6-1-2000

Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule

Adam B. Cox

EXPRESSIVISM IN FEDERALISM: A NEW DEFENSE OF THE ANTI-COMMANDEERING RULE?

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One can imagine the glee with which the original legal realists would have dismembered the Supreme Court's modern federalism jurisprudence. Musty formalism abounds, with decisions turning on the "essential" attributes of sovereignty, cases carving out seemingly meaningless conceptual distinctions, and doctrine largely ignoring functional analysis. Modern scholars have done the realist tradition proud, criticizing and sometimes even ridiculing the Court for grounding its recent revival of federalism in transcendental nonsense.

The Court's newly minted "anti-commandeering" rule is one of the most prominent installments in—and perhaps the paradigm of—this revival.[1] The Court initially crafted the rule in *New York v. United States*,[2] in which it held that Congress could not require the New York legislature to pass a law siting a low-level nuclear waste disposal facility somewhere within that state. Forcing New York to pass such a law, the Court held, amounted to impermissible "commandeering" of the state legislature. Five years later, in *Printz v.*

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1. Other recent products of the Supreme Court's modern federalism jurisprudence include *Alden v. Maine*, 119 S. Ct. 2240 (1999), and *Saenz v. Roe*, 119 S. Ct. 1518 (1999). While these decisions are not the subject of this Article, the application of expressive theory to institutional arrangements that this Article proposes should be useful to attempts to explain or justify those decisions.

2. 505 U.S. 144 (1992).

United States,[3] the Court elaborated on the anti-commandeering rule when it struck down the provisions of the Brady Handgun Violence Prevention Act ("Brady Bill")[4] that required state and local law enforcement officials to conduct background checks of prospective handgun buyers. Writing for the majority, Justice Scalia made clear that the prohibition laid down in *New York* was categorical, and that requiring state officials to administer a federal regulatory program violated that prohibition just as surely as did requiring a state legislature to pass a particular law.[5] In addition to elaborating on the extent of the anti-commandeering rule, Justice Scalia clarified the source of the rule, finding that the prohibition was entailed by essential postulates inhering in the concepts of dual sovereignty and the unitary executive.[6]

Although the basic prohibition that the *New York-Printz* rule describes—no commandeering—sounds fairly straightforward, the scope of the rule is actually quite complicated. For example, while the Court employed the anti-commandeering rule in *Printz* and *New York* to strike down congressional attempts to require certain actions by state officials, it explicitly acknowledged that Congress may still require the inaction of state officials by preempting state regulations,[7] and that Congress may still "encourage" state officials to take actions by using the promise of federal grant money or the threat of federal preemption.[8] Moreover, the Court has held that one group of laws (those that are "generally applicable") and one set of state officials (state judges) are exempt from the *New York-Printz* rule altogether.[9]

Commentators have not been kind to the anti-commandeering rule. They have argued, nearly without exception, that the rule is indefensible both under the Court's own formalist rationale and on more functional grounds.[10] According to the bulk of current

3. 521 U.S. 898 (1997).

4. Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as 18 U.S.C. §§ 921-924 (Supp. 1999)) [hereinafter Brady Bill].

5. *See Printz*, 521 U.S. at 933.

6. *See id.* at 918-19.

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

8. *See id.* at 166-69.

9. *See Printz*, 521 U.S. at 929-30; *New York*, 505 U.S. at 178-79.

10. *See, e.g.*, Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of*

commentary, the *New York-Printz* rule is nothing more than a powerful illustration of the Supreme Court's federalism fetish. Critics of *New York* and *Printz*, however, have largely ignored an area of legal theory that has blossomed during the ascendance of the anti-commandeering rule—expressivism.

The expressive dimension of law and law's role in shaping social norms and understandings have attracted significant scholarly attention in recent years.[11] Critics of the Chicago School have recently employed expressive accounts of law as a powerful weapon against certain forms of law and economics,[12] and the (New) Chicago School has in turn co-opted expressivism for its own purposes, integrating intricate accounts of social norms into their preexisting methodological framework and constructing expressive critiques of the original expressivists.[13] This recent popularity has resulted in the application of expressive theories to doctrinal areas from criminal punishment to the Establishment Clause to voting rights.[14] As yet,

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Federalism: New York, Printz *and* Yeskey, 1999 SUP. CT. REV. 71; Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199 [hereinafter Caminker, *The Limits of Formalism*]; Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle*, 111 HARV. L. REV. 2180 (1998). The one notable exception is Professor Roderick Hills, who has defended the anti-commandeering rule—what he calls the "*Printz* entitlement"—on political economic grounds. *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998).

11. *See, e.g.*, Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law: Why Rights Are Not Trumps*, 27 J. LEGAL STUD. 725 (1998); Symposium, *Law, Economics, & Norms: On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

12. *See, e.g.*, Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990) (using elements of expressivism to criticize Arrow's critique of social choices in democracy).

13. *See* RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY 41-70 (1998) (arguing that legal intervention generally undermines useful preexisting social norms).

14. *See, e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (criminal punishment); William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986) (Establishment Clause); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts", and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993) (voting rights).

however, no one has attempted to integrate expressive theories into discussions about what one might call "structural rights," such as federalism and separation of powers.[15]

The purpose of this Article is to begin investigating the importance of expressivism to any description of structural rights. Specifically, this Article will offer a potential response to the critics of the anti-commandeering rule. The prohibition on commandeering might be defensible, but only if the expressive dimension of governmental action is acknowledged. Part I reviews the conventional criticisms of the *New York-Printz* rule. According to most commentators, the anti-commandeering rule is ill-defined, ineffective, and arbitrary. Using the rule's perceived inadequacies as a reference point, Part II attempts to construct an expressive defense of the anti-commandeering rule. The perceived inadequacies—particularly *Printz*'s formalist tendencies—actually point the way to a potential functional defense by hinting at the expressive dimension of "state autonomy" and prompting an inquiry into why the expressive dimension of "autonomy" might be important. While the conclusions drawn in this part are necessarily tentative, I suggest that the anti-commandeering rule might serve to protect the capacity of the states to act as political counterweights to the federal government by preserving and reinforcing public perception of the states as credible alternative political institutions. More importantly, by sketching the outlines of an expressive defense of the anti-commandeering rule, I hope to illuminate the long-overlooked importance of expressive theory to any defense of institutional structures, and to spark a discussion about its explanatory and justificatory power in the context of structural rights.

15. After this Article entered publication, Professors Richard Pildes and Elizabeth Anderson completed an excellent restatement of their expressive theory of law that includes a short discussion of the application of that theory in the context of federalism. *See* Richard H. Pildes & Elizabeth Anderson, unpublished article, 148 U. PA. L. REV. 1503 (2000). Professors Adler and Kreimer have also mentioned (and summarily rejected) the possibility of applying an expressive theory of law in the context of federalism. *See* Adler & Kreimer, *supra* note 10, at 140-42.

I. THE DOCTRINAL INADEQUACIES OF *PRINTZ* AND *NEW YORK*

In order to demonstrate why the *New York-Printz* anti-commandeering rule is in need of justification, this Article first reviews the rule's inadequacies. The anti-commandeering rule invites three obvious criticisms: that it is ill-defined, ineffective, and arbitrary.

First, the rule is open to the criticism that it is ill-defined because neither *Printz* nor *New York* attempts to describe what constitutes commandeering. In practice, the boundaries of this concept are difficult to delineate.[16] For example, does federal tort liability for unconstitutional conduct by state police officers count as commandeering? How about a requirement that the state train its police officers to prevent such unconstitutional conduct? The basic descriptive problem stems from the fact that it makes little sense to try to define "commandeering" without reference to the values that might be served by an anti-commandeering rule, in the same way that it is hopeless to try to describe the appropriate contours of "state action" without resort to the values served by the state action doctrine. Unfortunately, neither *Printz* nor *New York* makes a serious attempt to lay out what these values might be.[17]

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16. For perhaps the most elaborate attempt to articulate the boundaries of the concept of commandeering as a matter of abstract logic and morality, see Adler & Kreimer, *supra* note 10, at 83-89 (suggesting that the boundary between commandeering and preemption "is most plausibly and sympathetically construed as a distinction between inaction and action").

17. *New York* does suggest the value of political accountability, *see* New York v. United States, 505 U.S. 144, 168-69 (1992), but it seems somewhat implausible that commandeering actually blurs political accountability. In order for commandeering to blur political accountability, a group of citizens must be concerned about a commandeering-based policy, yet be unable to trace its roots. This requirement implies either that the citizens are incompetent, or that commandeering hopelessly complicates the lines of accountability. It seems unlikely that caring citizens would be totally incompetent. Moreover, it is doubtful that commandeering hopelessly complicates accountability as an empirical matter; if state officials dislike a commandeering-based policy, they have every incentive to communicate to caring citizens that the federal government is responsible for that policy. Surely Sheriffs Printz and Mack explained to their constituents exactly who was responsible for their having to conduct background checks of handgun purchasers.

The above explanation does suggest that the problem of blurred political accountability might still arise when state and federal officials are content to

Second, commentators claim that the *New York-Printz* rule is ineffective because it does not protect what it purports to protect—a state's control over its own regulatory infrastructure. While the anti-commandeering rule does prohibit the federal government from issuing certain orders to state officials, it still permits Congress to preempt state regulations altogether.[18] For this reason, the critics claim, the doctrine does not serve to protect the states' power of regulatory initiative in any field. If a state refuses to use its regulatory machinery in the way that Congress wishes, Congress may simply disable state regulation by regulating at the federal level. One might even argue that preemption constitutes a greater affront to state autonomy than does commandeering; after all, when Congress commandeers the states, it might leave the details of implementing a regulatory decision substantially to the states' discretion,[19] and it might refrain from creating a new federal bureaucracy. In addition to failing to protect a state's power of regulatory initiative, the anti-commandeering rule may even fail to protect a state's right to abstain from regulating, because *Printz* and *New York* leave in place Congress's power of conditional spending.[20] Thus, the federal government may be able to force a state into doing its bidding by threatening to withhold grant money on which the state relies. In short, the anti-commandeering rule does not—as a logical matter—necessarily do anything to protect a state's control over its own regulatory infrastructure.

