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I. INTRODUCTION

In 1976, the Supreme Court revived constitutional federalism in *National League of Cities*.[1] In 1985, the Court overruled that decision.[2] In the 1990s, however, the United States Supreme Court once again resurrected constitutional federalism, but this time, however, in a different form — the "etiquette of federalism."[3] In *New York v. United States*, the Court held that the federal government lacked authority to "compel the States to enact or administer a federal regulatory program."[4] In *Printz v. United States*, the Court went further to hold that "Congress cannot circumvent that prohibition by conscripting the State's officers directly."[5] Ruling that "the Framers rejected the concept of a central government that would act upon and through the States,"[6] the Court found unconstitutional provisions of the Brady Act requiring local law enforcement officers to conduct background checks on prospective handgun purchasers.[7]

Where the national government issues a command directing a state official to enact or implement a certain policy, the command is ineffective because it is unconstitutional. In *Printz*, the Court concluded that its determinations as to whether such a command offends state sovereignty is not subject to any sort of balancing test.[8] The etiquette of federalism is

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1. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).
2. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
3. United States v. Lopez, 514 U.S. 549, 580, 583 (1995) (Kennedy, J., concurring).
4. 505 U.S. 144, 188 (1992).
5. 117 S. Ct. 2365, 2384 (1997) [hereinafter *Printz*].
6. 117 S. Ct. at 2377.
7. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1996).
8. The Court held:

> [t]he 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

violated even though the command is formally directed to a state official rather than a state and whatever the reasons the state official may have not to follow the command.[9] It is violated even though the command merely directs the performance of enforcement or ministerial obligations as opposed to policy.[10] Because of its categorical nature, the *Printz* Court's doctrine of dual sovereignty has arbitrary parameters.[11] This nature contrasts sharply with other doctrinal areas of Supreme Court jurisprudence involving federal-state relations.

Decided in the summer of 1997, *Printz* spurred extensive commentary, both in anticipation of and in reaction to the Supreme Court decision. Derided as "antinationalist"[12] and "anti-federalist,"[13] some observers even detected a return to the antebellum philosophy of John C. Calhoun.[14] There have been attacks on the Court's methodology, its "doctrinal formalism,"[15] as well as its policy objectives.[16] Even those who defend the

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> comparative assessment of the various interests can overcome that fundamental defect.

Printz, 117 S. Ct. at 2383.

9. *Printz*, 117 S. Ct. at 2382 (majority), 2399 (dissent).

10. *See infra* notes 78-82 and accompanying text.

11. Professor Chemerinsky recently termed the Supreme Court's approach in this area as "formalistic" in contrast to "functional." Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997). Though Professor Chemerinsky in my view does not provide sufficient countenance to the Supreme Court policies which underlie its "anti-conscription" doctrine, essentially we complain about the same phenomenon. He complains that the Supreme Court has no "justification as to the constitutional basis" for its new federalism policies. The problem is that the Court uses its policies to justify its constitutional theory while failing to assess the policies in the context of the particular statute it is evaluating. *See also* Erwin Chemerinsky, *The Values of Federalism*, 47 U. FLA. L. REV. 499 (1995). The Harvard Law Review similarly complains of *Printz's* "bright-line rule, the parameters of which remain unspecified." Note, *Federalism - Compelling State Officials to Enforce Federal Regulatory Regimes*, 111 HARV. L. REV. 207 (1997).

12. Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 200, 248 (1997).

13. John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209, 1235 (1997).

14. Bernard Schwartz, *A Presidential Strikeout, Federalism, RFRA, Standing, and Stealth Court*, 33 TULSA L. J. 77, 81 (1997); *cf.* Nowak, *supra* note 13, at 1235.

15. Caminker, *supra* note 12, at 201.

16. *E.g.*, Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998) (Supreme Court needs to develop a principled intergovernmental relations and political economy rationale for its results in cases such as *Printz* because the justifications for the nationalistic dual federalism doctrine developed by the Marshall and Taney courts no longer exist); Neil Kinkopf, *Of Devolution, Privitization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331 (1998) (Court's separation of powers doctrines do not support *Printz* dictum establishing a flat prohibition on congressional transfer of executive authority to a State); Evan H. Caminker, *supra* note 12, at 247 ("But because Justice Scalia's opinion eschews explicit discussion of the normative values underlying various definitions of state sovereignty, he provides no clear guidance concerning why or how important he believes it is to protect state autonomy.").

Court's holding rationalize the result with reference to constitutional doctrine or theory other than ones used by the Court.[17] Other commentary traces *Printz*'s implications for specific regulatory areas.[18]

Ironically, however, most commentary has not focused on *Printz*'s novelty within the specific context of other constitutional doctrines addressing federal-state relations.[19] This article focuses precisely on how *Printz* stands out when compared to related federal-state doctrines articulated by the Court. Part II opens this discussion by contrasting *Printz's* categorical test with balancing approaches used with respect to (1) Eleventh Amendment immunity of the States, (2) *Erie*-related doctrines regarding the application of federal law in state courts, (3) procedural due process applied to state governmental decisions, and (4) separation of powers jurisprudence. Part III briefly explores the historical underpinnings and functional justifications for *Printz*'s "anti-conscription" doctrine. Finally, this article concludes that a balancing approach, akin to the parsing of national and state functions under earlier dual sovereignty doctrines, is more likely to detect situations which offend the core policies the Court is trying to protect (i.e. political accountability, preservation of liberty, cost internalization, and separation of powers) than the technical boundaries upon which the current *Printz* test turns.

II. *PRINTZ'S* NOVELTY

The parameters of the Supreme Court's newest doctrine of constitutional federalism depart from those which the Court has developed in related areas of federal-state relations, such as Eleventh Amendment immunity, state court jurisdiction, procedural due process, and separation of powers cases. *Printz* prohibits injunction actions against state officials, though the Court's 1996 decision in *Seminole Tribe of Florida v. Florida*[20] preserved such actions in the context of Eleventh Amendment immunity.[21] *Printz* categorically refuses to compel state bureaucrats to

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17. *See* Hills, *supra* note 16, at 939 (seeking to justify the result in *Printz* with reference to the jurisprudence of takings and free speech under the First and Fifth Amendments).

