rejected the legal fiction of *Ex parte Young*, 209 U.S. 123, 159–60 (1908), in this context.

commands are fundamentally incompatible with our constitutional system of dual sovereignty.”⁵²

IV. THE CONSTITUTIONAL UNDERPINNINGS OF THE ANTI-COMMANDEERING PRINCIPLE

As Justice O’Connor noted in *New York*, the “proper division of authority between the Federal Government and the States” is “perhaps our oldest question of constitutional law.”⁵³ Because the Tenth Amendment “states but a truism that all is retained which has not been surrendered,”⁵⁴ *New York* and *Printz* acknowledged that the answer to whether Congress can commandeer the state legislature or executive officials, respectively, is not readily ascertainable from the Constitution’s text.⁵⁵ Instead, *New York* and *Printz* relied on three

52. *Id.* at 935.

53. 505 U.S. at 149. Chief Justice John Marshall would have agreed, writing nearly two hundred years earlier that the issue “is perpetually arising, and will continue to arise as long as our system shall exist.” *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

54. *United States v. Darby*, 312 U.S. 100, 124 (1941).

55. *E.g., Printz*, 521 U.S. at 905 (“[T]here is no constitutional text speaking to this precise question.”). Nevertheless, Justice Scalia perplexingly suggested that the anti-commandeering principle might be embodied in a substantive limit imposed by the word “proper” in the Necessary and Proper Clause. *See Printz*, 521 U.S. 923–24. Justice Scalia cited an article written by Gary Lawson and Patricia Granger who argued that:

the word ‘proper’ serves a critical, although previously largely unacknowledged, constitutional purpose by requiring executive laws to be peculiarly within Congress’s domain or jurisdiction—that is, by requiring that such laws not usurp or expand the constitutional powers of any federal institutions or infringe on the retained rights of the states or of individuals.

Id. (citing Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297–326, 330–33 (1993)).

This reading is a significant departure from longstanding legal consensus. For instance, in Attorney General Randolph’s letter to President Washington opining on the unconstitutionality of the Bank Bill, he conceded that the word “proper” was more likely than not a surplusage “which as often proceeds from inattention as caution.” *Edmund Randolph, The Constitutionality of the Bank Bill, No. 1*, at 5–6 (1791). Chief Justice John Marshall thought that the whole clause was unnecessary, but that if anything, it should be construed as an affirmative grant of power to Congress to make laws incidental to its expressed powers. In his rebuttal to Judge Spencer Roane’s critique of *M’Culloch v. Maryland*, he wrote of the Necessary and Proper Clause: “if no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.” *John Marshall, A Friend of the Constitution III*, at 45 (1819). And though he reached the opposite conclusion on Congress’s implied powers, Judge Roane also thought the Necessary and Proper Clause was doing no work. *Spencer Roane, Hampden II* (1819). Perhaps for these reasons, Justice Scalia placed little weight on the word, emphasizing instead that “[o]ur system of dual sovereignty is reflected in numerous constitutional provisions,” and “[i]t is not at all unusual for our resolution of a significant constitutional question to rest upon reasonable implications.” *Printz*, 521 U.S. at 923 n.13.

principal lines of reasoning in reaching their respective conclusions that federal commandeering of state legislatures and officials contravenes the Constitution's federalism. They are, broadly: historical, doctrinal, and structural and prudential considerations. This Part considers and critiques each argument in turn.

A. Historical Understanding and Practice

New York and *Printz* both began their anti-commandeering analyses by reference to "historical understanding and practice."⁵⁶ *New York* focused on the historical record and original intent of the Framers and concluded that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."⁵⁷ *Printz* agreed with *New York's* analysis,⁵⁸ but, perhaps recognizing that the Framers were more ambivalent about the commandeering of state officials, focused instead on the evidence of historical Congressional practice.⁵⁹

In her opinion in *New York*, Justice O'Connor traced the anti-commandeering principle to the transition from the Articles of Confederation to the Constitution.⁶⁰ The Articles of Confederation, she noted, acted only against the States and not individuals, and this inadequacy "was responsible in part for the Constitutional Convention."⁶¹ To Justice O'Connor, the Framers' rejection of the Congressional powers outlined in the Articles of Confederation was evidence that the new Constitution was intended to enable Congress to "exercise its legislative authority directly over individuals, rather than over States."⁶²

However, while it is clear that the Constitution was intended to cure a defect in the Articles of Confederation by operating against individuals, it is not clear that it was also intended to preclude Congress from operating against the state legislatures too. Like so

56. *Printz*, 521 U.S. at 905.

57. *New York*, 505 U.S. at 166.

58. *Printz*, 521 U.S. at 920.

59. *Id.* at 906-09.

60. *New York*, 505 U.S. at 163.

61. *Id.*

62. *Id.* at 165.

many other issues of early constitutional law, people disagreed.⁶³ For instance, Alexander Hamilton wrote in the Federalist No. 27:

It merits particular attention . . . 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.⁶⁴

On the other hand, Oliver Ellsworth, a delegate to the Constitutional Convention, explained to the Connecticut Convention: “This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity . . . But this legal coercion singles out the . . . individual”⁶⁵ Justice James Iredell broadly agreed, noting in his *Observations on this Great Constitutional Question* that “the Const[itution] intended all Laws of the U.S. . . . should operate upon Individuals & Not States.”⁶⁶

While many in the Founding Generation seemed to agree that the Federal Government should not requisition state legislatures, some of those same people were not opposed to federal control of state executives.⁶⁷ In fact, some Anti-Federalists may have actually

63. See, e.g., Jack N. Rakove, *American Federalism: Was there an Original Understanding?*, in *THE TENTH AMENDMENT AND STATE SOVEREIGNTY* (Mark Killenbeck ed., 2001) (suggesting that the Founders disagreed on the constitutionality and wisdom of commandeering).