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allow confusion to continue over what government entity is responsible for a policy. This possibility, however, proves too much. If the Court was indeed concerned about political accountability in such situations, then one would expect the Court at least to discuss concerns about political accountability in other cooperative federalism and separation-of-powers contexts. *See* Hills, *supra* note 10, at 824-30; *see also* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 188 (comparing "process autonomy" to judicial context).

18. *See New York*, 505 U.S. at 160.

19. This is exactly what occurred in *New York*: Congress commandeered the states by requiring them, either alone or in regional compacts, to provide for the disposal of low-level radioactive waste generated within their borders, but it preserved a role for the states by allowing them to make the actual siting decisions. *See New York*, 505 U.S. at 151-54.

20. *See* Printz v. United States, 521 U.S. 898, 917-18 (1997); *New York*, 505 U.S. at 166-67.

Third, the anti-commandeering rule can be criticized as arbitrary because of the exceptions that *Printz* and *New York* allow to the principle of protecting a state's autonomy over its own governmental structures. The commandeering cases include two such exceptions: the judicial exception and the exception for generally applicable laws.[21] If a state's control over its governmental structures is worth protecting in general, why is it not worth protecting in these instances? *Printz* attempts to legitimize the judicial exception by arguing that the Constitution's Supremacy Clause singles out state judges and binds them in a special way. Several commentators, however, have exposed the weak footing of this argument.[22] Moreover, neither *Printz* nor *New York* makes any real attempt to justify the exception for generally applicable laws. It is simply a holdover from *Garcia v. San Antonio Metropolitan Transit Authority*.[23] As many

21. *See Printz*, 521 U.S. at 898, 932-33 & n.17; *New York*, 505 U.S. at 160, 178-79. *Cf.* Reno v. Condon, 120 S. Ct. 666 (2000). An additional exception may also exist for congressional legislation passed pursuant to Section 5 of the Fourteenth Amendment. *See* Adler & Kreimer, *supra* note 10, at 119 (arguing that such an exception "is well grounded in constitutional history, judicial doctrine, and legislative practice"). Recent Supreme Court case law supports the proposition that, as a general matter, federalism concerns shake out differently when Congress legislates pursuant to its Section 5 power. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 60-76 (1996). Whether the Court would uphold Section 5 legislation that commandeers the states, however, remains an open question: neither *Printz* nor *New York* directly addresses this potential exception to the anti-commandeering rule, and recent cases such as *City of Boerne v. Flores*, 521 U.S. 507 (1997), make clear that the Court refuses to abandon all federalism constraints in the context of the Fourteenth Amendment.

22. *See* Caminker, *The Limits of Formalism*, *supra* note 10, at 212-17; Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1077 (1995) [hereinafter Caminker, *State Sovereignty and Subordinacy*]; Ellen D. Katz, *State Judges, State Officers, and Federal Commands after* Seminole Tribe *and* Printz, 1998 WIS. L. REV. 1465, 1502; Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 59 n.278; Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 84-85 (1998).

23. 469 U.S. 528 (1985). *See New York*, 505 U.S. at 160 ("This litigation presents no occasion to apply or revisit the holdings of [*Garcia* and other cases subjecting states to generally applicable laws], as this is not a case in which Congress has subjected a State to the same legislation applicable to private

commentators have argued persuasively, both exceptions are difficult to defend if one assumes the validity of *Printz*'s principle that constitutional federalism mandates judicial protection of the states' control over their own governmental structures.[24]

II. AN EXPRESSIVE DEFENSE OF THE ANTI-COMMANDEERING RULE

Should the *New York-Printz* anti-commandeering rule be read as a rule protecting each state's control over its regulatory infrastructure? Or is there another principle that can better explain why the laws invalidated in *Printz* and *New York* might have been especially pernicious, and why the Court perhaps should be less concerned about federal preemption and judicial commandeering? This Part suggests that there is: expressive grounds more plausibly justify the anti-commandeering rule. In this Part, I first briefly describe the nature of "expressive" theories of law and regulation. An expressive theory of law is one that is concerned with the social meaning of government action. I then argue that the anti-commandeering rule is more plausibly defended on expressive grounds than on the grounds articulated by the Supreme Court. This argument proceeds in three parts: first, I argue that states secure certain values of federalism by serving as alternative political institutions to the national government; second, I contend that states must be vibrant in order to serve as credible alternative political institutions, and that the vibrancy of state political institutions is supported in part by public perceptions of the "autonomy" of states; and third, I suggest that the Court may preserve and promote these public perceptions of state "autonomy" when it invalidates congressional legislation that treats the states as puppets. In short, the anti-commandeering rule might serve the important function of representing and reinforcing social understandings of state "autonomy" that are crucial to the production of some of the public goods secured by federalism.[25]

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parties."); *Printz*, 521 U.S. at 932 n.17 (hinting at a possible retreat from *Garcia* through the introduction of a balancing test for generally applicable laws).

24. *See, e.g.*, Caminker, *State Sovereignty and Subordinacy*, *supra* note 22, at 1021-60, 1071-72.

25. Thus, as will become clear below, this Article argues that the expressive account of the anti-commandeering rule informs a functional account. *See infra* text accompanying notes 27-36.

A. The Nature of Expressive Justifications

There is currently substantial debate over the nature of expressive theories of law.[26] It is therefore necessary to clarify what I intend when I refer to an "expressive defense" of the anti-commandeering rule. Because proponents of expressive theories of law often take as their adversary a certain flavor of law and economics, expressive theories are often understood in opposition to "consequentialist" theories of law.[27] But expressive theories need not be seen as nonconsequentialist, and the expressive theory of regulation and adjudication that I employ in this Article is not. In fact, the expressive theory that this Article applies is neither a novel nor a marginal account of the law. To the contrary, it is simply a reinvigoration of the richness of the law—a reminder that the things done by government actors (legislators, executive officials, and judges alike) are important for reasons apart from the "tangible" effects that those actions produce. Regulatory and adjudicatory action also have "expressive" features, and these features are contingent on *the way in which* government action goes about achieving the more tangible effects.

To see this distinction more concretely, consider the anti-commandeering rule itself. Because *New York* and *Printz* rely principally on the doctrinal claim that the Constitution requires that a state's *control* over its own regulatory infrastructure be protected, the bulk of the criticism leveled against the rule has evaluated it along the "tangible" metric of "preserved state control." Critics ridicule the anti-commandeering rule along this evaluative metric for the reasons discussed above: it isn't clear that the rule actually protects a state's control over its own regulatory structure, and, to the extent the rule does, it isn't clear what values of federalism this control promotes. In contrast, this Article evaluates commandeering using an expressive metric. It investigates the *way in which* the federal

26. *Compare* Matthew D. Adler, *Expressive Theories of Law*, 148 U. PEN. L. REV. 1363 (2000), *with* Pildes & Anderson, *supra* note 15.

27. Professor Adler appears to understand expressive theories in this way in his recent critique of expressivism. He constructs an elaborate description of expressivism that requires every expressive factor of a legal norm to be devoid of any "causal connection" to any nonexpressive value. *See* Adler, *supra* note 26.

government goes about depriving states of actual control over their regulatory infrastructures when it commandeers, and explores the expressive qualities both of that government action and of the Court's action in invalidating it.

There may be more than one reason why the expressive character of law matters. This Article, however, relies on only the following way in which the expressive character of law is important: Certain judge-made legal norms—which can entail expressive character either through judicial expression or by proscribing certain regulatory expression—may be important because their expressive character may represent and reinforce certain social or political understandings that are important to securing public goods. Hence, this Article does not defend the position that the expressive character of legal norms is important "for its own sake" even if it does not protect or promote certain public goods.[28]

The voting rights case *Shaw v. Reno*[29] usefully illustrates how the expressive features of a legal norm might protect a public good—in *Shaw*, certain aspects of representative democracy. In that case, the Supreme Court invalidated a newly created congressional district in part because of the district's shape.[30] The dissenters criticized the Court for recognizing this "analytically distinct" constitutional claim, arguing that the claim was disconnected from any inquiry into impermissible racial purposes or any notion of a conventionally cognizable injury such as vote dilution.[31] The *Shaw* majority, however, believed that the social meaning of the district's bizarre shape itself created a cognizable "injury."[32] As the majority explained, the twisted geography "reinforces racial stereotypes and threatens to undermine our system of representative democracy by *signaling* to elected officials that they represent a particular racial group rather

28. Although this Article treats these two understandings of the expressive function of law as different because much other scholarship does, *see, e.g.*, Adler & Kreimer, *supra* note 10, at 110, it is contested whether these two understandings are in fact truly different. *See infra* note 36.

29. 509 U.S. 630 (1993). This account draws heavily on Pildes & Niemi, *supra* note 14.

30. *See id.* at 647-48 (concluding that the geography of election districts "is one area in which appearances do matter").

31. *See id.* at 659 (White, J., dissenting).

32. *See id.* at 646-49.

than their constituency as a whole."[33] The expressive analysis of the bizarre shape was not anti-consequentialist. As the Court described it, the expressive character of the district shape had real (negative) effects on the political norms that structure participatory democracy in North Carolina: the shape of the district sent a message to the district's representative that she represented a "black district," which might have led her in Congress to represent the interests of only her African American constituents.[34] On this account then, the Court's decision to strike down the districting scheme served the important expressive function of representing and reinforcing preferable political norms regarding participatory democracy.