18. Alfred R. Light, *He Who Pays the Piper Should Call the Tune: Dual Sovereignty in U.S. Environmental Law*, 4 ENVTL. LAW. 779 (1998) (questioning the validity of provisions in federal environmental statutes); Jay T. Jorgensen, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899, 925 (1997) (Attorney General could not, with the approval of a state agency head, simply override a lack of authority (or an express prohibition) in state law that limits the immigration enforcement functions that state and local officials may undertake).

19. A notable exception in the separation of power area is Professor Neil Kinpopf, who has examined *Printz*'s sharp contrast with the Court's separation of powers jurisprudence under the Appointments Clause. Kinpopf, *supra* note 16.

20. 517 U.S. 44 (1996) [hereinafter *Seminole*].

21. *See infra* notes 26-36 and accompanying text.

follow federally-mandated administrative procedures, though the Court, only two weeks before *Printz* was decided, had limited its refusal to compel state courts to follow federal judicial procedure to situations where state procedures are based on neutral principles.[22] *Printz* refuses to command state compliance with federal statutory procedures where federal law controls the regulated citizens' rights and obligations, though the Court has long commanded state compliance with procedures required by constitutional due process, even for state administrative processes in which the regulated citizens' rights and obligations are governed by state law.[23] In addition, *Printz* enlists dual sovereignty to prohibit congressional transfer of the President's executive power to the States.[24] In separation of powers cases, however, the Court has sustained delegations of power to the other branches of the federal Government where there are adequate safeguards to cabin the delegated power and where encroachment on Presidential prerogatives are not too severe. In contrast, *Printz* resolves its separation of powers concern through a categorical prohibition to foster a unitary Executive which clearly does not exist within the Federal establishment.[25]

A. Eleventh Amendment Immunity

The *Printz* Court found no constitutional significance in the fact that the statute at issue attempted to impose responsibility on state officials rather than the state itself, despite the principal dissent's adherence to Eleventh Amendment distinctions between states and state officials embodied in *Ex parte Young*.[26] In *Seminole,*[27] decided the year prior to *Printz*, the Court had decided that Congress lacks authority to abrogate the Eleventh Amendment immunity of the States through exercise of its Commerce Power. The Court indicated there, however, that citizens could continue under the doctrine of *Ex Parte Young* to seek prospective injunctive relief from state officials violating federal law.[28]

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22. Johnson v. Fankell, 117 S. Ct. 1800, 1807 (1997); *see infra* notes 37-59 and accompanying text; Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?* 95 COLUM. L. REV. 1001, 1023 n.88 (1995) ("For such procedural requirements to be valid, they must be nondiscriminatory with respect to the source of the defense (both by their terms and as applied) and must be supported by a legitimate and sufficiently strong state interest."); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128 (1986).

23. *See infra* notes 60-67 and accompanying text.

24. 117 S. Ct. 2365, at 2367; *see infra* note 68 and accompanying text.

25. *See infra* notes 68-82 and accompanying text.

26. 117 S. Ct. at 2382 (majority), 2399 (dissent).

27. 517 U.S. 44 (1996).

28. 517 U.S. at 71 n.14, 72 n.16. Since the statute provided for remedies against a state official less than the full remedial powers of the federal court, including contempt, which *Ex Parte*

In the principal dissent in *Printz*, Justice Stevens notes the "considerable tension" between the majority's holding and the Court's "Eleventh Amendment sovereign immunity cases."[29] Stevens indicates that a constitutional distinction between States, entitled to sovereign immunity, and local officials (such as the officials instructed to implement the Brady regime), not entitled to sovereign immunity under Eleventh Amendment principles, should apply.[30] Again, however, the Court's majority rejected the dissent's invitation to import such a distinction into its "anti-conscription" analysis, finding the "Eleventh Amendment jurisprudence" of "no relevance."[31]

The *Ex parte Young* "fiction" is a long-established principle intended to prevent states from subverting the Supremacy Clause through immunity from judicial orders to comply with federal law.[32] Commentators note its "evident necessity."[33] *Printz's* refusal to honor its distinctions, between the state and a state's official and between retroactive sanctions and prospective injunctive relief, undermines the *Ex parte Young* doctrine by providing an additional and separate means for acquiescing in state departures from statutory or constitutional mandates. The *Ex parte Young* doctrine has internal limits. The doctrine does not permit the recovery of money from a state even where a state official rather than the

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Young would authorize, the Court read the statute to preclude an *Ex Parte Young* action against a state official. 517 U.S. at 74. ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*"). In a somewhat similar context, the Supreme Court has interpreted §1983 not to support actions against state officials on the grounds that a suit against a state official is tantamount to a suit against the official's office. Will v. Michigan Dep't of State Police, 491 U.S. 58, 70-71 (1989). Again in an important footnote, the Court distinguished suits seeking prospective relief because "a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because personal-capacity actions for prospective relief are not treated as actions against the State." 491 U.S. at 71 n.10 (quoting Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985)). Some have suggested that this hyper-technical distinction in 1988 signaled the Court's paving the way for undermining the *Ex Parte Young* "fiction." Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 99 (1990). While this author finds this prospect remote, Jackson finds it more plausible that the Court might extend Eleventh Amendment protection to actions against state officials for structural relief to the extent those actions cannot, in the Court's view, be assimilated to common law writs against individual officials. *Id.* at 104 n.197. It is possible that *Printz* does this by adding to a State's Eleventh Amendment immunity a State official's implied immunity to compel prospective injunctive relief under federal law in situations where the actions sought are acts of the State official in his official rather than personal capacity.

29. 117 S. Ct. at 2394 n.16.

30. 117 S. Ct. at 2399.