64. THE FEDERALIST NO. 27, at 174–75 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis omitted); see also THE FEDERALIST NO. 45, at 292 (James Madison) (stating that it was “extremely probable, that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union”).

65. 2 JONATHAN ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* 197 (2d ed. 1863).

66. James Iredell, *Observations on this Great Constitutional Question*, 27 (1793). This document appears to have been a draft of Iredell’s dissent in *Chisholm v. Georgia*. He ultimately omitted most of his discussion of state sovereignty, instead limiting his opinion to the contention that the Judiciary Act of 1789 failed to prescribe a process for hearing the case. 2 U.S. (2 Dall.) 419, 449 (1793) (Iredell, J., dissenting).

67. See Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1960 (1993) (“Though the Founding Generation did not wish to permit coercion of states in their sovereign, legislative capacities, many individuals envisioned federal commandeering of state executive officers. Apparently, they saw no inconsistency in abandoning federal commandeering of state

supported federal commandeering of state officials as a means of preserving state power, both by ensuring local control over federal regulation and preventing federal patronage from shifting the loyalties of state officials and the people to the Federal Government.⁶⁸ Under this view, Hamilton's *The Federalist No 27*, far from being "the most expansive view of federal authority ever expressed,"⁶⁹ was actually a concession to the opponents of overly centralized federal power.

The lessons of modern cooperative federalism legislation – where the federal and state governments share control over the implementation of federal statutes – appear to lend credence to the Anti-Federalists' vision of commandeering.⁷⁰ In these cooperative arrangements, the Federal Government depends on the States to implement its policies. States, in turn, "use [the] regulatory power conferred by the Federal Government to tweak, challenge, and even dissent from federal law."⁷¹

Because Justice Scalia was probably cognizant of the fact that the Founders were not unanimous in the view that Congress cannot commandeer state executives, he focused his historical arguments in *Printz* on the "enactments of the early Congresses."⁷² The Justice noted that "almost two centuries of apparent congressional avoidance of the practice" was persuasive evidence of the fact that

legislatures while at the same time permitting federal commandeering of state executives.").

68. See Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1108–12 (2013).

69. *Printz v. United States*, 521 U.S. 898, 915 n.9 (1997). Justice Scalia also attempted to cabin the passage, asserting that all it required was that States "enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law." *Id.* at 913. Citing an earlier dissenting opinion of Justice O'Connor's, Justice Scalia argued that any language to the contrary "appear[ed] to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government." *Id.* at 910–11.

70. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1298 (2009).

71. *Id.* at 1259.

72. *Printz*, 521 U.S. at 909. Of course, the Founding Generation disagreed on the Constitutional value of legislative practice. Compare James Madison, *Letter to Charles Jared Ingersoll* (June 25, 1831), <https://founders.archives.gov/documents/Madison/99-02-02-2374> (explaining that he decided not to veto the second Bank Bill despite having opposed the original Bank Bill because "the uniform sanction of successive legislative bodies, through a period of years and under the varied ascendancy of parties" amounted to "the requisite evidence of the national judgment and intention") with *Hunter v. Martin*, 18 Va. 1, 28 (1815) (opinion of Roane, J.) ("With respect to the opinions of the members of congress, who passed the judicial act, I had not expected that they would have been quoted, to prove it constitutional. Their opinion was already manifest, in the act itself . . . The reiterated opinions of the same men, gains nothing, on this question of constitutionality . . .").

commandeering was unconstitutional.⁷³ On the other hand, it is also possible that the First Congress avoided commandeering state executives simply because it did not trust state executives to implement federal law faithfully, and not because of any constitutional impediment.⁷⁴ It is true though, that as an historical matter, Congress did not generally force state executives or legislatures to implement its agenda.⁷⁵ And the judiciary, it seems, eventually took note.

B. Doctrinal Foundations

New York and *Printz* both sought to ground their holdings in Supreme Court precedent. However, while the anti-commandeering principle has historical precedent in the Supreme Court's case law, it was not the dominant view of the Court in the early days. It was not until the mid-1800s that the Court held that the Constitution does not act against the States in their sovereign capacity. Even then, the anti-commandeering principle did not coalesce into a formal doctrine until the 1980s.

The nation's early judges were sharply divided as to the extent of the Federal Government's powers over the States.⁷⁶ Perhaps the most illuminating example was the early constitutional crisis that culminated in the Supreme Court's influential decision in 1816, *Martin v. Hunter's Lessee*,⁷⁷ in which the Court considered whether

73. *Printz*, 521 U.S. at 918.

74. See Campbell, *supra* note 68, at 1144–45 (noting Federalist apprehension around using state officers to enforce federal laws, as urged by Anti-Federalists who pointed to law and oaths that bound state officers).