In contrast, some commentators would claim that the expressive character of the holding in *Shaw* is important for its own sake—that is, regardless of whether the ruling has any effect on participatory democracy in South Carolina. Even in the absence of such an effect, these commentators argue, the invalidation of the gerrymandered district is important because it expresses the country's commitment to colorblindness in a way that helps define us as a nation.[35] This alternative understanding of the expressive importance of legal norms is undoubtedly important.[36] Nevertheless, it is not essential to

33. *Id.* at 650 (emphasis added). The Supreme Court has retreated from this explicitly expressivist account of bizarrely shaped districts in more recent voting rights cases. *See, e.g.*, Miller v. Johnson, 515 U.S. 900 (1995) (suggesting that *Shaw* used bizarre shape merely as an evidentiary tool in the search for the actual motivation of the legislature); Bush v. Vera, 517 U.S. 952 (1996) (following a more traditional inquiry into whether a racial motivation predominated). Nevertheless, the Court's statements remain a useful example of more directly consequentialist accounts of expressivism.

34. *See Shaw*, 509 U.S. at 648. The Court also argued that the district's shape sent a message to citizens that voting is a practice of racial solidarity, which might thereby have exacerbated racial bloc voting. *See id.* at 647-48 ("[The reapportionment plan] reinforces the perception that members of the same racial group . . . think alike, share the same political interest, and will prefer the same candidates at the polls. . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.").

35. *See, e.g.*, Adler & Kreimer, *supra* note 10, at 9.

36. In fact, it is far from clear that there is necessarily a difference between these two formulations of the expressive function of law. If invalidating the voting district at issue in *Shaw* expresses a constitutive element of our nationhood, one might argue that this "nationhood" is simply a set of social understandings and norms that are beneficial because they further certain public val-

the defense set forth in this Article. For that reason, the remainder of the Article focuses on the more consequentialist flavor of expressivism.

B. *The Values of Federalism and the Importance of States as Alternative Political Institutions*

To begin constructing a claim that the expressive features of the anti-commandeering rule promote certain public goods, this section previews the claim's building blocks—the public goods that a rule of constitutional federalism, such as the *Printz* rule, might promote.[37] The Supreme Court sometimes defends our federal structure of government on the ground that it secures several important public goods, including the promotion of diversity, the prevention of tyranny, and the enhancement of democracy.[38] Commentators hotly debate whether there are any such values of federalism advanced by the existence of states.[39] But, accepting the existence of such values for the

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ues. If this is the case, then invalidating the voting district is not really important "for its own sake"; rather, it is important because it helps construct, at a very high level of abstraction, a set of social understandings.

37. One might quarrel with the need to construct a functional defense of federalism—or, at a minimum, claim that federal judges have no business engaging in such an inquiry—on the ground that the Framers decided over two hundred years ago that federalism was a beneficial institutional arrangement. After all, Madison and the other Federalists carried the day at the Constitutional Convention. But this response misses the mark: The Constitution establishes a federal system, but it certainly does not articulate clearly the myriad rules of engagement between the states and the federal government. Neither the Tenth Amendment nor the Commerce Clause, for example, clearly entails the anti-commandeering rule. (This is why Justice Scalia's formalist/originalist reasoning in *Printz* is unpersuasive.) And given that constitutional formalism and originalism cannot describe adequately the details of "our federalism," we have no choice but to seek out a functional account. In other words, it is necessary to understand *why* we have a federal system in order to understand what shape that system should have.

38. In *Printz*, however, the Court relied on formal rather than functional grounds. For the suggestion that nearly all the Court's current members are embracing formalism in the context of federalism, see Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78 (1995).

39. *Compare* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (arguing that all of the values conventionally attributed to federalism are actually nothing more than values of decentralization, and thus do not require the existence of inde-

moment, does the anti-commandeering rule promote any of them? In order to answer this question, this section examines the conventionally articulated values of federalism and the background assumptions on which they rest. The section concludes that some values of federalism depend quite directly on the states' possessing the power of regulatory initiative and thus are not directly promoted by the anti-commandeering rule. But other values of federalism, like tyranny prevention, are more a function of the vibrancy of state political institutions than a function of the regulatory initiative power of states. These values may be advanced by the *New York-Printz* rule because, as the following sections will show, the anti-commandeering rule might serve to preserve and promote the existence of vibrant states.

The most common catalog of the values of federalism includes the promotion of diversity,[40] the prevention of tyranny,[41] and the enhancement of democracy.[42] To this list one might add the improvement of economic efficiency through competition among the states,[43] the acceleration of progress through experimentation by the states,[44] and perhaps the protection of certain values of community.[45]

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pendent states), *with* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997) (arguing that the values attributed to federalism require the existence of independent states).

40. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493-94 (1987).

41. *See infra* notes 53-62 and accompanying text (discussing the role of states as political counterweights to the federal government); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) (suggesting that states can prevent federal tyranny by enacting state versions of 42 U.S.C. § 1983, which would target unconstitutional *federal* action).

42. *See* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 91-94 (1995).

43. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Federalism might also be efficiency enhancing in at least two other respects. First, as Professor Hills has pointed out, the existence of redundant regulatory structures covering the same territorial jurisdiction may, with the right set of property rules, promote healthy competition for the provision of regulatory services. *See* Hills, *supra* note 10, at 855-86. Relatedly, the transaction costs associated with using independent states to implement some federal policy may be lower than the agency costs associated with using federal agencies to implement all federal law. *See* Roderick M. Hills, *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181 (1998).

44. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 528-30 (1995).

45. The differences between the values of energetic democracy and the val-

Examining this list, it becomes apparent that different institutional features of the federal structure are more or less important for securing these different values. Some of the values—diversity, competition, and experimentalism—appear to depend significantly on the existence of many states pursuing unique regulatory agendas. If all of the states pursued identical regulatory strategies, or were prevented from instituting meaningful agendas altogether, these values, as a logical matter, could not be promoted. Obviously there would be no regulatory diversity, because all of the states would structure the lives of their citizens in the same way. Moreover, this uniformity would prevent state competition and experimentation: people would have no incentive to "vote with their feet" if each state provided the same package of public goods,[46] and experimentation by definition requires that different states attempt different solutions to the same social problems.

Because diversity, competition, and experimentation depend on the ability of states to pursue unique regulatory agendas, it is difficult to see how the anti-commandeering rule would directly promote these values. For, as Part I acknowledges, the rule does not, as a logical matter, preserve the states' ability to pursue their own agendas. In a post-*Printz* world of intergovernmental relations, Congress still possesses other tools with which to enforce uniformity: it can preempt state regulation and directly impose uniform national regulation, or it can use either the carrot of federal grant money or the stick of threatened preemption to coerce the states into regulating in accordance with uniform standards established by the federal government.[47] Of course, there may be political reasons why Congress

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ues of community are subtle. For a discussion of the interaction between these values, see HANNAH ARENDT, ON REVOLUTION (1963).

46. Of course, people would still make decisions about where to live based on the climate, their jobs, and other factors external to the structure of government. But people would make these decisions even in the absence of states.

47. It is true that the anti-commandeering rule may provide some protection to the states' power of regulatory initiative simply because it takes from Congress one tool with which Congress may coerce the states. This fact, however, does not explain why the Court adopted an anti-commandeering rule in particular. Denying to Congress *any* of the instruments of state coercion that it currently possesses would reduce the number of ways in which Congress can control the regulatory infrastructure of the states. For that reason, it is difficult to explain why one would choose to invalidate commandeering rather than one

would not be able to coerce the states in these ways.[48] For now, however, it is sufficient to reiterate that *Printz* fails to provide direct judicial protection (in the form of a Calabresian property rule) for each state's regulatory infrastructure.

The other values of federalism—the enhancement of democracy and community,[49] and the prevention of federal tyranny[50]—appear to depend more on the existence of alternative political institutions that are independent of the federal government than on the states' power of regulatory initiative.[51] (According to conventional accounts, democracy- and community-enhancement also require that these alternative institutions be smaller than the federal government.) Because tyranny prevention in particular provides a good example of this dependence on the existence of alternative political institutions, the remainder of the Article will focus on this value.[52]

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of the other tools of intergovernmental coercion.

48. In fact, the theory advanced below—that the anti-commandeering rule might help protect the tyranny-preventing role of the states—points to one such political restraint. If the states have the capacity to serve as counterweights to the federal government in the national political process, then they will be able to exert political pressure against federal attempts to diminish their powers of regulatory initiative. (In this way, the potential expressive justification this Article advances bears some relationship to process-perfecting theories).

49. Democracy may be enhanced by federalism in part because state governments have higher "democratic densities" than the federal government—that is, because a higher percentage of state citizens participate in state government through holding elected or appointed office than do United States citizens participate in federal government. In addition, state citizens who are not government officials have the opportunity to engage the political community more often because of this higher democratic density.

50. *See* Amar, *supra* note 41, at 1448-51; Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after* Garcia, 1985 SUP. CT. REV. 341.

51. The existence and vibrancy of political institutions is not entirely (or even largely) independent of those institutions' powers of regulatory initiative. *See infra* text accompanying note 60. The importance of regulatory power, however, does not undermine the additive theory of expressive significance that this Article proposes. *See infra* note 61.