31. 117 S. Ct. at 2382 n.15.

32. *See* John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1445-46, 1455-58 (1975).

33. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-27 at 191 (2d ed. 1988).

state itself is the named party.[34] The exception to Eleventh Amendment immunity also does not apply to retroactive, as opposed to prospective, relief in which a plaintiff seeks relief with respect to a state or state official's past behavior, such as damages, compensation, or an injunction directed at undoing a completed transaction. The Court recently acknowledged that the doctrine "is an exercise in line-drawing" that must "reflect the real interests of States" based on a case-by-case inquiry into a state's "special sovereignty interests."[35] *Printz* undermines these distinctions by establishing a separate constitutional federalism doctrine which ignores the state vs. state official and retroactive/prospective distinctions and which refuses to engage in a case-by-case balancing in deciding whether to require state participation in a congressional regulatory scheme.[36]

B. Erie and Related Doctrines

Eleventh Amendment jurisprudence is not the only related area of Supreme Court jurisprudence which the *Printz* court has ignored and may undermine. The issue of the extent to which the Government can require the States to follow specific procedures in support of federal statutory objectives is reminiscent of long-standing problems associated with application of the *Erie* doctrine. *Erie* requires federal courts to apply state law in adjudicating common law causes of action heard under the federal courts' diversity jurisdiction.[37] In *Hanna v. Plumer*,[38] the Supreme Court found that federal courts did not have to apply state judicial procedures in diversity cases even though state substantive law must apply under the *Erie* doctrine. Instead, the federal courts could follow the Federal Rules of Civil Procedure. The obverse of *Hanna* is the issue of whether a state court adjudicating a federal cause of action may follow its own procedures when they differ from those which a federal court would follow had the claim been brought there.[39] In *Felder v. Casey*,[40] the Court required state courts to follow federal procedure in adjudicating federal claims under Section 1983. In her dissent in *Felder*, Justice O'Connor com-

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34. Edelman v. Jordan, 415 U.S. 651, 663 (1974).

35. Idaho v. Couer d'Alene Tribe, 117 S. Ct. 2028, 2039-40 (1997).

36. For example, the doctrine may complicate the use of citizen enforcement suits in environmental law. *See* Light, *supra* note 18, at 817-23.

37. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

38. 380 U.S. 460 (1965).

39. For example, in *Felder v. Casey*, 487 U.S. 131 (1988), a Wisconsin court attempted to apply a state statute which required notification of a state or local governmental entity or officer within 120 days of the injury to a civil rights claim brought pursuant to 42 U.S.C. § 1983 (1997). The Court held that the state notice provision was "patently incompatible with the compensatory goals of the federal legislation" and refused to permit the state to use its procedures in adjudicating the federal claim. *Id.* at 143.

40. 487 U.S. 131 (1988).

plained that the Court had refused to allow state courts to follow their own procedures because of "a sort of upside-down theory of federalism" or a " 'reverse-Erie' theory."[41] State substantive law may not trump federal procedures under *Hanna*, but federal substantive law might trump state procedure under *Felder*.[42]

Concurrent with the *Printz* case in 1997, however, the Court reached a result in favor of state procedural primacy in a suit adjudicating federal statutory rights. In *Johnson v. Fankell*,[43] an Idaho trial court denied summary judgment on several officials' qualified immunity defense under Section 1983. The officials appealed, but the Idaho Supreme Court dismissed. The United States Supreme Court held that even though the officials would have had a right to immediate appeal had their action been brought in federal court, the state courts did not have to provide a similar right within their state court systems. Quoting dictum from its earlier case of *Howlett v. Rose*[44] at length, Justice Stevens writing for a unanimous Court emphasized the Court's reluctance to obligate a state court to entertain a federal claim "when [the] state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts."[45] In *Fankell*, the Court distinguished *Felder* on the grounds that in *Fankell* application of the state rule of procedure would not necessarily "produce a final result different from what a federal ruling would produce," and that the right of appeal under federal law did not have as its source the substantive federal law provision Section 1983 but rather the procedural federal law provision Section 1291.[46]

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41. 487 U.S. at 161 (O'Connor, J., dissenting).

42. For example, state courts must forego their generally applicable notice-of-action requirements and awards of pre-judgment interest in the context of state court adjudication of federal statutory rights. Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330 (1988).

43. 117 S. Ct. 1800 (1997).

44. 496 U.S. 356 (1990).

45. Johnson v. Fankell, 117 S. Ct. 1800, 1805 (1997) (quoting Howlett v. Rose, 496 U.S. 356, 372 (1990)).

46. 117 S. Ct. at 1806. In the course of its analysis, the Court found relevant its rationale in a somewhat different Section 1983 case, *Johnson v. Jones*, 505 U.S. 304 (1995). In that case, the Court considered claims of government officials that they were entitled to an immediate appeal from an order denying them summary judgment on the ground that the record showed a genuine issue of material fact whether the officials had *engaged in conduct* that constituted a clear violation of constitutional law. The Court in *Johnson* upheld the order, distinguishing its earlier case of *Mitchell v. Forsyth*, 472 U.S. 511 (1985), in which the Court endorsed an immediate appeal on the issue of whether the facts *showed a violation* of clearly established law. The Court explained that in *Johnson* the court had found the "strong 'countervailing considerations' surrounding appropriate interpretation of § 1291" to be "of sufficient importance to outweigh the officials' interest in avoiding the burdens of litigation." Johnson v. Fankell, 117 S. Ct. 1800, 1807 (1997). Similarly, in *Johnson v. Fankell*, the Court found strong "countervailing considerations" in the need to respect a State courts' "consistent application of its neutral procedural rules" to a federal law requiring "a State to undertake something as fundamental as restructuring the operation of its courts." *Id.*

The balancing approach elaborated in *Fankell* acknowledges a sort of "Converse-*Hanna*" doctrine for state judges. The doctrine looks to factors like those which have guided the *Erie* doctrine over the years, such as the relation of procedure and substance, outcome determination, and the balancing of state and federal interests.[47] Its analytical balancing approach, like the *Ex parte Young* doctrine, thus contrasts with *Printz*'s categorical "anti-conscription" principle for state law enforcement officials.