75. The early Congresses did enact two groups of laws that imposed obligations on state officials to implement federal law: laws requiring state judges to enforce federal law; and the Extradition Act of 1793, which required state executives to return fugitives from other states at the behest of those states. *Printz*, 521 U.S. at 907–09. But, as Justice Scalia observed, both groups of laws are textually permitted by the Supremacy Clause and the Extradition Clause, respectively. *Id.*

76. The seriatim opinions in *Chisholm v. Georgia*, 2 U.S. (2 Dal.) 419 (1793) are illuminative of this lack of consensus. Justice Wilson, for instance, concluded that both the text and spirit of the Constitution demonstrated that the People rendered the States subordinate to the Federal Government. *Id.* at 454–55. Chief Justice Jay, in an opinion that might have been written by Justice Oliver Wendell Holmes more than a century later, wrote that it was absurd to subject cities but not States to suit when there was no practical difference between them, asking: “In this land of equal liberty, shall forty odd thousand in one place be compellable to do justice, and yet fifty odd thousand in another place be privileged to do justice only as they may think proper?” *Id.* at 472–73. On the other hand, Justice Iredell, in his draft dissenting opinion, argued that a suit against a State would be “inconsistent with its Sovereign Character.” Iredell, *supra* note 66, at 25.

77. 14 U.S. (1 Wheat.) 304 (1816).

the Virginia Appeals Court was required to follow the United States Supreme Court's interpretation of federal law.⁷⁸ In the case leading up to *Martin, Hunter v. Martin*,⁷⁹ the Virginia Appeals Court reversed the state trial court, which had thought itself bound by a prior judgment of the Supreme Court, and held that the Supreme Court had no power to compel the state courts. In his seriatim opinion for the Virginia Appeals Court, Judge Cabell articulated a strikingly modern version of process federalism. He observed that the substantive powers of the State and Federal Governments overlap considerably – both governments have jurisdiction over the same territories and people, and “frequently [legislate] on the same subjects.”⁸⁰ However, Judge Cabell noted that the “system [would be] deranged” if there can be no meaningful separation between the two governments.⁸¹ Instead of attempting to carve out separate substantive spheres for the Federal and State Governments, Judge Cabell's solution was procedural. “[E]ach government,” he noted, “must act by *its own* organs: from no other can it expect, command, or enforce obedience, even as to objects coming within the range of its powers.”⁸² Thus, Judge Cabell created a procedural solution for maintaining a distinction between the State and Federal Governments by preventing either from controlling the other, while recognizing the inevitable substantive overlap of the two governments' legislative prerogatives.

Writing for the Court in *Martin v. Hunter's Lessee*, Justice Story rejected Judge Cabell's process federalism, both on textual and structural grounds. According to Justice Story, the Supreme Court's power to review State court decisions stems not just from Article III but also from the distinctly national texture of the Constitution itself.⁸³ Because it was the People and not the States that endowed the Constitution with its powers, the People had the “right to . . . make the powers of the state governments, in given cases, subordinate to

78. *Id.* at 305–06. The holding in *Martin v. Hunter's Lessee* is not directly in tension with *New York* and *Printz*, as it concerned only the Judiciary's Article III power whereas *New York* and *Printz* only addressed Congress's Article I power.

79. 18 Va. 1 (1815).

80. *Id.* at 8.

81. *Id.*

82. *Id.* Judge Roane similarly argued that “the Constitution of the United States in almost no other instance, acts through the governments of the several states The great grievance complained of under the articles of confederation, was, that they acted only through the states To remedy this evil, an entire new system was adopted, by which the general government acted directly upon the people.” *Id.* at 35.

83. *Martin*, 14 U.S. (1 Wheat.) at 338.

those of the nation.”⁸⁴ Accordingly, Justice Story observed that the Judiciary’s Article III powers were “part of the very same instrument which was to act not merely upon individuals, *but upon states*; and to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others.”⁸⁵ He continued: “It is a mistake that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives.”⁸⁶

Despite Justice Story’s rhetorical flourish, he nevertheless avoided issuing a writ of mandamus to the Virginia Appeals Court to enforce the Supreme Court’s prior judgment, and instead simply reversed the Virginia Appeals Court’s decision and affirmed the state trial court’s decision.⁸⁷ This may have been to appease Justice Johnson. Justice Johnson agreed that the Supreme Court had the final say on matters involving federal law but rejected the notion that the Federal Government could compel the States to act. On this point, he was emphatic:

[S]o firmly am I persuaded that the American people can no longer enjoy the blessings of a free government, whenever the state sovereignties shall be prostrated at the feet of the general government . . . that I could borrow the language of a celebrated orator, and exclaim, ‘I rejoice that Virginia has resisted.’⁸⁸

While the Court has never retreated from *Martin v. Hunter’s Lessee*’s view of federal courts’ power to review state courts and force state officials to comply with federal law,⁸⁹ it began to rethink its view of Congress’s capacity to control state legislatures by the mid-1800s. In 1842, Justice Story wrote in *Prigg v. Pennsylvania* that “it might well be deemed an unconstitutional exercise of the power of interpretation, to insist, that the states are bound to provide means to

84. *Id.* at 325.

85. *Id.* at 328 (emphasis added).

86. *Id.* at 343.

87. *Id.* at 362.

88. *Id.* at 363 (opinion of Johnson, J.).