52. *See* sources cited *supra* note 50. Tyranny prevention also provides a nice example because it is the value of federalism perhaps most often stressed by the Court in recent years. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.");

"Tyranny prevention" is perhaps an unfortunate term, because it suggests both a degree of federal overreaching and a degree of state resistance that seem implausible in modern America. For this reason, some commentators criticize the very notion that states could prevent federal "tyranny" by pointing out that the ideal of the state militia is dead: How could a state possibly stand up to a tyrannical federal government backed by the federal armed forces?[53] But tyranny prevention can be conceptualized in a much more modest manner. This Article, for example, uses the term "tyranny prevention" to refer to nothing more than the fact that the states can serve as and foster political counterweights to the incumbent powers within the federal government.

There are at least two ways in which the state governments might be able to prevent tyranny by providing alternative political institutions. First, the mere existence of states provides organizations that can support generalized opposition to the federal government, fostering minor political parties or even major political candidates that can then enter into the national political process with an established base of support and recognition. Second, states can serve as checks against more discrete instances of unfavorable—or overreaching—federal policy: their political infrastructures can serve as something like an interest group on behalf of state citizens (and states in general) in the national political process.[54] Alexander Hamilton described the role of states-as-interest-groups in *The Federalist* No. 26: "[T]he State legislatures . . . will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the

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Printz v. United States, 521 U.S. 898, 911 (1997) (quoting Gregory v. Ashcroft, 50 U.S. 452 (1991), and THE FEDERALIST No. 51 (James Madison)); New York v. United States, 505 U.S. 144, 181 (1995) (quoting Gregory v. Ashcroft, 50 U.S. 452 (1991), and Coleman v. Thompson, 501 U.S. 722 (1991)). At any rate, the arguments made about tyranny prevention will apply, to some degree, to the values of enhanced democracy and community.

53. *See* Rubin & Feeley, *supra* note 39, at 928-29.

54. The analogy to "interest groups" is obviously imperfect. States are, as a general matter, significantly more heterogeneous than most conventional interest groups that come to mind. But this does not prevent them from serving as organizational solutions to the dilemma of providing voice to their median citizen preferences in the national political process.

alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent."[55]

Despite the obvious fact that states could not today repel a tyrannical federal government by using armed force,[56] Hamilton's general claim is not anachronistic. It astutely recognizes the two complementary roles that states can play—in their relationships with the federal government and their citizens respectively—to be effective interest groups for their constituents. First, states can be the voice of their citizens' discontent. That is, they can articulate their citizens' preferences or best interests in the national political process. Whether through the media, the state governors' association, or other, more informal modes of communication, state governments can let federal legislative and executive officials know what their citizens do and do not want. Second, states can sound the alarm to the people. They can use the resources of their own political infrastructures to alert their citizens when the federal government adopts policies inconsistent with their citizens' preferences or best interests.[57]

In practice, these complementary roles work together in the following way to enable states to serve as political counterweights to the federal government. When federal policymakers adopt a policy that is out of line with a state electorate's preferences or best interests, state officials can communicate their citizens' dissatisfaction to federal officials by exercising their state's voice in the national political process on behalf of their citizen-constituents. Furthermore, the federal policymakers will be obliged to listen to this subtle threat by the state because, if they do not, the state will "sound the alarm" to its citizens, who might in turn be more disposed to throw the

55. THE FEDERALIST No. 26, at 217 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1966).

56. *See* Rubin & Feeley, *supra* note 39, at 928-29.

57. Some commentators, such as Rubin and Feeley, might argue that there is nothing peculiar about states that makes them particularly well suited to playing these two roles, especially since the power of regulatory initiative—something that private organizations do not possess in the same way that states do—is of reduced relevance. While this may be true, it is important to remember that, because organizing is a difficult task, solutions to problems of collective action are path dependent. Thus, since states do exist as such solutions, it makes sense to take steps to preserve their role.

federal officials out of office. Thus, by flexing their muscle as alternative political institutions, states serve as an important intergovernmental check, furthering a system of mutual policing in which the states and the federal government reciprocally use the tools each has to prevent tyranny by the other. As James Madison put it: "In the compound republic of America . . . a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."[58]

Note that states' capacity to perform these two roles does not depend directly on their power of regulatory initiative.[59] That is not to say that the regulatory authority of each state is irrelevant to its continued existence as an alternative political institution. Certainly, if the federal government used its regulatory authority to eviscerate the regulatory powers of state governments, it is hard to imagine that the states would continue to exist as effective alternative political institutions. After all, people would be unlikely to participate in state political life if states had no regulatory authority. But in the real world of intergovernmental relations, Congress would not dare obliterate the states' regulatory authority in one fell swoop.[60] And small reductions in the states' power of regulatory initiative do not in and

58. *See* THE FEDERALIST No. 51, at 357 (James Madison) (Benjamin Fletcher Wright ed., 1966).

59. Discussing tyranny prevention, Professor Evan Caminker recognizes the disjunction between the extent of regulatory authority and the existence of alternative political communities:

> [Commandeering] does not materially reduce the universe of governing tasks left to state officials, and thus should not appreciably undermine the state's character as an independent political culture. Short of the unrealistic assumption that Congress will literally leave states with next to nothing to do except administer centrally prescribed programs . . . the concern that commandeering authority will prevent state[s] . . . from developing and harboring federal resistors is more rhetorical than real.

Caminker, *State Sovereignty and Subordinacy*, *supra* note 22, at 1077. This excerpt, however, identifies the only important impact of commandeering as that on regulatory power; it does not acknowledge the potential expressive implications of commandeering on "the state's character as an independent political culture." *Id.*

60. "[N]o one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions . . . ." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 302 (1978).

of themselves "remove the states as a force to reckon with in national politics,"[61] because the states' role as interest groups depends on their ability to exercise their voice (political muscle), not their regulatory muscle.[62]

In short, the existence of states as alternative political institutions—which is at least to some extent independent of states' power of regulatory initiative—is important for promoting the value of tyranny prevention.

C. *How Perceived "Autonomy" Helps Preserve the States as Vibrant Alternative Political Institutions*

The capacity of a state government to act as a political counterweight to the federal government through intergovernmental checking depends on both national political actors and state citizens perceiving the state to be a credible political institution.[63] By "credible political institution" I mean that the state must be able to maintain legitimately that it represents the interests of its citizens and, as a corollary, to maintain legitimately that its voice (or threats, as it may be) in the national political arena is backed by the political force of its citizen-constituents. This requires the state to be able to claim to both national political actors and its own citizens that it represents its citizens' preferences or best interests. Otherwise, neither has much reason to listen to the state. For the state's representational claim to

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61. Rapaczynski, *supra* note 50, at 394. To preview the argument of the next Part, the claim is simply that the "small decisions" that commandeer states may do more to undermine the social norms that support vibrant states than do the "small decisions" that, through other mechanisms of intergovernmental relations, chip away regulatory power. If this is true, then instances of commandeering are more likely over time to undermine the ability of states to serve as interest groups for their citizens in the national political process.

62. Professor Vicki Jackson has also noticed that having an alternative political institution may be more important than having an institution with specific regulatory powers: "Even if no areas of substantive legislative jurisdiction were reserved exclusively for a subnational-level government, it is at least in theory possible that having independently elected and accountable subnational leadership would provide a structural check on the actions and policies of the national government." Jackson, *supra* note 10, at 2219-20.

63. *See* Gregory v. Ashcroft, 501 U.S. 452, 459 (1991) ("If this 'double security' is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints *only if both are credible.*" (emphasis added)).

be plausible, the state government must include a mechanism by which to measure the preferences or best interests of its citizens. States, like all democratic governments, possess just such a mechanism—political participation.

Not all political processes function well, and a state's ability to represent its constituents depends on the healthy functioning of the political process. One might call a state with well-functioning political processes a "vibrant state"—a state in which citizens engage in the mechanisms that enable the state political machinery to measure their preferences or best interests. Voting is the paradigmatic way in which citizens signal state political institutions, but there are many other modes of political participation as well.[64] Citizens can themselves become public officials, they can interact with their elected representatives and appointed state officials between elections, and they can organize through other collective bodies to get their message across in the political process. All of these mechanisms enable state political institutions to represent their constituents in the national political process.

For these mechanisms to work, however, citizen-constituents must see signaling the state political institutions as a worthwhile exercise.[65] If citizens see participation in the state political process as largely irrelevant or superfluous to participation in the national political process, then these mechanisms will break down because citizens will stop participating, or participate less, in the state political process. This disillusionment cost will reduce the ability of the state political process to measure citizen preferences.[66] Perceptions of

64. *See* Friedman, *supra* note 39, at 390-94.

65. Again, there are obviously several reasons why state citizens might come to see signaling state political institutions a less worthwhile exercise. In addition to responding to changes in their perceptions of a state's autonomy, for example, citizens will certainly also respond to changes in the shape of a state's power of regulatory initiative. My claim here, however, is merely that if commandeering (1) effects a reduction in regulatory initiative similar to other tools of intergovernmental relations, but (2) does so in a way that appears to be a greater affront to state autonomy, then it may have a greater effect on citizen perceptions of the worth of state political participation. It is, in that respect, a claim about an additive expressive force at work in shaping citizen understandings.

66. Perceptions of state "autonomy" by state officials may also be important. If state officials begin to see themselves as the puppets of federal policy-

state "autonomy" are important for preserving participation because they promote the trustworthiness or importance of state officials qua state officials in the eyes of citizens. These perceptions make it possible for citizens to see interaction with these officials through the political process as meaningful, because the perceptions lead citizens to see their officials as more than simply remote loudspeakers issuing commands provided by some federal official far away.[67] Thus, citizen perceptions of state "autonomy" may be critical to the maintenance of vibrant states. Moreover, it is at least plausible to think that the Supreme Court has a role in promoting these perceptions in order to further the value of states-as-political-counterweights.