In *Printz*, the Government found relevance in principles requiring state courts to hear claims under federal law, citing the landmark decision of *Testa v. Katt*.[48] *Testa* requires state courts to adjudicate claims arising under federal law where the state courts have adequate jurisdiction over similar claims under state and local law.[49] Like *Fankell*, *Testa* embodies a nondiscrimination principle. States may deny a forum to hear federal claims only where they decline to hear analogous state law claims.[50] But the Court rejected the Government's argument and distinguished the case, explaining, "*Testa* stands for the proposition that state courts cannot refuse to apply federal law — a conclusion mandated by the terms of the Supremacy Clause."[51]

The *Printz* Court found *Testa* not relevant because of (1) the text of the Constitution binding "the Judges in every State" to federal law in a context where lower federal courts might not even be established,[52] (2) the distinctive nature of courts where "unlike legislatures and executives, they applied the law of other sovereigns all the time,"[53] and (3) the distinctiveness of recent cases allowing Congress to require "state administrative agencies to apply federal law while acting in a judicial capacity."[54] The Court concluded that cases discussing state court obligations were irrelevant because it viewed the obligations of state administrators under Brady to be "*non* adjudicative responsibilities of the state agency."[55] Re

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47. *Cf.* Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (outcome determinative test under *Erie*); Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958) (balancing test under *Erie*); Dice v. Akron, Canton, & Youngstown R.R., 342 U.S. 359 (1952) (balancing of state federal interests to decide right to trial by jury in state court under federal cause of action).

48. 117 S. Ct. at 2381 (citing Testa v. Katt, 330 U.S. 386 (1947)).

49. *See* FERC v. Mississippi, 456 U.S. 742, 773 n.4 (1982) (Powell, J., concurring and dissenting).

50. *Id.*, citing Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 HARV. L. REV. 966, 971 (1947) (nothing in *Testa* upsets "the traditional doctrine that Congress may not interfere with a state's sovereign right to determine and control the jurisdictional requirements of its own courts"). *Id.*

51. *Printz*, 117 S. Ct. at 2381.

52. 117 S. Ct. at 2371 (quoting U.S. CONST. art. VI, § 2, cl. 2).

53. *Id.*

54. 117 S. Ct. at 2381 (interpreting FERC v. Mississippi, 456 U.S. 742, 759-771 & n.24 (1982)).

55. 117 S. Ct. at 2382 n.14. Justice Stevens, the author of the unanimous opinion in *Fankell*, wrote the principal dissent in *Printz*. As one might expect, Stevens dispatches the

jection of congressional requirements that States comply in an administrative context was categorical.[56]

Despite the debate in *Printz* over *Testa*, neither the Court nor Justice Steven's dissent makes reference to *Fankell* decided two weeks earlier. Instead of resting his *Printz* dissent on the grounds that the state's refusal to implement the Brady Act was not based on "neutral procedural rules," Justice Stevens endorses less cabined congressional discretion to appraise "the interests of cooperative federalism" and "its own constitutional power" and to decide whether to enlist the States in lieu of "an enlarged federal bureaucracy."[57] Both the majority and Justice Stevens adopt bright-line rules. The majority holds that Congress cannot compel the States to enact or enforce a federal regulatory program by conscripting state officers directly.[58] Stevens would defer to Congress as to such matters.[59] *Erie*-like cases suggest a more even-handed approach in which the

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majority's categorical distinction of judicial and other capacities in which state administrators act. 117 S. Ct. at 2400-2401 (Stevens, J., dissenting). Stevens sees the majority's reliance on the text of the Supremacy Clause as "misguided" because the Clause is not the source of the state judge's "duty to accept jurisdiction of federal claims that they would prefer to ignore." 117 S. Ct. at 2400. Instead, the Clause is direct to the matter of what law applies in cases properly before a state court. Moreover, he rejects the majority's implicit *expressio unius* argument that the Constitution's endorsement of requiring state judges to enforce federal law implies no similar obligation for other state officials. *Id.*

56. In rejecting the Government's arguments that the Court should examine the burdens and benefits of requiring state implementation, the Court explains:

> 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 in 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.

117 S.Ct. at 2383.

57. 117 S. Ct. at 2401 (Stevens, J., dissenting).

58. 117 S. Ct. at 2384.

59. That Stevens disagrees with the general notion that Congress cannot force States to implement federal regulations is apparent throughout his dissent. 117 S. Ct. at 2390 ("[S]tate judicial and executive branch officials may be required to implement federal law where the National Government acts within the scope of its affirmative powers."); 117 S. Ct. at 2395 ("[U]nelected judges are better off leaving the protection of federalism to the political process in all but the most extraordinary circumstances"); 117 S. Ct. at 2398 ("The majority relies upon dictum in *New York* to the effect that '[t]he Federal Government may not compel States to enact or administer a federal regulatory program.' But that language was wholly unnecessary to the decision of the case."). Other than a backhand salute to a principle he traces to *National League of Cities* that there may be a constitutionally-significant distinction between a command to "States as States" to enact legislation and a command to state officials to assist the Federal government, Stevens disclaims a judicial role in regulating congressional enlistment of the States. 117 S. Ct. at 2398.

Court would balance substantive federal policies against state administrative burdens in order to resolve the matter on a case-by-case basis.