89. *See, e.g., Ex parte Young*, 209 U.S. 123, 166–68 (1908) (upholding the power of federal courts to enjoin state officials from enforcing unconstitutional laws); *FERC v. Mississippi*, 456 U.S. 742, 784 n.13 (1982) (O’Connor, partially dissenting) (observing that federal courts’ powers to enjoin violations of federal law is “far different” from the power of Congress to coerce state legislatures).

carry into effect the duties of the national government.”⁹⁰ Twenty years later the Court had become more resolute. In 1861, Chief Justice Taney noted in *Kentucky v. Dennison* 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.”⁹¹ And in 1868, the Court announced in *Lane County v. Oregon* that “[t]he people . . . established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States.”⁹²

Beginning in the early 1980s, Justice O’Connor seized on the process federalism embodied in these early cases and began fashioning the anti-commandeering principle.⁹³ She first articulated

90. 41 U.S. 539, 616 (1842).

91. 65 U.S. 66, 107 (1861). The Chief Justice was starkly prudential in his rationale, cautioning that “if [Congress] possessed this power, it might overload the [state] 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.” *Id.* at 107–08.

92. 74 U.S. 71, 76 (1869).

93. The Court’s development of the anti-commandeering principle parallels its development of another type of procedural federalism: state sovereign immunity. The Court’s first opinion on state sovereign immunity, *Chisholm v. Georgia*, was, like Justice Story’s opinion in *Martin v. Hunter’s Lessee*, strikingly nationalistic. Both opinions took the view that it was the People, not the States, who granted their sovereign power to the Federal Government, and therefore were competent to subjugate the States’ sovereignty to the national government. And from this conception of the Constitution’s nationalism, both opinions drew the same conclusions that Article III granted the Judiciary power over state governments. Of course, *Chisholm* was quickly abrogated by the Eleventh Amendment. However, in his *Commentaries on the Constitution* published in 1833, Justice Story argued that *Chisholm* was rightly decided and that the Amendment was a new limit on the Court’s Article III powers intended to protect war-stressed State treasuries. It was not until the end of the 1800s that the Court recognized that state sovereign immunity was a structural limit on Congress’s power, not tied to the Eleventh Amendment’s limits on the Court’s Article III powers. *See* *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). And like Justice O’Connor’s “rediscovery” of the process federalism embodied in *Hunter v. Martin*, *Prigg*, *Dennison*, and *Lane County*, the Rehnquist Court eventually rediscovered the central tenets of *Hans*—that state sovereign immunity was a structural limit embodied in the principles of the Tenth Amendment, not the Eleventh. *See* *Alden v. Maine*, 527 U.S. 706, 713–14 (1999).

The parallels between these two types of process federalism beg the question whether Congress could use its Fourteenth Amendment powers to commandeer the States in the same way it can abrogate state sovereign immunity. *See* *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976); *see also* *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (requiring congruence and proportionality for Congress’s prophylactic use of its Fourteenth Amendment powers); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (requiring, and not finding, a clear statement from Congress that it intended to use its Fourteenth Amendment powers to override state sovereignty). However, since neither the Clean Air Act nor the Clean Power Plan were promulgated with an eye towards protecting citizens’ Fourteenth Amendment rights, I do not

the concept in a partial dissent in 1982 in *FERC v. Mississippi*, which rejected a Tenth Amendment and Commerce Clause challenge to the Public Utility Regulatory Policies Act (PURPA).⁹⁴ PURPA required state agencies to “weigh its detailed standards, enter written findings, and defend their determinations in state court” without giving them a meaningful way to opt out.⁹⁵ According to Justice O’Connor, this unconstitutionally “compel[led] state agencies either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to state authority.”⁹⁶

Justice O’Connor refined her argument in a separate dissent in *Garcia v. San Antonio Metropolitan Transit Authority*,⁹⁷ which overruled *National League of Cities v. Usery*.⁹⁸ She acknowledged that Congress’s Commerce powers are extensive but argued that it did not have unlimited means to effectuate them.⁹⁹ Invoking Justice Marshall, she contended that Congress’s exercise of its power must comply with the “letter *and spirit* of the constitution.”¹⁰⁰ “The *spirit* of the Tenth Amendment . . . is that States will retain their integrity in a system in which the laws of the United States are nevertheless supreme.”¹⁰¹ The Court, Justice O’Connor concluded, has a duty and *an ability* “to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power.”¹⁰²

Finally, in 1991, Justice O’Connor clearly delineated the anti-commandeering principle, albeit in dicta, in her majority opinion in *Gregory v. Ashcroft*.¹⁰³ The pertinent issue was whether a State’s constitution, which required state judges to retire at a certain age, was preempted by the Federal Age Discrimination in Employment Act.¹⁰⁴ Though she resolved the issue on statutory grounds, Justice O’Connor emphasized that if Congress were to attempt to regulate

consider the intriguing question any further.

94. 456 U.S. 742, 775 (1982).

95. *Id.* at 787.

96. *Id.* at 783.

97. 469 U.S. 528, 580 (1985).

98. 426 U.S. 833 (1976).

99. *Garcia*, 469 U.S. at 588.

100. *Id.* at 585 (quoting *M’Culloch v. Maryland*, 17 U.S. 316, 421 (1819)).

101. *Id.*

102. *Id.* at 587.

103. 501 U.S. 452 (1991).

104. *Id.* at 455.

state judges' qualifications it would be unconstitutional because the power of States to determine their officials' qualifications is "reserved to the States under the Tenth Amendment."¹⁰⁵

C. Structural and Prudential Logic

In addition to their historical and doctrinal arguments, *New York* and *Printz* both bolstered their anti-commandeering holdings with structural readings of the Constitution, which they demarcated with prudential considerations about the real-world costs and benefits of the doctrine.