D. Proscribing Denigrating Social Meaning: Why the Anti-commandeering Rule Might Help Preserve Perceptions of State "Autonomy"

The maintenance of vibrant states that can act as political counterweights to the federal government thus plausibly depends on public perceptions of state autonomy. So, how might the anti-commandeering rule serve to prevent the erosion of social understandings of state autonomy? My tentative claim is that it does so by invalidating certain government action that threatens seriously to undermine these public perceptions. In invalidating such actions, the Court does two related things: it prevents congressional legislation from expressing a particular message that might erode the social understanding of state autonomy, and it simultaneously reinforces that social understanding by expressing due regard for the importance of state autonomy.[68] This section argues that congressional

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makers, they may likewise become disillusioned about the state political process. This could lessen their resolve to voice the policy positions of their constituents in the national political process and could conceivably cause them to leave state office all together.

67. Although, for simplicity, this Article relies generally on the traditional mechanism of explicit participation by citizen-constituents to explain the link between perceived autonomy and actual vibrancy, such a description fails to account directly for low levels of voter turnout and other indicators of low levels of political participation. While this shortcoming somewhat tempers the causal links laid out above, it is a common difficulty that plagues many accounts of representative institutions.

68. As noted above, *see supra* text accompanying note 28, the invalidation of commandeering legislation might reinforce beneficial social understandings

commandeering of states—more so than other mechanisms of federal control of state regulatory capacities—expresses denigration for state autonomy and thereby threatens to erode public perceptions of state autonomy.[69]

Investigating the creation of social meaning requires undertaking an incredibly complicated inquiry.[70] As Professors Pildes and Niemi said of such an inquiry in the context of voting rights:

> If courts grant expressive harms constitutional recognition, they must then engage in exquisitely difficult acts of interpretation. For the material to be interpreted is not a legal text, but the expressive significance or social meaning that a particular governmental action has in the specific historical, political, and social context in which it takes place . . . . What matters is the social message their action conveys or, less positivistically, the message courts perceive the action to convey.[71]

Because of the inherent complexity of the task, this section does not attempt to be comprehensive. Instead, it modestly makes three suggestions about why the expressive significance of commandeering might be especially denigrating of state autonomy. First, this section suggests that the way in which Congress coerces state officials when it commandeers might give rise to perceptions that

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through two different mechanisms: first, through the act of invalidation itself (the public striking down of a piece of legislation) and second, through the public reason-giving of the Court that accompanies the invalidation. Although I rely on both mechanisms throughout this Article, there is good reason to think that the second mechanism plays a smaller role than the first. After all, the second requires that the public pays attention to what the Supreme Court says, and not just to what it does.

69. As an initial matter, note that, unlike the political accountability justification for commandeering, which implausibly relies on the public being blind to federal involvement in instances of commandeering, *see supra* note 17, the expressive account operates precisely because citizens perceive their state officials to be under the thumb of the federal government when commandeering occurs.

70. For elaborate attempts to cash out questions of social meanings, social norms, and related questions, see, for example, MICHEL FOUCAULT, DISCIPLINE AND PUNISH (1977); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

71. Pildes & Niemi, *supra* note 14, at 507-08. Their article, perhaps the most celebrated application of expressive theory to Supreme Court doctrine, similarly struggles to explain how social meaning is created.

commandeering—more than other tools of intergovernmental coercion—treats state officials as mere puppets of the federal government. The section further suggests that this image of states-as-puppets is a social perception that is particularly demeaning to the autonomy of states. After describing briefly the evidence suggesting that concerns about puppeteering may animate the anti-commandeering rule, this section examines the potential expressive significance of other features of commandeering. Theories of social construction suggest that two other features of commandeering might exacerbate the denigratory meaning created by the perception of puppeteering: commandeering's "obviousness" and its "novelty."

1. Perceptions of "puppeteering"

The language of *Printz* contains hints that the Court relied in part on the social meaning of commandeering to invalidate the background check provisions of the Brady Bill. The case contains clues that the Court thought that commandeering, more than other mechanisms of intergovernmental relations, made the states appear to be nothing more than puppets of the federal government.[72] For starters, the Court used the term "commandeer" to describe what the federal government had done to the states. This action, which *Webster's Dictionary* defines as "to seize" or to "take forcibly," does not sound like the stuff of ordinary intergovernmental relations.[73] The Court then piled on harsh metaphors to describe further the character of Congress's action, concluding that commandeering "reduc[es] [the

72. The Supreme Court's decision in *Reno v. Condon*, 120 S. Ct. 666 (2000), handed down after this Article entered the publication process, supports the proposition that the Court is concerned, in the commandeering context, with federal coercion of the states that resembles puppeteering. In *Condon*, the Court held that the Driver Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-2725 (1999), did not impermissibly commandeer state governments. *See Condon*, 120 S. Ct. at 672. In reaching that conclusion, the Court stressed the fact that the DPPA simply restricts the states' use of driver information databases. The DPPA does not, the Court emphasized, require states (1) to serve as mouthpieces of the federal government or (2) to serve as marionettes of the federal government by taking congressionally prescribed regulatory actions against their own citizens. *See id.* It was the absence of these features, the Court held, that distinguished the DPPA from the laws at issue in *New York* and *Printz*.

73. WEBSTER'S NEW WORLD DICTIONARY 279 (3rd college ed. 1991).

states] to puppets of a ventriloquist Congress"[74] and "dragoon[s]"[75] state officials—actions wholly inconsistent with the "[p]reservation of the States as independent and autonomous political entities."[76] Moreover, the Supreme Court was not alone in perceiving commandeering in this light; Justice Scalia's majority opinion liberally borrowed this florid language from lower court opinions similarly condemning commandeering legislation.[77]

In contrast, the Court has not shared the same concerns about conditional spending or preemption. In *New York*, for example, Justice O'Connor described these tools of intergovernmental relations as "permissible method[s] of *encouraging* a State to conform to federal policy choices" that stop "short of [the] outright *coercion*" of commandeering.[78] Clearly the Court thinks that there is something importantly worse about Congress controlling state officials by using explicit affirmative mandates, despite the persuasive argument made by the *Printz* dissent that the federal government may use other mechanisms to exert as much control over a state's regulatory infrastructure.[79] Thus, with commandeering, it seems that the Court is

74. Printz v. United States, 521 U.S. 898, 928 (1997) (quoting Brown v. EPA, 521 F.2d 827, 839 (9th Cir. 1975)).

75. *Id.* (quoting Mack v. United States, 66 F.3d 1025, 1035 (9th Cir. 1995) (Fernandez, J., dissenting)).

76. *Id.* (quoting *Brown*, 521 F.2d at 839); *see also Mack*, 66 F.3d at 1035 ("If the Tenth Amendment has anything to do with the separate sovereign *dignity* of the states, it is difficult to see how that dignity is not undermined by the reality of a command that they commit their resources to the carrying out of [the] federal policy, whether they like it or not." (emphasis added)).

77. *See supra* notes 74-76. There are, of course, causation problems whenever one attempts to use, in this fashion, judicial language that is not *explicitly* justificatory. Such language is subject to two possible interpretations: that it manifests the Court's perception of the regulation's social meaning, which guided the Court's determination; or that it is a rhetorical flourish of the holding already reached on independent grounds by the Court. In fact, such language probably serves both functions. For a discussion of the other reason for uncertainty about the meaning of the Court's metaphors—that they do not explicitly claim to be describing the expressive features of commandeering—see *infra* text accompanying notes 95-98 (discussing *Printz*'s ambiguous reliance on expressive grounds).

78. New York v. United States, 505 U.S. 144, 166-68 (1992) (emphasis added).

79. In dissent, Justice Stevens criticized the Court for treating other instances of federal control over states as less coercive:

troubled by the perceived meaning of the *particular manner* in which Congress goes about utilizing the regulatory infrastructure of the state, more than by the fact that Congress uses that infrastructure.

If the Court did, in fact, act to prevent congressional action whose social meaning could threaten public perceptions of state autonomy, then at least one aspect of *Printz* that commentators criticize—its overblown formalism—becomes a bit more understandable. Seen through an expressive lens, this part of the opinion becomes a vehicle for a rhetorical celebration of state autonomy that furthers the second function of invalidation—*reinforcement* of the social understanding of state autonomy. The formal concepts in the opinion become cover for the Court's stump speech about preserving state autonomy.[80]

Other case law supports this reading of *New York* and *Printz*. In other doctrinal areas in which "autonomy" in some sense is at stake,

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> [T]he Court suggests that the obligation set forth in [Testa v. Katt, 330 U.S. 386 (1947)] that state courts hear federal claims is 'voluntary' in that States need not create courts of ordinary jurisdiction. That is true, but unhelpful to the majority. If a State chooses to have no local law enforcement officials it may avoid the Brady Act's requirements, and if it chooses to have no courts it may avoid *Testa*. But neither seems likely.

Printz, 521 U.S. at 950 n.9 (Stevens, J., dissenting).