C. *Procedural Due Process*

Printz's rejection of a balancing approach also implicates the Court's principles of procedural due process. The procedural due process explosion of the 1970's arose in the context of individuals seeking entitlements from the federal largess, in landmark cases such as *Goldberg v. Kelly*[60] and *Mathews v. Eldridge*.[61] In this area of constitutional law, the Court also balances interests of affected citizens and the Government to determine how much process is due in administrative decisions.[62]

In procedural due process jurisprudence, the choice as to whether a state creates an "entitlement" or other constitutionally-protected interest belongs to the state. Federal due process protections under the Fourteenth Amendment critically depend upon the state's view of its own law.[63] But once rights and obligations under state law are established, the state's administrative and judicial processes must meet federal constitutional requirements.[64] For example, a state may choose to operate or not to operate prisons. If they choose to operate prisons, however, they must meet constitutional-required minimum standards.[65]

In *Printz*, the Court refused to require a state or its officials to support the federal interest in gun registration in the context of the state's law enforcement regime. It refused despite the expression of that federal interest in a federal statute validly enacted pursuant to the Commerce Clause. As Justice Stevens' dissent points out, *Printz* eliminates the Hobson's Choice logic of *FERC v. Mississippi* under which a state must regu-

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60. 397 U.S. 254 (1970).

61. 424 U.S. 319 (1976).

62. These principles apply in the context of a regulatory regime. For example, in *Brock v. Railway Express, Inc.*, 481 U.S. 252 (1987), a federal agency administered a regime regulating commercial motor transportation, including protection of employees of companies who refuse to operate a motor vehicle that does not comply with applicable state and federal safety regulations. The Court found that the failure of the federal agency's administrative process to inform the employer of the relevant evidence before temporary reinstatement of an employee deprived the employer of procedural due process under the Fifth Amendment.

63. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985) (property interest), *cert. denied* after remand, 488 U.S. 946 (1988); Hewitt v. Helms, 459 U.S. 460, 466-67 (1983) (liberty interest); Logan v. Zimmerman Brush Co., 455 U.S. 422, 431-33 (1982); Paul v. Davis, 424 U.S. 693, 708-09 (1976); Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972).

64. This is the central message of *Loudermill*'s rejection of Justice Rehnquist's "bitter with the sweet" approach. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) ("The point is straight forward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct.").

65. *See* Welsh v. Likins, 550 F.2d 1122, 1132 n.8 (8th Cir. 1977).

late under federal standards or choose not to continue to regulate at all.[66] *Printz* contrasts sharply with the procedural due process cases. Due Process requires that a state conform its regulatory processes to Federal minimum procedural requirements mandated by the courts, notwithstanding the state's control over creation or elimination of the "property" subjected to the procedural requirements. *Printz*, however, simply permits a state to refuse to participate in Federal regulatory processes mandated by the Congress, notwithstanding the state's ongoing institutions operating pursuant to state procedure in an overlapping area logically related to the Federal substantive regulation.[67] Without sanction, the States may do nothing.

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66. 117 S. Ct. at 2399 ("In *FERC*, we upheld a federal statute requiring state utilities commissions, *inter alia*, to take the affirmative step of considering federal energy standards in a manner complying with federally specified notice and comment procedures, and to report back to Congress periodically." The Court continued, "the state commissions could avoid this obligation only by ceasing regulation in the field, a 'choice' that we recognized was realistically foreclosed, since Congress had put forward no alternative regulatory scheme to govern this very important area."). The *Printz* Court's attempt to distinguish *FERC* is altogether unconvincing. Justice Rehnquist writes that in *FERC* the Court had "upheld the statutory provisions at issue precisely because they did not commandeer state government, but merely imposed preconditions to continued state regulation of an otherwise pre-empted field." 117 S. Ct. at 2381. The Court also makes reference to *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981), but unlike *FERC*, the regulatory regime considered in *Hodel* placed "the full regulatory burden" on the Federal Government in the event that a state chose not to cooperate in regulation. 452 U.S. 264, 288. No such alternative existed in *FERC*.

The dissenting opinions in *FERC* are far more telling. Justice Powell argued in his partial dissent in *FERC* that the statute involved there violated the Tenth Amendment to the extent that it "prescribes administrative and judicial procedures that States must follow in deciding whether to adopt the proposed standards." 456 U.S. at 771 (Powell, J., dissenting). Justice Powell found *FERC* particularly offensive to state sovereignty in its provision for judicial review of state decisions at the instance of the Federal Government or "any person" under the statute's citizen enforcement suit provision. 456 U.S. at 772-73 (Powell, J., dissenting). He found *Testa* not to the contrary because of *Testa*'s recognition that "Congress must respect the state institution's own decisionmaking structure and method." 456 U.S. at 773 n.4 (Powell, J., dissenting). Instead, he found *Testa*'s general principal that the Congress must take the state courts as it finds them fully applicable "to other organs of state government." 456 U.S. at 774. Justice O'Connor's dissenting opinion in *FERC*, while more provocative and wide-ranging, is consistent with Justice Powell's. 456 U.S. at 783 (O'Connor, J., dissenting) ("[T]here is nothing 'cooperative' about a federal program that compels 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."). In *Printz*, the majority essentially adopts the *FERC* dissenters' views.

67. Under *FERC*, a state had to abandon public utility regulation, a matter upon which the Federal government had no intention of offering a federal alternative regulatory system, in order to avoid doing the Congress' bidding on specific issues of federal interest. Under *Printz*, a state need not abandon local law enforcement, a matter upon which the Federal government has no intention of offering a federal alternative regulatory system, in order to avoid doing the Congress' bidding on specific issues of federal interest.