Though not perfectly coherent in their conception of the latticework of process federalism, *New York* and *Printz* seemed to agree on one point: Federalism is not a prohibition on Congress's otherwise authorized exercise of its Article I powers, but rather a structural limit on the powers delegated to Congress in the first place.¹⁰⁶ According to *New York*, "The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment, which . . . is essentially a tautology."¹⁰⁷ "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is *necessarily a power the Constitution has not conferred on Congress*."¹⁰⁸ *Printz* clarified that the fact that the States retained "a residuary and inviolable sovereignty" is "reflected throughout the Constitution's text."¹⁰⁹

105. *Id.* at 463.

106. *But see* *Reno v. Condon*, 528 U.S. 141, 149 (2000) ("In *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment."); Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 158, 158 (2001) (arguing that the Tenth Amendment's anti-commandeering principle "is best understood as an external constraint upon congressional power—analogue to the constraints set forth in the Bill of Rights—but one that lacks an explicit textual basis."). Justice O'Connor probably would not have concerned herself much with the difference. "In the end," she observed, "just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment." *New York v. United States*, 505 U.S. 144, 159 (1992).

107. *Id.* at 156–57.

108. *Id.* at 156 (emphasis added).

109. *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting THE FEDERALIST NO. 39, at 245 (J. Madison)).

Thus, rather than itself being a structural prohibition on Congress's exercise of its enumerated powers, the Tenth Amendment is better understood as a directive to the Court to determine "whether an incident of state sovereignty is protected by a limitation on an Article I power."¹¹⁰ Of course, the Court's search for a justiciable federalism has a "sordid" past,¹¹¹ but unlike its pre-1937 attempts to limit Congress's power with arbitrary, formalist limits on the Commerce Clause, or its short-lived understanding of the Tenth Amendment as a prohibition on Congress's enumerated powers in *National League of Cities*,¹¹² the new federalism of *New York* and *Printz* is purely procedural. Congress is not substantively limited in its exercise of its enumerated powers; rather, it is only limited in *how* it may exercise those powers.¹¹³

Having structurally arrived at the concept of process federalism, *Printz* and *New York* outlined its contours using thoroughly prudential reasoning.¹¹⁴ For Justice O'Connor, the principle value of

110. *New York*, 505 U.S. at 157; see also H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 639, 649 (1993) (arguing that *New York*'s process federalism is essentially a rule of construction that the Courts should engage in a *M'Culloch* style review as to whether a Congressional statute complies with both the letter and *spirit* of the Constitution).

111. See William E. Leuchtenburg, *The Tenth Amendment over Two Centuries: More than a Truism*, in THE TENTH AMENDMENT AND STATE SOVEREIGNTY 41 (Mark Killenbeck ed., 2001) (describing the Courts' ill-fated pre-1937 attempt to define a substantive limit on Congress's infringement into State domains); Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, in FEDERALISM AND SUBSIDIARITY 34, 73, n.75 (James E. Fleming & Jacob T. Levy eds., 2014) (describing "dual federalism" as dying its first death in 1937).

112. See *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (holding an amendment to the Fair Labor Standards Act, 29 U.S.C. § 203 (2012), unconstitutional because Congress's exercise of Commerce Clause power imposed substantial costs upon appellants and displaced state policies).

113. Recently, however, the Court has sought to map out some minor substantive limits on Congress's Commerce Clause powers in the name of federalism. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

114. Both Justices O'Connor and Scalia would likely stridently disagree that they were doing anything of the sort. Justice O'Connor stressed: "Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution." *New York*, 505 U.S. at 157. However, her repeated references to the benefits of state autonomy suggest that its advantages do matter. Additionally, as Chief Justice Marshall demonstrated in *M'Culloch*, structural constitutional reasoning works when it makes sense. See also CHARLES BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 22 (1969) ("I am inclined to think well of the method of reasoning from structure and relation . . . because to succeed it has to make sense—current, practical sense."); Neil Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L.R. 1630, 1634 (2006) ("For a federalism

the anti-commandeering principle is its promotion of local political accountability.¹¹⁵ She noted that when 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.”¹¹⁶ Federal coercion diminishes those officials’ accountability because they cannot respond to the needs of the local electorate. Federal preemption of state law, on the other hand, does not pose the same accountability problem since federal officials make their decisions in the public’s eye and “suffer the consequences” of unpopular decisions.¹¹⁷

In *Printz*, Justice Scalia suggested that another type of accountability would be damaged by allowing the Federal Government to commandeer the States: Congress’s own. The Constitution, according to Justice Scalia, vests all the executive power in the President “to ensure both vigor and accountability.”¹¹⁸ This “would be shattered . . . if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.”¹¹⁹ Thus, by forcing the States to administer its laws instead of the President or the President’s appointees, Congress could skirt its own political accountability that stems from the fact that the President is obliged to “take Care that the Laws be faithfully executed.”¹²⁰

Printz and *New York* recognized that anti-commandeering is not just politically beneficial. The principle also protects individuals against the aggrandizement of power by either the federal or state governments, alleviating the risk of tyranny and abuse by either. As Justice Kennedy explained in his concurrence in *Printz*, “[t]he great innovation of [the Constitution’s dual sovereignty design] was that ‘our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.’”¹²¹ This separation “is one of the Constitution’s structural protections of

concerned with state retention of regulatory control, the relevant questions sound in a distinctly constitutional form of cost-benefit analysis.”).

115. See *New York*, 505 U.S. at 169.

116. *Id.*

117. *Id.* at 168.