80. These statements might reinforce social understandings either directly, through public consumption (although one must seriously question the extent to which the public pays attention to the language of Court opinions), or indirectly, by ensuring that Congress takes seriously the importance of the concept of state autonomy. This latter possibility was described generally by Professor Philip Bobbitt as the "cueing function" of judicial review, in which the Court invalidates congressional legislation as "a cue to a fellow constitutional actor, an incitement to Congress to renew its traditional [commitments]." PHILIP BOBBITT, CONSTITUTIONAL FATE 194 (1982). Other scholars have recently suggested that this same rationale might explain the outcomes in *New York* and *Printz*. Professor Vicki Jackson, for example, argues that "occasional prompting from the Court" may help reinforce the political safeguards of federalism by casting a "shadow of enforcement [that] may prompt more responsible consideration of the need for national action." Jackson, *supra* note 10, at 2227. *See also* Adler & Kreimer, *supra* note 10, at 102; Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1484 (1995) (similarly explaining *United States v. Lopez* as a "constitutional wake up call"); Caminker, *State Sovereignty and Subordinacy*, *supra* note 22, at 1088 n.327; Meltzer, *supra* note 22, at 63.

the Court has shown a similar concern about congressional interference that resembles puppeteering.[81] *United States v. Klein*,[82] a Civil War-era separation-of-powers case, provides one illustrative example—perhaps especially so since both separation of powers and federalism doctrines concern "structural" rights.[83] *Klein* arose in the following context: After the Civil War, the Supreme Court held that persons who had received a presidential pardon had to be considered loyal for the purposes of legislation preventing the forfeiture of land by loyal noncombatant rebel owners. Congress, apparently wishing to overturn the Court's ruling, passed an act providing that

> no pardon should be admissible as proof of loyalty and, further, that acceptance without written protest or disclaimer of a pardon reciting that the claimant took part in or supported the rebellion should be conclusive evidence of the claimant's *disloyalty*. The statute directed the Court of Claims and the Supreme Court to dismiss for want of *jurisdiction* any pending claims based on a pardon.[84]

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81. The reliance on expressive features to differentiate two methods by which Congress acts to achieve the same "result" is closely related to arguments, made by Professor Richard Pildes and others, that reasons for action are often more important in constitutional adjudication than the actions themselves. *See* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998); *cf.* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998). In addition, the reliance on expressive features is obviously not restricted to cases implicating autonomy. For example, Professor Pildes has described *Shaw v. Reno* as a case in which the Court differentiated, in the expressive dimension, government action that in the conventionally important dimensions was no different from action the Court considered acceptable. *See* Pildes & Niemi, *supra* note 14, at 506 ("As the dissenters persuasively argue, [a bizarrely shaped majority-minority district] does not involve a more invidious use of race than [a regularly shaped majority-minority district], nor does one differ meaningfully from the other in its effect on individuals' voting rights.").

82. 80 U.S. 128 (1871).

83. In several respects, separation of powers and federalism might be considered parallel structures. For example, one important reason for creating both institutional arrangements was to provide for independent institutions that would police each other in a mutual fashion.

84. RICHARD H. FALLON, JR. ET. AL, HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 367-68 (4th ed. 1996); *see Klein*, 80 U.S. at 143-44.

On an appeal by the United States from a court of claims decision which granted relief to a pardoned rebel landowner prior to the passage of the new act, the Supreme Court held the statute unconstitutional. The Court's decision is somewhat cryptic, suggesting several potential grounds for invalidating the law.[85] But one cause for the Court's concern appeared to be the mechanism by which Congress had attempted to make the law applicable to pending appeals. Rather than simply changing the substantive legal standard and making that standard applicable to cases pending on appeal—something Congress could probably have done—Congress in effect required the Supreme Court to dismiss pending cases for lack of jurisdiction once the Court made an evidentiary finding that the plaintiff should prevail under the governing legal standard.[86] This mechanism did not please the Court:

> [T]he language of [Congress's law] shows plainly that it does not intend to withhold appellate jurisdiction *except as a means to an end* . . . .
>
> . . . [T]he denial of jurisdiction to this Court . . . is founded solely on the application of a rule of decision . . . .
>
> It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions . . . to the appellate power.[87]

Thus, the Court perceived Congress to be fiddling with a case on appeal without changing the applicable substantive legal standard—

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85. The Supreme Court suggested, among other things, that the Act infringed on the constitutional power of the executive by impairing the effect of a presidential pardon, and even that it might be impermissible to apply new laws "retroactively" to cases pending on appeal before the passage of the law. *See Klein*, 80 U.S. at 145-48.

86. The manner in which the Court distinguished *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 460 (1856), suggests that the Court would have upheld an act passed by Congress that simply changed the governing legal standard at issue in *Klein*. *See Klein*, 80 U.S. at 146-47. In that case, Congress had passed a law legalizing a bridge that the Court had previously held to be a nuisance. Such a law did not raise the concerns present in *Klein*, the Court suggested, because in *Wheeling Bridge* the congressional act had not created an "arbitrary rule of decision." Instead, the law at issue had left the Court "to apply its *ordinary rules* to the new circumstances created by the act." *Klein*, 80 U.S. at 146-47 (emphasis added).

87. *Klein*, 80 U.S. at 145-46 (emphasis added).

in a sense forcing the Court to rule in a way inconsistent with existing law.[88] The Court's concern in *Klein* seems to be the very concern later echoed by Justice Scalia in *Printz*: that Congress played ventriloquist to another institution.[89] As Professor Lawrence Sager put it, Congress tried to force the Justices "to implicate themselves in what they saw as an injustice, and furthermore, to do so in the public light of judicial reason-giving for articulate reasons that went to the heart of the injustice."[90] Even though Congress could likely have reached the same result simply by changing the existing rule of decision, the Court held that the method by which Congress sought to achieve its desired result was illegitimate.

More generally, the Court's individual rights jurisprudence contains similar puzzles in which the Court seems to stress the importance of appearances when personal autonomy is at stake. Abortion-rights doctrine under the Equal Protection Clause of the Fourteenth Amendment presents one such puzzle. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[91] for example, the Court's conclusion about whether certain abortion regulations unduly infringed women's decisional autonomy regarding the choice to have an abortion seemed to turn on something other than the actual control left to women by the regulations. In *Casey*, the Court concluded that a spousal notice requirement amounted to a greater infringement of women's decisional autonomy than did a

88. "[T]he court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary." *Id.* at 147. For a detailed account of *Klein* that reads the case in this fashion, see Lawrence G. Sager, Klein's *First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2525-28 (1998).

89. *Clarke v. United States*, 886 F.2d 404 (D.C. Cir. 1989), represents another example of a court showing discomfort with Congress playing ventriloquist. In that case, the members of the District of Columbia's council challenged a law passed by Congress which "ordered the Council to revise local law so as to exempt religious institutions from the statutory ban on discrimination against homosexuals." Louis Michael Seidman, *The Preconditions for Home Rule*, 39 CATH. U. L. REV. 373, 379 (1990). The court of appeals held that the law violated the free speech rights of the council members.

90. Sager, *supra* note 88, at 2529. Thus, Professor Sager reads *Klein* as standing for the principle that "[t]he judiciary will not allow itself to speak and act against its own best judgment on matters within its competence which have great consequence for our political community." *Id.* at 2529.

91. 505 U.S. 833 (1992).

twenty-four hour waiting period requirement.[92] Although the Court posited some unpersuasive functional distinctions between the two regulations, a *general* functional distinction seems nearly impossible to locate: For a woman without a car, perhaps the second regulation would more significantly restrict decisional autonomy, but for a woman with an abusive husband, probably the first would. Nevertheless, the spousal notification provision struck the Court as importantly different than the writing requirement—perhaps because the Court perceived the requirement that a woman consult her spouse about her decision to have an abortion to be more denigrating to her autonomy. As in *Printz*, it appears to be the expressive significance of the law, and not its function impact on autonomy, that is most relevant.

Supreme Court precedent thus suggests that in the realm of "autonomy"—personal or institutional—*Printz* may be just one in a long line of cases finding formal distinctions important even in the absence of real differences in decision-making authority.[93] It may be an area of doctrine in which the Court responds frequently to the expressive significance of regulation. More specifically, the clues contained in *Printz*, along with the similarities between the commandeering cases and *Klein*, suggest a potential formulation of the expressive significance of commandeering: The Court may perceive commandeering to be a form of congressional interference that treats state officials as nothing more than puppets of the federal government. And, when Congress forces state officials to play Pinocchio to its Geppetto, it demeans the significance of state autonomy by suggesting that state officials are powerless to represent, in a meaningful way, their citizens' best interests.

92. The Court actually did not explicitly confront this question in a comparative manner. But it did invalidate the spousal notification requirement while upholding the twenty-four hour waiting period, thereby holding the former to be a greater infringement on autonomy than the latter. *See id.* at 888-98.

93. Broadening the focus to take into account other doctrinal areas not as directly concerned with "autonomy," we see the Court concerned about the *meaning* of regulation as much as its concrete result in the recent rise of the First Amendment endorsement test and other doctrines. *See* Pildes & Niemi, *supra* note 14, at 511-12; Pildes, *supra* note 81, at 736-50.

There is a problem, however, with relying on the hints contained in the case law regarding instances of puppeteering in order to conclude that the social meaning of commandeering is particularly denigratory of state autonomy.[94] It is less than clear that the Court perceived itself, in those cases, to be investigating the potential *expressive* harm of commandeering legislation. As discussed above, the language of state "puppets" chosen by the *Printz* Court does hint that the Court was concerned with the *appearance* of commandeering,[95] and *New York* does contain clues that conditional spending and preemption might convey more benign messages. Although I did not discuss the possibility above, one might even stretch to read the following passage in *New York* as hinting that the expressive significance of commandeering is more threatening to norms of political participation than is the expressive significance of other forms of federal control: "Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences."[96] Nevertheless, in the end, neither

94. There is actually a second concern with relying on courts' perceptions as a justificatory mechanism, but it is a concern that exceeds the scope of this Article because of its more general dimensions. The second difficulty with relying on the message courts perceive commandeering to convey in order to justify the anti-commandeering rule is that doing so assumes either (1) that the Court, as an institution, is positioned such that its perceptions of the expressive significance of a regulation correspond at least partially to the social meaning the public ascribes to that regulation, or (2) that the Court's perceptions of social meaning are sufficient to justify certain constitutional proscriptions, even if those perceptions bear no relation to the message that the public perceives. There are certainly theories that would suggest that there is some truth to the first assumption; something like what Karl Llewellyn describes as highly context-specific "situation sense," for example, might be part of what makes courts particularly well suited to identifying social meanings. *See* KARL L. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 201-06 (1960). More work needs to be done, however, on the courts' role in identifying social meaning. Moreover, it seems unlikely that investigating this role can be avoided by relying on the second assumption, as it is difficult to imagine a plausible account of why a court's perceptions of social meanings should matter if those perceptions bear no relation to public perceptions.

95. *See supra* text accompanying notes 74-79.

96. *New York*, 505 U.S. at 168. This quote appears immediately before Justice O'Connor's discussion of political accountability, however, so it seems more likely that she is referring to citizen confusion than disillusion.

opinion speaks of social meaning or social messages as directly as one would hope.

Certainly the Court knows how to be more explicit. In *Shaw v. Reno*, the Court stressed that electoral districting was "an area where appearances matter," and spoke directly of the message that bizarrely shaped districts might send to voters.[97] Similarly, in Establishment Clause jurisprudence, the Court has more clearly applied an expressive inquiry, stating that if government "identification [with religion] *conveys a message* of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated."[98] Neither *Printz* nor *New York* contains statements this explicit about the message that the Court perceives to be conveyed by commandeering.

While the Court's failure to provide crystal clear signals about its perception of commandeering's expressive significance is in part what makes the conclusions in this Article tentative, the Court's lack of clarity should not lead us to ignore the hints that the commandeering cases do contain. Moreover, it should not be surprising that the Court does not embrace an explicitly expressive approach in the commandeering context. Even in the areas mentioned above as instances of more explicitly expressive inquiry by the Court, the Court has hesitated to engage consistently in an inquiry into the social message of regulation. In Establishment Clause jurisprudence, for example, the Court's equivocation over the proper test has led to debate about the extent to which the Court has in fact adopted Justice O'Connor's endorsement test.[99] And in the voting rights context, a majority of the Court now appears to have beaten a hasty retreat from Justice Souter's expressivist hints in *Shaw I*.[100] In light of this, it is too much to expect resounding methodological clarity from the commandeering cases. Therefore, the hints in those cases are useful, and they point to a way in which commandeering might send a message more denigratory of state autonomy than either conditional

97. Shaw v. Reno, 509 U.S. 630, 647-48 (1993).

98. School Dist. v. Ball, 473 U.S. 373, 389 (1985) (emphasis added).

99. *See, e.g.*, Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343-44 (5th Cir. 1999); Kent Greenawalt, Quo Vadis: *The States and Prospects of "Tests" under the Religion Clauses*, 1995 SUP. CT. REV. 323, 370-71.

100. *See supra* note 33.

spending or preemption: Commandeering may be seen as an act that treats state officials as mere puppets of the federal government.

Having established why commandeering might be perceived as importantly different, and worse, than other tools of intergovernmental coercion, Part II turns next to examine other ways in which the denigratory social meaning ascribed to commandeering might be exacerbated. The following sections suggest two features of the practice that might play a role: the "obviousness" of commandeering, and its "novelty" or "unconventionality."

2. The importance of "obviousness" to social meaning

Social meaning can not be determined by simply inquiring into the "actual facts" of a situation, whatever those might be. There are at least three reasons why this disjunction between facts and meaning might exist. One reason inheres in the ambiguity of what constitute "facts."[101] Another reason results from the complexity of facts—from the possibility that even if facts are not inherently ambiguous, they can be extremely complicated.[102] This complexity might affect the way in which the facts affect social meaning. Finally, the contested nature of facts may influence their effect on social meaning. These reasons may go some distance toward explaining what is special about federal laws that commandeer state officials. Specifically, commandeering's "effect" on state autonomy may appear more obvious than the "effect" of other schemes of federal control because the facts of commandeering are relatively straightforward and uncontested.

Intergovernmental relations are a complicated business. The debate over the actual effects of various methods Congress uses to control state regulatory infrastructures makes this clear. There are several depths from which the facts of these different schemes can be viewed. Consider, for example, the comparison between conditional

101. *See, e.g.*, Felix S. Cohen, *Field Theory and Judicial Logic*, *in* THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 121 (Lucy Kramer Cohen ed., 1960) (arguing about fact skepticism).

102. Although, for simplicity, I have cast this explanation such that it does not rely on any claim about fact indeterminacy, it seems fairly unlikely that there exist, in any meaningful sense, such things as "actual facts" that exist independent of any observer. At the least, the relevance of such "actual facts" would undermine any thick conception of social meaning.

grants and commandeering. At a superficial logical level, these two mechanisms of federal control seem different: the former gives state officials a "choice," and the latter does not. But as I discussed above, many commentators have criticized this logical distinction.[103] They claim that conditional grants do not really give state officials any meaningful "choice" because state officials can never afford to turn down federal grant dollars. Of course, this more subtle understanding of the facts is itself contested. Professor Roderick Hills, for example, claims that state officials do decline federal grant money when they object to the strings attached, and that these refusals of funds demonstrate that the states' ability to choose is not illusory.[104]

The resolution of this debate would at least require rich empirical data; but resolution may not be all that important for our purposes. The very fact that the nature of conditional grants is contested and complicated might be important for its social meaning. And, as a corollary, the anti-commandeering rule might be explained in part by what one might crudely call the "obviousness" (or "plain meaning") theory of expressive meaning. On this account, commandeering may express more denigration for state autonomy because of its clarity.

Take complexity first. Commandeering legislation leaves no doubt about its implications: it directly commands state officials to take the precise regulatory action prescribed by the federal government. For example, in the case of the Brady Bill background check provision, there was no doubt that local law enforcement would have to dedicate personnel and money to promote a congressionally selected policy.[105] Even if this would also have been true had

103. *See supra* notes 20-21 and accompanying text.

104. *See* Hills, *supra* note 10, at 862-63.

105. It is true that, in both *Printz* and *New York*, the state officials retained some regulatory discretion. In *Printz*, local law enforcement officers were required only to make a "reasonable effort" to check the criminal histories of prospective gun buyers. *See Printz*, 521 U.S. at 903. In *New York*, the state legislature was given discretion to make the siting decisions for the disposal of its low-level radioactive waste. *See New York*, 505 U.S. at 151-54. But these facts might do little to diminish the denigratory quality of the social meaning of commandeering because (1) they may be complexities that are not perceived by the public, and (2) they may not serve to ambiguate the existence of the initial directive.

Congress made the availability of certain grant money to the states contingent on states performing background checks—that is, even if a conditional grant would have similarly deprived states of any real choice—the coercion created by the conditional grant scheme would have been somewhat harder to discover. Understanding the effect of conditional grants requires looking beyond the language of congressional legislation and into the empirical realities of money and power in intergovernmental relations. The sophistication and knowledge required to engage in such an inquiry might lessen the power of the inquiry's outcome to affect the social understanding of conditional grants.[106] Thus, the public might perceive conditional grants as less an affront to state autonomy than commandeering because the public would not, and perhaps could not, dig deep into the facts surrounding conditional grants.[107] Commandeering, however, requires no excavation; its surface facts communicate clearly the coercive force it imposes on state governments, thereby making more obvious its disrespect for state autonomy.

A partly complementary possibility is that the contested nature of something like a conditional grant leads it to have a different social meaning than commandeering. If the public is fully aware of the scholarship debating the true effect of conditional grants and thus

106. This argument suggests that Justice O'Connor may have gotten her accountability argument in *New York* backwards. *See New York*, 505 U.S. at 168-69; *supra* note 17 (arguing that it is implausible that commandeering blurs political accountability).

107. Although they do not suggest it directly, Professors Pildes and Niemi's analysis raises the possibility that a similar phenomenon may be in play in the bizarre districts voting rights cases. In *Shaw v. Reno*, for example, the "actual facts" may be that the bizarre shape of the challenged districts is not caused by a singular, value-reductionist focus on racial issues in districting. Instead, the districts may have been strangely shaped precisely because race was *not* the sole factor used to draw the districts. It may be that Congress could have created compact majority-minority districts, but that the desire to protect incumbents drove it to select a squiggly district over a more compact one. If this is true, then, on an expressive account, the district should actually have been upheld because it represented the outcome of a pluralistic districting process. But Pildes and Niemi argue that, even if these facts are true, it is still appropriate to strike down the district if it created the social perception of value reductionism. They seem to think that this social perception might be driven more by the clearly visible shape of the district than by a more nuanced understanding of the politics of districting. *See* Pildes & Niemi, *supra* note 15.

understands the complexity of the various facts, it may still perceive conditional grants as more benign. This is because the existence of disagreement over what constitute the actual facts may ambiguate the social meaning of conditional grants.[108] Simply put, the existence of two potential meanings for conditional grants thereby blurs just what it is that conditional grants are.[109] In contrast, the relatively uncontested nature of the facts surrounding commandeering may lead the public to perceive commandeering to be more denigratory of state autonomy.

3. The contextual nature of social meaning

A third possible mechanism for discovering what is different about commandeering draws on Pildes and Niemi's attention to the "social meaning that a particular governmental action has in *the specific historical, political, and social context in which it takes place.*"[110] This focus on context alludes to an important claim about social meaning that undergirds all that this Article has thus far argued: Context is crucial to any account of social meaning because "[s]ocial understandings, including those concerning the legitimacy of political institutions, are formed with reference to

108. Professor Lawrence Lessig presents a similar account of the construction of social meaning in *The Regulation of Social Meaning*. *See* Lessig, *supra* note 70, at 1010-12. While he discusses ways in which people can use deliberate *actions* to ambiguate social meaning, it seems plausible that *arguments*—in the form of scholarship—could do the same. With respect to the role of action, he provides an historical example:

> The Nazis required Jews to wear yellow stars. Wearing a star had then a particular meaning, in part constructed by *disambiguating* who were Jews and who were not, thereby facilitating the expression of racial hatred. Danes who opposed the racism of the Nazis then began to wear stars themselves. Their action then ambiguated the meaning of wearing a star.

Id. at 1010 (footnotes omitted).

109. Note that this argument does not necessarily depend on any claim about the inherent indeterminacy of facts. Instead, it relies only on the *current knowledge* of the facts being incomplete, and therefore contested.

110. Pildes & Niemi, *supra* note 14, at 507-08.

. . . developed practices."[111] To say it differently, "[t]he social meanings of actions are very much a function of existing social norms."[112]

This claim about social meaning, which I accept as fairly uncontroversial, suggests another reason why commandeering may be seen to express inadequate respect for the value of state autonomy: the social meaning of commandeering may result in part from its novelty as a tool of intergovernmental relations. One might call this a "conventionalist account." On this account, tools like preemption and conditional grants are not perceived as expressing disrespect for our federal structure because those tools have a long tradition of established practice.[113] The novelty of commandeering, on the other hand, may contribute to a social perception that commandeering is not among the conventional tools of federal-state relations. This perception, in turn, may promote an understanding that commandeering is oblivious or antithetical to federalism's conventional commitments, including the commitment to state autonomy.[114]

By focusing on commandeering's relationship to more established practices of intergovernmental relations, the *Printz* majority lends some support to the conventionalist understanding of commandeering. Justice Scalia's majority opinion highlights the perceived novelty of commandeering. For him, the absence of the historical use of commandeering suggests that Congress does not possess the

111. *Id.* at 502. *See generally* Lessig, *supra* note 70 (discussing the contingent nature of social meaning and how various actors can change social meaning).

112. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996).

113. Preemption may actually not present a useful comparison because it is sanctioned more directly by the Supremacy Clause of the Constitution. The more direct constitutional commitment to preemption may play an important role in shaping social understanding of this practice.

114. For a different argument about the importance of approved existing practice in determining the constitutionality of a new practice, see Professor Evan Caminker's article *Context and Complementarity Within Federalism Doctrine*, 22 HARV. J.L. & PUB. POL'Y 161 (1998), which suggests that the Supreme Court could strive for aggregate, rather than case-by-case, coherence in its federalism jurisprudence. Professor Caminker's argument about aggregate functional balancing suggests a corollary expressive argument: The bulk of existing practices may at some point lead a new practice to be *perceived* as the last straw that snaps the structure.

constitutional authority to commandeer the states: "if . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist."[115] To be clear, Justice Scalia does not claim to use tradition in furtherance of the conventionalist account described above. He believes that tradition is an important source of "original" meaning, not of social meaning. Still, his evidence does provide some support for the expressive account of the anti-commandeering rule.

There are two difficulties, however, with the conventionalist account of commandeering. As an initial matter, one must make some sense of the category "developed practices." The *Printz* majority makes little attempt to do this. Perhaps both preemption and conditional grants are considered developed practices: Preemption is fairly directly sanctioned by the Supremacy Clause and has had the Supreme Court's imprimatur at least since *Gibbons v. Ogden*;[116] conditional grants may have been widely used even prior to the New Deal.[117] But at a minimum, one might want to see a detailed examination of the historical pedigree of these practices before concluding that they count as familiar practices of federal-state relations. Even then, a sterile examination of historical pedigree would be, at best, a rudimentary proxy for whether some practice constitutes a developed practice or custom, because describing the set of developed practices itself requires an investigation into the construction of social meaning.[118]

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115. *Printz*, 521 U.S. at 905. Note that the dissent strongly contested the evidence that Justice Scalia marshaled in support of the novelty of commandeering legislation. *See id.* at 945-54 (Stevens, J., dissenting). The dissent's argument might be seen as an attempt to ambiguate the existence of a tradition that excluded commandeering as a practice. *See supra* text accompanying notes 101-09 (discussing the effects of contestability and clarity on the expressive power and meaning of facts).

116. 22 U.S. (9 Wheat.) 1 (1824) (holding that federal law licensing those engaged in the coastal trade preempted New York law granting a steamboat monopoly).

117. *See* Hills, *supra* note 10, at 859.

118. Professors Pildes and Niemi, for example, rely more on our common intuitions than a historical inquiry in order to conclude that territorial districting constitutes a developed custom. *See* Pildes & Niemi, *supra* note 14, at 502.

Another difficulty with the conventionalist account is that it can be reductionistically static.[119] While the account might appear to explain why some new-fangled practice is perceived as antithetical to the values of existing practice, it cannot—at least in the simple form described above—explain how social understandings of existing practices evolve. For that reason, applying a strong (or oversimplified) version of the conventionalist argument would constrain government action to the existing status quo. Our own history of federal-state relations demonstrates that such a strong originalist bias would both inaccurately describe the evolution of our constitutional traditions and lead to counterproductive stasis. Consider, for example, the implications of applying the nineteenth century understanding of "commerce" to the modern administrative state.[120]

The shortcomings of the oversimplified conventionalist account need not be fatal. By taking into consideration more dimensions of context, it is possible to develop models of social meaning that capture more accurately things like the evolution of tradition or the variable importance of convention in different settings. Bruce Ackerman's theory of constitutional moments, which is one of the most well-known accounts of how our constitutional traditions evolve in general, is one example of a theory that takes into account more dimensions of context. While his theory is perhaps not sufficiently "fine-grained" to explain how the evolution of tradition would lead to the acceptance of conditional grants but not commandeering, it at least suggests the possibility of modifying the conventionalist account without discarding it completely.

In the context of commandeering (and perhaps regulation more generally) one way to refine the conventionalist account might be to acknowledge that, because commandeering's *relationship* to the other tools of intergovernmental coercion helps shape its expressive significance, its meaning will be contingent in part on the perceived availability of these other regulatory mechanisms. That is, the ready availability of alternative, more conventional mechanisms by which

119. The problem of static bias shares its roots with the problem of identifying established practices, as both difficulties stem from the need for a richer account of how traditions develop and evolve.

120. *See* United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

Congress can accomplish its regulatory end may exacerbate the denigratory social meaning of commandeering. When these alternatives exist, it becomes more difficult for the public to ascribe good reasons to Congress's decision to deviate from accepted norms of regulatory interference; and if it becomes difficult to find good reasons for the deviation, it becomes more likely that the public will ascribe to the deviation reasons more denigratory of state autonomy.[121] Conversely, when commandeering appears to be the only mechanism available by which Congress can accomplish its regulatory end, the apparent justification for using the "unconventional" tool of commandeering may diminish its denigratory social message.

Thus, the perception of what one might call "available alternatives" is another, slightly more complicated way in which commandeering's relationship to existing norms of intergovernmental relations might help shape its social meaning. This richer account of context has complicated implications for the specific instances of commandeering that the Court has invalidated.[122] In particular, it makes clear that this facet of social perception must be worked out in part on a case-by-case basis, because the availability of more conventional regulatory tools to accomplish Congress's goals will depend on the specific regulatory context. Still, on a more general level, this theory of available alternatives does suggest that the general availability of the conventional tools of conditional spending and preemption might lead commandeering, in many instances, to have a social meaning more denigratory of state autonomy than it otherwise would.

121. A partial analog to this mechanism may be at work in the least-restrictive-means test that courts apply in many First Amendment contexts, although, to be clear, the Court's accounts of that test do not suggest that it is grounded in expressive significance.

122. For example, one would have to question whether the Court adequately considered the interim nature of the background-check requirement at issue in *Printz*. The Brady Bill provisions suggest that Congress may have actually preferred to have used federal officials to implement the law, *see* 18 U.S.C. § 922(s)(1)(D), but that it was not possible to implement a federal system of background checks instantaneously.

III. CONCLUSION

In short, the critics may be wrong about the *New York-Printz* anti-commandeering rule. Although the rule may do no more to protect the states' powers of regulatory initiative than would a rule invalidating any one of the more conventional tools of intergovernmental coercion, its expressive character may do more than would some other rule to protect an important aspect of each state's role in our federal structure. By invalidating congressional legislation that the public perceives to be especially denigratory of state autonomy, the rule may serve to maintain and reinforce social understandings of state autonomy that are crucial to states' capacity to serve as political counterweights to the federal government.

Even if this is all true, however, we must acknowledge that the Supreme Court did not rely explicitly on expressive harms when it struck down the laws at issue in *Printz* and *New York*.[123] Instead, the Court relied largely on formalist reasoning—regarding the essence of federalism, the unitary status of the executive, and the original meaning of the Constitution. Thus, there are still powerful grounds on which to criticize the methodology of the Court, if not its outcome. Or are there?

While this Article has attempted to explain the Court's decisions in *New York* and *Printz* using an expressive account of law, it has not articulated the appropriate role for the judiciary within such an account. Once we understand the power of legal norms to shape social norms, however, we must immediately confront the implications of the Court's acknowledging its role in constructing social reality. Should the Justices explicitly acknowledge that in intergovernmental relations, as in voting rights, criminal punishment, and every other area of the law, "appearances do matter"?[124] And, if they do this, should they go one step further and acknowledge that the Court's opinions are in part attempts to promote beneficial social understandings?[125] Once we answer these questions, it may turn out that

123. *See supra* text accompanying notes 95-98.

124. Shaw v. Reno, 509 U.S. 630, 647 (1993).

125. *See supra* text accompanying note 80 (suggesting that *Printz*'s formalism might be a rhetorical tool for promoting perceptions of state autonomy); *cf.* THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 44 (1935) (arguing that "law" can only serve as a symbol of our ideals if it is fanatically formalis-

the expressive explanation this Article proposed is actually yet another indictment of the Court's modern federalism jurisprudence.

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