D. Separation of Powers

The "anti-conscription" principle also implicates the Supreme Court's balancing principles governing separation of powers and the delegation doctrine. Viewed through the anti-delegation or separation of powers lens, the *Printz* question may be recast as whether and to what extent the President's executive power to implement or enforce federal law can be conferred or transferred to the States. The majority's practical separation of powers concern is that conscription of the States encroaches upon the prerogatives of the Executive Branch of the Federal Government. The congressional vesting of executive power in the States or their officials, which are not subject to the direct supervisory control of the President, presents the same sort of separation of powers concerns as creation of agencies within the Federal Government not subject to Presidential direction or congressional structures that avoid the Constitution's assignment of specific responsibilities to the Executive Branch.[68]

In this respect, attempted congressional transfer of the President's authority to implement, or "execute" to use the Article II term, resembles other congressional attempts to avoid Presidential prerogatives to prepare the budget,[69] to obtain confidential advice regarding appointments,[70] or to veto legislation presented to him in the constitutionally prescribed manner.[71] The "anti-conscription" principle thus serves the function "to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."[72] In this sense, the Brady law resembles the unconstitutional Gramm-Rudman regime of *Bowsher v. Synar*, where Congress attempted "to grant to an officer under its control what it does not possess," the President's executive power.[73] It is unlike the independent counsel approved in *Morrison v. Olson* because the President may not remove the state and local law enforcement officials charged to administer the provisions of the Brady law. Justice Scalia insists in *Printz* that the Framers sought " unity in the Federal Executive— to insure both vigor and accountability."[74] He concludes: "That

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68. A note in the Harvard Law Review in the early eighties saw federal delegation of administrative obligations to the States to "constitute an improper delegation of federal power or a violation of the due process of lawmaking." Note, *Tenth Amendment*, 96 HARV. L. REV. 191 n.32 (1982).

69. Bowsher v. Synar, 478 U.S. 714 (1986).

70. Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 467 (1989) (Kennedy, J., concurring).

71. INS v. Chadha, 462 U.S. 919 (1983).

72. Morrison v. Olson, 487 U.S. 654, 658 (1988).

73. *Bowsher*, 478 U.S. 714, 726 (1986).

74. 117 S. Ct. at 2378.

unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its law."[75]

Justice Scalia in *Printz* also complains, that in delegating enforcement authority to the States, Congress of necessity delegates discretion to act or not to act. For example, a law enforcement official charged with administration of the Brady law must interpret what "reasonable efforts" must be made to conduct background checks and, as a consequence, decide what priority to give the congressionally mandated tasks with respect to personnel and time vis a vis other responsibilities.[76] In explaining the need for a categorical prohibition on congressional transfers of executive power to the States, *Printz* questions distinctions made in the Government's brief between "making" law or "policymaking," and "enforcing" law or "implementation." Scalia sees this line as similar to the distinction of "proper congressional conferral of Executive power from unconstitutional delegation of legislative authority for separation-of-powers purposes."[77] "Executive action that has utterly no policymaking component is rare," he opines and concludes that "an imprecise barrier against federal intrusion . . . upon state authority is not likely to be an effective one."[78] In any event, he fails to see how permitting Congress to "dragoon" the States to "enforce" federal law because the Brady law "leaves no 'policymaking' discretion with the States" or "improves rather than worsens the intrusion upon state sovereignty."[79]

Distinctions between policymaking and implementation or enforcement, however, have long been a subject of Supreme Court concern in the interpretation of important federal statutes. For example, under the Federal Tort Claims Act, the Government may not be sued when

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75. *Id.* Professor Camicker has criticized this aspect of *Printz*. Evan H. Camicker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075, 1078 (1997) ("[A]s a practical matter, presidential supervision of state officials cannot realistically secure the values of centralized authority that drive the unitary theory.").

76. 117 S. Ct. at 2381.

77. *Id.*

78. *Id.*

79. *Id.* That Justice Rehnquist concurs in Justice Scalia's opinion questioning the practicality of a workable anti-delegation doctrine amuses in light of his previous advocacy of resurrecting such a doctrine in earlier Supreme Court decisions. *E.g.*, Industrial Union AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring) ("I have no doubt that the provision at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative power."). Scalia also touches on the Court's recent separation of powers cases elsewhere, referring to the *Chadha* legislative veto decision for the proposition that just because recent Congresses have enacted many similar provisions does not mean that they all cannot be unconstitutional. 117 S. Ct. at 2376 ("The legislative veto, though enshrined in perhaps hundreds of federal statutes, most of which were enacted in the 1970's and the earliest of which was enacted in 1932, was nonetheless held unconstitutional.").

its agents are performing discretionary functions.[80] Non-discretionary or ministerial functions inadequately performed, however, can be the subject of damages action by those injured. Under the Administrative Procedure Act, the Court has long distinguished two types of administrative discretion, agency action "committed to agency discretion by law" not subject to judicial review at all because there is "no law to apply"[81] and agency action reviewable to determine whether it should be overturned as arbitrary, capricious, or an abuse of discretion.[82] In *Printz*, however, Justice Scalia disclaims the practicality of determining whether state executive action has a sufficiently minor policymaking component so as to constitute mere enforcement . The Court thus simply refuses, in the context of its dual sovereignty doctrine, to make the same sort of distinctions it frequently has made elsewhere.

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80. *See* United States v. Gaubert, 499 U.S. 315 (1991) (challenged action of federal regulators involved the exercise of discretion in furtherance of public policy goals and thus claims barred by the discretionary function exception); Berkowitz v. United States, 486 U.S. 531 (1988) (suit based on Government's licensing of an oral polio vaccine and on its subsequent approval of the release of a specific lot of that vaccine to the public not within discretionary function exception if government policy did not allow official who took the challenged action to release a noncomplying lot on the basis of policy considerations); Dalehite v. United States, 346 U.S. 15 (1953) (claims arising from massive explosion of fertilizer manufactured and prepared for export pursuant to federal program for increasing food supply in occupied areas after World War II barred by discretionary function exception).

81. *E.g.*, Lincoln v. Vigil, 508 U.S. 182 (1993) (decisions about allocating funds from a lump sum appropriation); Webster v. Doe, 486 U.S. 592 (1988) (employment termination decisions of the CIA director); ICC v. Locomotive Engineers, 482 U.S. 270, 282 (1987) (refusals to grant reconsideration of an action because of material error); Heckler v. Chaney, 470 U.S. 821 (1985) (decisions not to take enforcement action). The reviewability of the actions of an administrator turn on the nature of the action and the existence of a congressional standard by which to evaluate the action. In the absence of an express statutory standard, the decision of a prosecutor not to bring an action or of a bureaucrat not to allocate funds to a program may not be reviewable. Congress may, however, cabin the prosecutor's discretion by specifying the criteria limiting his ability to decline prosecution or the bureaucrat's discretion by specifying precisely how agency monies may be spent. In the latter situation, agency actions or inactions may be overturned as "contrary to law."

82. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). Outside the context of statutory construction, the Court also has needed to distinguish ministerial from discretionary duties for the purpose of deciding whether an extraordinary writ of mandamus should issue. This distinction goes back at least as far as *Marbury v. Madison*, where William Marbury sought to compel Madison to deliver Marbury's commission as a justice of the peace. Chief Justice Marshall drew a sharp distinction between ministerial obligations whose fulfillment mandamus could compel and discretionary powers, with which the writ could not interfere. Mandamus sometimes seems to function much like "abuse of discretion" review under the APA. *See* Work v. Rives, 267 U.S. 175 (1925). Other times a more orthodox view seems to prefer that mandamus lie only for breach of a "clear, non-discretionary duty." Heckler v. Ringer, 466 U.S. 602 (1984). But the Court always has acknowledged that a line must be drawn.

III. BACK TO A FUNCTIONAL TEST FOR DUAL SOVEREIGNTY

Printz's rhetoric makes reference to a number of policy concerns which motivate dual sovereignty, including political accountability,[83] preservation of liberty,[84] and internalization of costs.[85] Though the Court describes these functions in its discussion of the historical origins of the dual sovereignty doctrine, its does not examine such concerns in its evaluation of the intergovernmental arrangement in *Printz*. Instead, the Court merely looked to see whether the Federal Government has sought to compel the States to enact or enforce a federal regulatory program. Because it did, the attempt failed.[86] The Court should not have abandoned the analytical methods it has used in other doctrinal areas in developing its etiquette of federalism.

Even if every schoolchild learns the doctrine of dual sovereignty,[87] that term no where appears in the Constitution's text, and its origins can seem "mystical."[88] Much of the Court's discussion in *Printz* is devoted to an exploration of those origins. *Printz*'s case for dual sovereignty rests primarily on a historical analysis of the Framing Period and an examination of the structure of the Constitution.[89] This reliance probably is due in no small measure to the lack of persuasiveness in its subsequent argument that "prior jurisprudence" of the Court commands its result.[90]

The Government argued in *Printz* that the Framers and early Congresses contemplated that the Federal Government would make use of the States to administer federal programs. This was in response to the Petitioner's claim that the practice was "until very recent years at least, unprecedented."[91] What every schoolchild learns, according to the Court, is that citizens within the United States are subject to the laws of two sov-

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83. *Printz*, 117 S. Ct. at 2377 ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens.").

84. 117 S. Ct. at 2378 ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

85. 117 S. Ct. at 2382 ("By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes.").

86. 117 S. Ct. at 2383.

87. *See* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (O'Connor, J.).

88. *See* FERC v. Mississippi, 456 U.S. 742, 767 n.30 (1982) ("For while Justice O'Connor articulates a view of state sovereignty that is almost mystical, she entirely fails to address our central point.").

89. *Printz*, 117 S. Ct. at 2369-2376 (discussion of the Framing Period); 117 S. Ct. at 2376-2379 (structure).

90. This portion of the Court's analysis is found at 117 S.Ct. at 2379-2383. Justice Stevens comments that "a neutral historian would have to conclude that the Court's discussion of history does not even begin to establish a prima facie case." 117 S. Ct. at 2394 n.15.

91. 117 S. Ct. at 2370.

ereigns, a national government of enumerated powers and a state government of a "residuary and inviolable sovereignty."[92] The "Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.' "[93]

In contrast to the Court's categorical test for detecting violations of the etiquette of federalism, its "rationale" for the doctrine has a functional basis. Dual sovereignty has two principal functions for state governments: to ensure that States "will represent and remain accountable to its own citizens"[94] and to structure a protection of liberty to "reduce the risk of tyranny."[95] The doctrine also serves to ensure the same two functions for the Federal government and protects the unitary nature of Executive power in the President.[96]

As DeTocqueville later emphasized, it was the Framers' "master stroke of policy" that "the Federal courts, acting in the name of the laws, should take cognizance only of parties in an individual capacity."[97] DeTocqueville himself was shocked how the "plain American" citizen:

> could distinguish with surprising facility the obligations created by the laws of Congress from those created by the laws of his own state, and who, after having discriminated between the matters which come under the cognizance of the Union and those which the local legislature is competent to regulate, could not point out the exact limit of the separate jurisdictions of the Federal courts and the tribunals of the state.[98]

Late eighteenth century foreign observers of American government expressed sentiments similar to those of DeTocqueville. Lord Bryce,

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92. 117 S. Ct. at 2376 (quoting THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

93. 117 S. Ct. at 2377 (quoting THE FEDERALIST No. 15, at 109 (James Madison) (Clinton Rossiter ed., 1961)).

94. 117 S. Ct. at 2377. Accountability in this sense would include attribution of the costs of government to the level responsible for setting policy.

95. 117 S. Ct. at 2378 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

96. *Id.*

97. DETOCQUEVILLE, DEMOCRACY IN AMERICA 154.

98. *Id.* at 173. DeTocqueville questioned whether such a system would work in other cultures, such as those in Mexico and Europe. For America, though, DeTocqueville saw the division as genius. The division of sovereignty meant that states had no "desire for aggrandisement or the care of self-defense" and could concentrate instead on "internal improvements." *Id.* at 169. The happy state of affairs in America derived more from the absence of national interference with the "spirit of enterprise" and from the "limited and incomplete nature" of the Union rather than the presence of national power or leadership. *Id.* at 170.

writing in the 1880s, analogized the "American Union" to a "great factory, wherein two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each set doing its own work without touching or hampering the other."[99] In 1871, the Supreme Court summarized the sentiment as follows:

> There are within the territorial limits of each State two governments, restricted in their sphere of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals of enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other.[100]

Printz, however, does not employ the eighteenth or nineteenth century modes of analysis in which the Supreme Court must determine the interstate and intrastate roles which this constitutional theory would assign to the national and state sovereignties separately.