118. *Printz*, 521 U.S. at 922.

119. *Id.* at 923.

120. U.S. CONST. art. II, § 3.

121. *Printz*, 521 U.S. at 920 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

liberty.”¹²² The ability of the Federal Government to conscript, at no cost to itself, state officers or legislatures into its service trenches too far into these personal liberties, leaving the citizenry vulnerable to a massive consolidation of power by Congress or, perhaps more credibly in modern times, the President.

The Constitutional scaffolding of *New York* and *Printz* suggests three overarching things about the contours of the anti-commandeering principle, which exist in some tension with each other. First, the historical arguments for anti-commandeering advanced in *New York* and *Printz* were not universally accepted by the founding generation, especially with respect to the commandeering of state officials. To the contrary, the Anti-Federalists may have advocated for the commandeering of State officials precisely because of its potential to maintain state power by enhancing the States’ control over the implementation of federal law. The Anti-Federalists may have also thought that commandeering would enable States to maintain the loyalties of their citizens and state officials, which might otherwise shift to the Federal Government through federal patronage and employment. Perhaps for these reasons, Congress historically avoided commandeering state governments.

Second, while not compelled by precedent, the anti-commandeering principle has doctrinal roots reaching back to some of the earliest constitutional cases. The principle was based on the recognition that, because the legislative powers of the States and Congress overlap significantly, the Constitution’s dual sovereignty could only be retained by implying a procedural limit on each of the two governments’ ability to “impos[e] an obligation to obey” the other.¹²³

Third, the anti-commandeering principle seems to be an implied, structural limit on Congress’s Article I powers, rather than an express prohibition on the Congress’s exercise of otherwise enumerated powers. The limit stems from the Constitution’s commitment to the “separate and independent autonomy [of] the States.”¹²⁴ The

122. *Id.* at 921.

123. *Hunter v. Martin*, 18 Va. 1, 8 (1815); *see also Young, supra* note 111, at 58 (arguing that the flaws of dual federalism’s commitment to separate substantive legislative spheres are multi-directional; just as it is problematic to defend states’ federalism at the expense of Congress’s substantive powers, so is it problematic to overly police *state* infringement into traditionally national areas like foreign affairs).

124. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869)).

structural contours of the doctrine are informed by three functionalist, prudential concerns regarding the evils of commandeering, specifically that it: (1) interferes with local political accountability; (2) could interfere with the Congress's own accountability; and (3) could deeply threaten personal liberty by consolidating too much power in the Federal Government.

In sum, commandeering may have historically been understood to *enhance* state control, whereas the modern anti-commandeering doctrine views commandeering as a threat to State sovereignty, individual liberties, and political accountability. Both views, however, recognize the inevitable substantive overlap of State and Federal Government legislative spheres. These countervailing considerations suggest that the anti-commandeering principle is, at heart, a cost-benefit analysis, balancing a recognition of broad national power with the autonomy of State processes. In principle, it has the salutary effect of increasing local and federal political accountability while safeguarding personal liberties. However, it should not be read too broadly lest it have the unwanted effect of consolidating too much federal power.

V. THE ANTI-COMMANDEERING PRINCIPLE AND ANCILLARY STATE REGULATORY BURDENS

Having explored the doctrinal and constitutional dimensions of the anti-commandeering doctrine, this Part returns to the question posed by *West Virginia*: whether the Clean Power Plan unconstitutionally commandeers the States due to the fact that, even if the States opt out, the federal plan cannot be implemented without imposing ancillary regulatory burdens on state regulators. Putting aside the ripeness issue with *West Virginia*'s challenge,¹²⁵ the argument still fails of its own force because it contravenes the prudential and doctrinal framework of the anti-commandeering principle.

Most damningly, *West Virginia*'s challenge would turn the structural and prudential rationales of *New York* and *Printz* on their heads, resulting in significantly less state autonomy, political

125. Since the federal plan has not yet been finalized, it may not be ripe for judicial review and it may not be reviewable under the Administrative Procedure Act, 5 U.S.C. § 704 (2012) (providing for judicial review of *final* agency action). On the other hand, the Court has not always required that a controversy be live and immediate when other considerations weigh heavily in favor of review. *See Duke Power Co. v. Carolina Env. Study Grp.*, 438 U.S. 59, 81–82 (1978).

accountability, and personal security, because it would unravel many cooperative federalist regulations¹²⁶ and lead to much more preemption of state law. As discussed above, the anti-commandeering principle already exists in slight tension with the Anti-Federalists' vision of enhancing state control by filtering federal programs through state officials.¹²⁷ But the two versions are not mutually incompatible precisely because anti-commandeering promotes cooperative federalism by requiring the Federal Government to internalize the costs of its regulations.¹²⁸ This, in turn, permits a significant measure of state control over federal programs.¹²⁹ In doing so, the anti-commandeering doctrine is able to have its cake and eat it too.

Without the option to costlessly co-opt state governments and officials, the Federal Government must choose between preempting States entirely or incentivizing them to cooperate. But because federal preemption can be very costly to the Federal Government – it is often politically unsavory, expensive, resource intensive, and logistically difficult or impossible at times¹³⁰ – cooperative federalism

126. See *supra* note 13 and accompanying text.

127. See Siegel, *supra* note 114, at 1634.

128. But see Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 696 (2001) (arguing that *Printz* “suggested a possible return to a vision of dual federalism and the possible invalidation of cooperative federalism regulatory schemes.”). Others, however, have convincingly argued that *Printz* and other decisions rested on a vision of “dual sovereignty” quite apart from dual federalism. *E.g.*, Young, *supra* note 111, at 66 (noting that “the horse of dual federalism is dead, and we should quit beating it.”).

129. See *Bulman-Pozen & Gerken, supra* note 70, at 1285–92.

130. These are all costs on the Federal Government itself. Presumably, the Federal Government would also weigh the costs of reduced accountability and responsiveness, and the opportunity costs of failing to use the States as laboratories of innovation that also stem from federal preemption of local control. On the other hand, Professor Siegel has argued that the anti-commandeering doctrine might cause more preemption than cooperative federalism. See Siegel, *supra* note 114, at 1646 (arguing that “the unavailability of commandeering may result in more instances of federal preemption going forward.”). Moreover, Professor Siegel sees little difference between cooperative federalist frameworks like conditional spending and commandeering in terms of the regulatory control exercised over state governments. *Id.* at 1657. While it is true that with cooperative federalism, the State’s degree of discretion in the exercise of federal programs is formally dictated by Congress, the States nevertheless have significant latitude in choosing how to implement even relatively specific, bright-line programs. For instance, North Carolina’s virtual non-compliance with many of the EPA’s delegated environmental programs presents one powerful example of State autonomy within cooperative federalist arrangements. See, e.g., Lilian Dorka, *Letter of Concern to NC DEQ*, EPA CIVIL RIGHTS COMPLIANCE OFFICE (Jan. 12, 2017), <https://assets.documentcloud.org/documents/3381929/NCDEQ-Letter-of-Concern-from-EPA.pdf> (expressing concern that North Carolina was violating federal civil rights laws in its implementation of the Clean Water Act); Keith Goldberg, *EPA Threatens to Yank NC Permitting Authority*, LAW360 (Nov. 17, 2015, 4:55 PM),

becomes a more attractive option. This option, as the Anti-Federalists once hoped, empowers the States to “tweak, challenge, and even dissent from federal law.”¹³¹

But taken to its logical end, West Virginia’s argument would effectively destroy cooperative federalism as a viable alternative. It would mean that Congress (or federal agencies acting pursuant to delegated Congressional power) would be precluded from regulating in an area whenever it would have the side effect of triggering other state-law based regulatory burdens that would be shouldered by state regulators. Congress would be left with two alternatives: either preempt every area that might be incidentally impacted by a federal regulation or refrain from regulating overlapping areas of state and federal power altogether. Since the latter is unlikely, the inevitable result would be much more federal preemption of state laws, effectively unraveling the delicate cost-benefit balancing achieved in *New York* and *Printz*.

Putting the prudence of the anti-commandeering principle aside, West Virginia’s argument is not supported in the case law or in more than a century of political practice. Congress has enacted statutes based on cooperative federalism since the early 1900s,¹³² which, as Justice Scalia emphasized in *Printz*, can be “‘weighty evidence’ of the Constitution’s meaning.”¹³³ Many of these regulations, like the EPA’s Clean Power Plan, rely on state regulatory frameworks to ensure their effective implementation.¹³⁴ And, like the Clean Power Plan,

<https://www.law360.com/energy/articles/727938/epa-threatens-to-yank-nc-permitting-authority> (EPA threatened to revoke North Carolina’s permitting authority under the Clean Air Act and Clean Water Act because of the State’s efforts to limit citizens’ access to judicial review of environmental permits).

131. *Bulman-Pozen & Gerken*, *supra* note 70, at 1298. *See also* Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1557 (2012). Gerken explains:

In cooperative regimes, states draw their power from their position as federal servants, not separate sovereigns. As administrators of the federal regime, states often have a great deal of discretion in carrying out federal policies. The policymaking space in which they wield power is not the separate regulatory carve-out imagined by champions of sovereignty and process federalists. Instead, state policymakers wield power in the nooks and crannies of the administrative system.

Id.

132. *See generally* JANE CLARK, *THE RISE OF A NEW FEDERALISM* (1938) (discussing the burgeoning options for cooperative federalism in the New Deal era).

133. *Printz v. United States*, 521 U.S. 898, 905 (1997) (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986)).

134. *See New York v. United States*, 505 U.S. 144, 167–68 (1992) (recognizing the Clean Water Act, the Occupational Safety and Health Act, the Resource Conservation and Recovery Act, and the Alaska National Interest Lands Conservation Act as examples of regulations

these regulations would require additional intervention by Congress if the States were to decline to pick up the regulatory slack caused by federal implementation of the regulations.¹³⁵ Yet the Court in *New York* expressly approved of these cooperative arrangements, noting that:

[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. This arrangement, which has been termed "a program of cooperative federalism," is replicated in numerous federal statutory schemes. These include the Clean Water Act, the Occupational Safety and Health Act, the Resource Conservation and Recovery Act and the Alaska National Interest Lands Conservation Act.¹³⁶

Moreover, the Court has specifically declined to strike down federal statutes simply because they inconvenience the States.¹³⁷ For instance, in *Reno v. Condon*, the Court unanimously rejected South Carolina's Tenth Amendment challenge to the Driver's Privacy Protection Act (DPPA), which restricts States' ability to disclose drivers' personal information without their consent.¹³⁸ The Court acknowledged that "the DPPA's provisions will require time and effort on the part of state employees" but nevertheless declined to find that it commandeered the States because the DPPA did "not require the states in their sovereign capacity to regulate their own citizens."¹³⁹ Likewise, in *Printz*, Justice Scalia suggested that an "incidental application to the States of a federal law of general applicability" would only be unconstitutional if it "excessively interfered with the functioning of state governments."¹⁴⁰ The flaw with the Brady Act was not that it burdened States, but that the "whole *object* of the law [was] to direct the functioning of the state

relying on State regulatory frameworks).

135. *See id.*

136. *Id.* at 167–68 (citations omitted).

137. *See Weiser, supra* note 128, at 698 (predicting that "the Supreme Court will not invalidate a federal regulatory program merely because it will consume a state's time and resources.").

138. 528 U.S. 141, 150 (2000).

139. *Id.* at 150, 151.

140. *Printz v. United States*, 521 U.S. 898, 932 (1997).

executive.”¹⁴¹ Even crediting West Virginia’s argument that the Clean Power Plan will require time and effort on the part of state regulators, this incident is not the “whole object” of the regulation, and it plainly does not rise to the level of “excessively interfer[ing] with the functioning of state governments.”¹⁴²

Alternatively, it may be that West Virginia is using the anti-commandeering principle as a back door to seek a new substantive limit on Congress’s powers. In other words, the Federal Government would be precluded from legislating in areas that are already heavily regulated by the States, especially core issues of state interest like power generation.¹⁴³ The argument finds some support in Justice O’Connor’s partial dissent in *FERC*.¹⁴⁴ Responding to the majority’s reasoning that the States “may escape PURPA simply by ceasing regulation of public utilities,” Justice O’Connor argued that States should not be forced to avoid regulating in areas of traditional State concern to avoid the burdens imposed by a coercive federal regulation.¹⁴⁵ She stressed that “[u]tility regulation is a traditional function of state government . . . By taxing [the State regulators’] limited resources . . . and decreasing their ability to address local regulatory ills, PURPA directly impairs the power of state utility commissions to discharge their traditional functions efficiently and effectively.”¹⁴⁶

Nevertheless, Justice O’Connor stressed that Congress could still preempt the field entirely, an alternative that “[t]he States might well prefer.”¹⁴⁷ Accordingly, it seems that Justice O’Connor was concerned more with the mechanism of Congress’s exercise of its power than with the substance. Moreover, to the extent that Justice O’Connor’s anti-commandeering principle ever contained any substantive components, she expressly disavowed them in *New York*, stating that “[w]hile Congress has substantial powers to govern the Nation directly, *including in areas of intimate concern to the States*, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’

141. *Id.*

142. *Id.*

143. For instance, in its Opening Brief, West Virginia argues that the Clean Power Plan “commandeers the States’ *exclusive authority* to regulate the intrastate generation and transmission of electricity.” Brief for Petitioner, *supra* note 3, at 79 (emphasis added).

144. *FERC v. Mississippi*, 456 U.S. 742, 775–96 (1982).

145. *Id.* at 781.

146. *Id.*

147. *Id.* at 787.

instructions.”¹⁴⁸ Thus, to the extent that West Virginia’s argument leads to the conclusion that Congress is substantively constrained from regulating in “areas of intimate concern” to the States, it has no support in the modern anti-commandeering doctrine.¹⁴⁹

West Virginia’s best argument might be that Congress has not delegated to the EPA the authority to preempt the States in the areas of state law that will be affected by the Clean Power Plan, and therefore the federal plan necessarily relies on state cooperation in its implementation. It is true that if the States were to refuse to implement the permitting, ratemaking adjustments and other incidental regulatory burdens of the federal plan, the EPA would likely be unable to achieve the 32% overall carbon emission reductions it is seeking. It would have to go to Congress to ask for authority to preempt these traditional areas of state law. Still, the argument proves too much. If every federal regulation that relies on States to shoulder incidental burdens were unconstitutional, either the entire regulatory state would collapse or Congress would have to enact vast swaths of new legislation regulating areas that have historically been the domain of the States. More than commandeering, it would be an all-out annihilation of State autonomy. The *anti*-commandeering principle surely does not go that far.¹⁵⁰

VI. CONCLUSION

Though not compelled by constitutional history or precedent, the anti-commandeering doctrine is a convincing structural and prudential reading of the Constitution’s commitment to dual sovereignty, which recognizes Congress’s expansive national power while retaining States’ procedural autonomy. It draws a bright-line rule, which makes it administrable in a way that the Court’s “sordid” pre-1937 Tenth Amendment doctrine was not. And it also enhances state autonomy, political accountability, and personal security by promoting cooperative federalist statutes where the State and Federal Governments work together to implement federal programs.

148. *New York v. United States*, 505 U.S. 144, 162 (1992) (emphasis added).

149. *Hunter v. Martin*, 18 Va. 1, 8 (1815).

150. To the extent West Virginia’s argument has any merit, it is statutory, not constitutional. It might be that Congress, which has historically been relatively deferential to States’ control over their power sectors, did not intend for the EPA to exercise its power under the Clean Air Act in ways that would impinge on this domain.

West Virginia's reading of the anti-commandeering doctrine would undermine all of these values. Under West Virginia's understanding of the doctrine, federal legislation and regulations that necessarily imposed incidental burdens on state regulators would be unconstitutional, which would likely lead to Congress preempting huge swaths of traditional state law. Ultimately, this would significantly undermine State autonomy in ways that are not intended or sanctioned by the anti-commandeering principle.