President Reagan suggested a somewhat similar political initiative during his administration to achieve what was called *decongestion*, a "major sorting out of functional responsibilities among the three levels of government."[101] Thus, in his 1982 State of the Union, Reagan sought a "trade" in which the national government would assume the costs of Medicaid and the states would accept responsibilities for food stamps and AFDC. By disclaiming the sorting of functions as part of its etiquette of federalism, the *Printz* Court apparently would continue to leave such sorting to the political process. The Court's eighteenth century political philosophy-based rationale, however, demands such an inquiry.

The Court's partial revival of dual sovereignty to protect the structure of state government, but not its separate functions, seems all the more odd because of the majority's reliance on the actual operating structures of eighteenth century America to root its conclusion that state bureaucracies may avoid national commands to action. DeTocqueville was struck in the nineteenth century by the apparent absence in America of government "administration" as Europeans understood it. He remarked, "[n]othing is more striking to a European traveler in the United States than the absence of what we term the government, or the administration.

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99. JAMES BRYCE, THE AMERICAN COMMONWEALTH 318 (2d ed. 1891).

100. Tarbel's Case, 80 U.S. (13 Wall.) 397, 406 (1872). *See id.* at 407 ("In their laws, and mode of enforcement, neither is responsible to the other.").

101. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, IN BRIEF— THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH 1 (Dec. 1980).

Written laws exist in America, and one sees the daily execution of them, but although everything moves regularly, the mover can nowhere be discovered."[102]

Between 1976 and 1985, in *National League of Cities* and *Garcia*, the Supreme Court tried to assess the intrusiveness of specific federal laws on the operations of state government. The Tenth Amendment's guarantee of the state's independent sovereignty required then that the Court inquire into whether the law (1) regulated the "States as States;" (2) addressed matters that are "indisputably attributes of state sovereignty;" and (3) required state compliance in a manner that impaired a state's ability to "structure integral operations in areas of traditional functions."[103] The Court, or at least Justice Blackmun who had provided the fifth vote in *National League of Cities*, also balanced the federal interest against the impairment of state government wherever the three-part test was satisfied.[104] Professor Tribe has criticized the *National League of Cities* approach as "Talmudic parsing of traditional and non-traditional state functions."[105] Such parsing was, however, at the core of early America's doctrine of dual sovereignty.[106]

IV. CONCLUSION

As we have described above, while purporting to rely on historical precedent, *Printz* ignores the constitutional separation of governmental functions so obviously a part of eighteenth-century doctrine and its twentieth century analogue, *National League of Cities*. Instead of parsing interstate from intrastate responsibilities, the *Printz* Court distinguishes executive and adjudicative conscription and induced cooperation from unconstitutional coercion. The new distinctions preserve recent decisions and dictum in cases such as *FERC v. Mississippi* and *New York v. United States*.[107] Ironically, however, the *Printz* Court ignores the analytic frame-

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102. DeTocqueville, at 73. Thus, he perceived, "The administrative power in the United States presents nothing either centralized or hierarchical in its constitution; this accounts for its passing unperceived. The power exists, but its representative is no where to be seen." *Id.* at 74. Obviously, by the 1930s, this had changed. But just as obviously it would have been difficult for DeTocqueville to have divined the extent to which national policy could be effectuated through state bureaucracy where so little state bureaucracy could be found.

103. *E.g.*, EEOC v. Wyoming, 460 U.S. 226 (1983); Hodel v. Virginia Surface Mining Reclamation Ass'n, 452 U.S. 264 (1981).

104. FERC v. Mississippi, 456 U.S. 742, 763-64 n.28 (1982); Hodel v. Virginia Surface Mining Reclamation Ass'n, 452 U.S. 264 n.29; *see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (Powell, J., dissenting); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.10(d) (5th ed. 1995).

105. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-22 at 396 (2d ed. 1988).

106. *See supra* notes 98-101 and accompanying text.

107. *See supra* notes 59, 66.

works the Court has used in other areas important to federal-state relations, *e.g.* Eleventh Amendment, *Erie*-related doctrines, due process, and separation of powers decisions, all of which provide criteria to delineate the more serious intrusions on state sovereignty.

These criteria may include (1) the distinction between retroactive sanctions and prospective injunctive relief in the Eleventh Amendment cases,[108] (2) the distinction between state procedures which appear discriminatory or neutral with respect to a federal statute's legitimate substantive objectives in the converse-*Erie* cases,[109] (3) the distinction between state processes that meet and do not meet federal standards of procedural fairness in the due process cases,[110] and (4) the distinction of regimes where congressional transfer of power "impermissibly threatens the institutional integrity" of other branches of the federal government in separation of powers cases.[111] The Court's criteria in each of these other areas of constitutional jurisprudence seem more likely to detect situations which offend the core policies dual sovereignty is said to protect (i.e. political accountability, preservation of liberty, cost internalization, separation of powers) than the technical boundaries, executive vs. adjudicative, coercive vs. voluntary, upon which the *Printz* analysis currently turns. Once the relevance of such policy lynchpins and analytical criteria is recognized, the Court should feel less reluctant to return to a balancing akin to that of *National League of Cities*, which Justice Rehnquist once confidently declared would "in time again command the support of a majority of [the] Court."[112]

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108. *See supra* notes 33-36 and accompanying text.

109. *See supra* notes 43-59 and accompanying text.

110. *See supra* notes 63-67 and accompanying text.

111. *See supra* notes 69-82 and accompanying text; *see also* CFTC v. Schor, 478 U.S. 833, 851 (1986) (examining "the extent to which a congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch," rejecting "formalistic and unbending rules.").

112. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting).