Reining in the Tenth Amendment: Finding a Principled Limit to the Non-Commandeering Doctrine of *United States v. Printz*

INTRODUCTION

For much of the twentieth century, the Court and commentators pronounced the Tenth Amendment,[1] embodied in the concept of federalism as a check on Congress's enumerated powers,[2] a dead

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[1] U.S. CONST. amend. X. Specifically, the Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

[2] *See* Younger v. Harris, 401 U.S. 37, 44 (1971). The Court defined federalism:

> The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id.; *see also* Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1015-22 (1995). For most of its history, the Court applied a "delegated power" model of federalism. *See id.* at 1016. Under this model, the Court would review a law by making a direct inquiry into the scope of Congress's enumerated powers. *See id.* If the congressional action was beyond the scope of the authority delegated, the Court would hold that the power was properly reserved to the states. *See id.* This method is most consistent with the express language of the Tenth Amendment. *See* U.S. CONST. amend. X. The court adopted the "state enclave" model in *National League of Cities v. Usery*, 426 U.S. 833 (1976). *See* Caminker, *supra*, at 1016-17. Under this model, certain areas such as education are considered traditional government functions and are beyond the scope of Congress's legislative authority. *See id.* at 1017. The Court expressly overruled *National League of Cities* and its "state enclave" model in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *See id.* The *Garcia* Court held the traditional government function test unworkable and explained that the Court should invoke the principles of federalism only where the political process had failed. *See Garcia*, 469 U.S. at 546. The most recent incarnation of federalism, and the one upon which this Note focuses, is the "autonomy model." *See* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 641 (1993). The "autonomy model" asserts that the state and federal governments are each sovereign with respect to their discrete political communities. *See* Caminker, *supra*, at 1019.

letter.[3] Led by Justices O'Connor and Scalia, however, the Supreme Court has breathed new life into the doctrine.[4] More than a mere tautology,[5] the Tenth Amendment now imposes substantive limits on the scope of Congress's enumerated powers,[6] as well as the manner in which Congress may validly exercise those powers.[7] The Supreme Court has expounded on the merits of our system of dual sovereignty in great detail.[8] Among the virtues theoretically secured by the diffusion of sovereign power are the accountability of state and federal officials to their respective electorates,[9] the reduced risk of tyranny,[10]

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[3] *See* Powell, *supra* note 2, at 634 (arguing that there was no firm basis in the Constitution for federalism and that the Court should refrain from interpreting broad substantive content into the Tenth Amendment) (citing Wickard v. Filburn, 317 U.S. 111, 120 (1942); United States v. Darby, 312 U.S. 100, 123-24 (1941)).

[4] See for example *Federal Energy Regulatory Commission v. Mississippi (FERC)*, 456 U.S. 742, 775-97 (1982) (O'Connor, J., concurring in part and dissenting in part), *Gregory v. Ashcroft*, 501 U.S. 452, 455-73 (1991), and *New York v. United States*, 505 U.S. 144, 147-88 (1992), decisions authored by Justice O'Connor that track the doctrine's development. See also *Printz v. United States*, 117 S. Ct. 2365, 2368-84 (1997), where Justice Scalia expanded the anti-commandeering doctrine.

[5] *See New York*, 505 U.S. at 156-57 (explaining that Congress's commerce power is subject to affirmative limits imposed by the Tenth Amendment). *But see Darby*, 312 U.S. at 123-24 (asserting that the Tenth Amendment merely states a truism and does not secure any substantive rights).

[6] *See* United States v. Lopez, 514 U.S. 549, 551, 566-68 (1995) (holding that the national government had failed to demonstrate a nexus between guns in school zones and interstate commerce). The Court remarked that, because the federal government's powers are limited and enumerated, there must be a judicially enforceable outer limit to the Interstate Commerce Clause. *See id.* at 566. Although suggesting that some educational activity might affect commerce, Chief Justice Rehnquist argued that those activities having no such effect must be left to the states. *See id.* at 551, 566-67.

[7] *See Printz*, 117 S. Ct. at 2384 (announcing that, although Congress has the authority to require background checks before handgun sales, it may not order state and local officials to implement the policy); *New York*, 505 U.S. at 149, 177 (arguing that, although it would be within Congress's commerce authority to directly regulate low-level radioactive waste and preempt state regulation in the field, Congress may not commandeer state legislatures to affect the same end); *Gregory*, 501 U.S. at 473 (holding that Congress could not properly direct the State of Missouri to change the mandatory retirement age for its state judges). *But see* United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805) (instructing that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.").

[8] *See Printz*, 117 S. Ct. at 2377-78; *New York*, 505 U.S. at 168-69; *Gregory*, 501 U.S. at 458. *But cf.* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 907 (1994) (arguing that federalism, as defined by the Court, does not serve any of the purposes that the Court proffers).

[9] *See New York*, 505 U.S. at 169; *see also* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 777-78 (1995) (arguing that local decision makers engage in a more informed cost benefit analysis than their national counterparts); Jacques LeBoeuf, *The Eco-*

the diversification of policy choices,[11] and the increased participation of voters in the political process.[12] Although the textual and historical bases for the Court's model of federalism have been questioned,[13] the Court's recent jurisprudence has embraced the proposition that the Tenth Amendment confers upon the states a measure of inviolable autonomy.[14] The Court's most forceful articulation of this premise is through the non-commandeering doctrine, introduced in *New York v. United States*[15] and extended last term in *United States v. Printz*.[16]

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nomics of Federalism and the Proper Scope of the Federal Commerce Power, 31 SAN DIEGO L. REV. 555, 563 (1994) (asserting that federalism promotes efficiency because decision makers in decentralized governments are held responsible for their choice of social policy). *But see* Caminker, *supra* note 2, at 1064 (submitting that commandeering does not compromise accountability because local officials can counter any effort to shift the blame for an unpopular federal program).

[10] *See Printz*, 117 S. Ct. at 2378; *New York*, 505 U.S. at 181; *Gregory*, 501 U.S. at 458-59; *see also* Caminker, *supra* note 2, at 1075 (reminding that the Framers also envisioned strong states providing a military check against a powerful central government, a check that is somewhat anachronistic today). *See generally* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1500-07 (1987) (explaining that federalism protects against tyranny through mobility of citizens, self-interested government, and diffusion of power); Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 5-7 (1988) (explaining that state and local governments check federal power through lobbying and litigation, regulating in areas ignored by Congress, and providing a base of political support).

[11] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). *Compare* Merritt, *supra* note 10, at 10 (describing states as ideal laboratories for experiments) *with* Caminker, *supra* note 2, at 1078-79 (asserting that congressional commandeering does not threaten a state's ability to experiment more than instances of preemption). *But see* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980) (proposing that federalism actually discourages state politicians from undertaking risky innovation).

[12] *Compare* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 789-90 (1982) (O'Connor, J., concurring in part and dissenting in part) (suggesting that federalism allows citizens to participate in local government) *and* Deborah J. Merritt, *Federalism as Empowerment*, 47 FLA. L. REV. 541, 548 (1995) (asserting that the "lessons of self rule" are more easily learned at the state and local levels, where government is more readily accessible) *with* Rubin & Feeley, *supra* note 8, at 916 (recognizing that many scholars work under the assumption that federalism promotes citizen participation in government, but suggesting that there is no empirical or theoretical support for that proposition).

[13] *See* Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1990-2007 (1993) (demonstrating that the Framers' original understanding was that Congress could commandeer state executives).

[14] *See Printz*, 117 S. Ct. at 2376; *New York*, 505 U.S. at 177 (recognizing that the Tenth Amendment reserves a core of sovereignty to the states).

[15] 505 U.S. 144 (1992).

[16] 117 S. Ct. 2365 (1997).

The non-commandeering doctrine forbids Congress from commanding a state legislature to legislate in a particular manner,[17] or from directing state and local officials to implement national policy.[18]

This Note will explore the limits of the non-commandeering doctrine. Specifically, the Note will seek to answer a question left unresolved by *Printz*: whether Congress may command local officials to undertake purely ministerial tasks.[19] The answer depends on whether the intent of the Framers and the structure of the Constitution mandate the non-commandeering doctrine,[20] or whether normative considerations define the analysis.[21]

Part I explores the Court's revival of federalism jurisprudence in *National League of Cities v. Usery*,[22] until the Court's temporary abandonment of the Tenth Amendment as a limit on Congress's enumerated powers in *Garcia v. San Antonio Metropolitan Transit Authority*.[23] This section concludes that the Court's return to federalism faltered because the Court's test lacked a guiding principle and was therefore irretrievably vague.[24] Part II discusses the advent and development of the non-commandeering doctrine in the *New York* and *Printz* cases.[25] Part III challenges the reasoning behind the non-commandeering doctrine.[26] Specifically, this section posits that, even if the guiding principles behind the doctrine are sound, an absolute prohibition on this manner of exercising the commerce power is unwarranted given the deficiency in the textual and historical foun-

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[17] *See New York*, 505 U.S. at 188.

[18] *See Printz*, 117 S. Ct. at 2384.

[19] *See id.* at 2385 (O'Connor, J., concurring) (noting that the Court "appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid").

[20] *See New York*, 505 U.S. at 157 (reasoning that "[o]ur task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution.").

[21] *See* Merritt, *supra* note 10, at 10 (arguing that identifiable values justify federalism jurisprudence).

[22] 426 U.S. 833 (1976).

[23] 469 U.S. 528 (1985); *see also infra* notes 31-99 and accompanying text (discussing revival of the Court's federalism jurisprudence).

[24] *See infra* notes 92-99 and accompanying text. The Supreme Court has held that a law is impermissibly vague where persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[25] *See infra* notes 100-65 and accompanying text.

[26] *See infra* notes 166-90 and accompanying text.

dations.[27] Additionally, Part IV demonstrates that the doctrine is overinclusive by applying it to the National Child Search Assistance Act of 1990 (NCSAA),[28] which commands state and local officials to forward to federal agencies on an expedited basis information about missing children.[29] Part IV contends that even though NCSAA does not raise any of the normative concerns acknowledged in both *New York* and *Printz*, the Court would nevertheless hold the Act unconstitutional under the non-commandeering doctrine. Part V proposes that if the Court must define the line between national and state power it should do so by explicitly protecting the principles of federalism.[30] The Court should abandon the non-commandeering doctrine in favor of a balancing test that weighs the benefits of a national program against its burden on state sovereignty.

I. A BRIEF HISTORY OF FEDERALISM

For the forty years prior to the Supreme Court's decision in *National League of Cities*,[31] the Court relied on the political system to draw the proper line between federal and state power.[32] Before *National League of Cities*, the Court agreed with commentators that states' interests were adequately represented in the House of Representatives and that such representation precluded any overreaching by Congress into the province of the states.[33] The point seemed well settled and accepted until the Supreme Court heard arguments in *National League of Cities* in 1976.[34]

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[27] *See infra* notes 183-90 and accompanying text.

[28] 42 U.S.C.A. §§ 5779-5780 (West 1995).

[29] *See infra* notes 191-**Error! Bookmark not defined.** and accompanying text.

[30] *See infra* notes 227-35 and accompanying text.

[31] 426 U.S. 833 (1976).

[32] *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 176 (1980).

[33] *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954); *see also* CHOPER, *supra* note 32, at 175-77. Professor Choper's "Federalism Proposal" asserted that

> [t]he federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violated "states' rights" should be treated as nonjusticiable, final resolution being relegated to the political branches . . . .

Id. at 175. The very structure of the national political system ensures that states' interests are adequately protected; moreover, history shows that states' rights have not been trammeled. *See id.* at 176.

[34] *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 505-06

National League of Cities addressed a 1974 amendment to the Fair Labor Standards Act of 1938 (FLSA).[35] In its original form, FLSA required any employer involved in interstate commerce to comply both with federal minimum hourly wage and federal overtime pay requirements.[36] FLSA specifically exempted state employers.[37] In 1974, Congress amended FLSA to bring state employers under its auspices.[38] Consequently, state and local authorities challenged the amendment on various grounds, including the Tenth Amendment.[39]

Writing for the majority, Justice Rehnquist found Congress's 1974 Act constitutionally deficient.[40] While acknowledging that the Tenth Amendment traditionally had not been interpreted as a substantive limit on the commerce power,[41] the Court determined that the Tenth Amendment did have a substantive component.[42] Even where Congress has plenary authority to legislate,[43] Justice Rehnquist explained, the Tenth Amendment might provide a bar to Congress

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(1995). Although the Supreme Court had invalidated laws on federalism grounds between the late 1800s and 1937, after *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court abandoned federalism as a substantive limit on the power of Congress. *See* Chemerinsky, *supra*, at 505-06; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 378 (2d ed. 1988). Between 1937 and 1976, "the conventional wisdom was that federalism in general—and the rights of states in particular—provided no judicially-enforceable limits on congressional power." *Id.*

[35] *See National League of Cities*, 426 U.S. at 836. *National League of Cities* noted that this amendment broadened the definition of employer to include public agencies. *See id.*

[36] *See id.* at 835-36.

[37] *See id.* at 836. In its original form, the statute provided:

> "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State.

29 U.S.C. § 203(d) (1970).

[38] *See National League of Cities*, 426 U.S. at 836.

[39] *See id.* at 836-37.

[40] *See id.* at 834, 852.

[41] *See* U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[42] *See National League of Cities*, 426 U.S. at 842. Justice Rehnquist proclaimed:

> While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function in a federal system.

Id. at 842-43 (citations omitted).

[43] *See id.* at 842.

exercising its power against the "States as States."[44] The Court recognized an area of inviolable state sovereignty that Congress could not disturb.[45] The Court held that the Tenth Amendment protected states when Congress tried to regulate in an area of traditional government function.[46] Structuring wages for state employees, the Court reasoned, was so integral to a state's proper operation that it lay beyond Congress's power to regulate.[47] After *National League of Cities*, the challenge was for the judiciary to determine whether a given government function was in fact traditional.[48]

Five years later, the Court revisited the traditional government function test in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*.[49] In 1976, Congress passed the Surface Mining Control and Reclamation Act (SMCRA),[50] establishing a national program to protect against the effects of surface mining.[51] During the initial phase of the program, the federal government would regulate surface miners directly.[52] In the permanent phase of SMCRA, either the state or the

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[44] *See id.* at 854 (noting that "the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress's power to regulate commerce").

[45] *See id.* at 845.

[46] *See id.* at 852. The Court held "that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." *Id.* The Court refrained from providing an exhaustive list of traditional government functions. *See id.* at 851 n.16. Justice Rehnquist enumerated "fire prevention, police protection, sanitation, public health, and parks and recreation" as examples of services traditionally provided by a state to its citizens. *Id.* at 851.

[47] *See id.* at 845.

[48] *See National League of Cities*, 426 U.S. at 880-81 (Stevens, J., dissenting) (demonstrating that even the majority could not make a principled distinction among schools, hospitals, fire and police departments, and railroads as to whether they constituted traditional functions); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530 (1985) (noting that after *National League of Cities* the judiciary had struggled to identify traditional government functions to determine if a state was immune from Congress's commerce clause authority).

[49] *See* 452 U.S. 264, 286 (1981).

[50] 30 U.S.C. § 1201 (1976).

[51] *See Hodel*, 452 U.S. at 269. SMCRA had set forth several performance standards:

> (a) restoration of land after mining to its prior condition; (b) restoration of land to its approximate original contour; (c) segregation and preservation of topsoil; (d) minimization of disturbance to the hydrologic balance; (e) construction of coal mine waste piles used as dams and embankments; (f) revegetation of mined areas; and (g) spoil disposal.

Id. (citing 30 U.S.C. § 1265(b) (1976)).

[52] *See id.* SMCRA directed the Secretary of the Interior to promulgate the Act's

federal government would regulate surface miners consistent with federal guidelines.[53]

Testing SMCRA against the framework from *National League of Cities*, the Court determined that the Tenth Amendment challenge could not prevail.[54] SMCRA did not implicate the traditional government function test because it regulated individuals and not states.[55] Instead, the Court asserted, SMCRA conformed to the doctrine of cooperative federalism,[56] because the states had the option of either regulating consistently with federal guidelines or being preempted.[57] After *Hodel*, the traditional government function test remained intact and the doctrine of cooperative federalism was formally acknowledged and condoned by the Court.[58] Therefore, while the judiciary still had to distinguish between laws affecting traditional and nontraditional government functions, Congress could encourage compliance with a regulatory scheme by threatening to preempt the field.[59]

The next year, the Court considered the constitutionality of the Public Utility Regulatory Policies Act of 1978 (PURPA)[60] in *Federal*

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environmental performance standards and to enforce them during the interim phase. *See id.* During the interim phase, SMCRA held the Secretary responsible for instituting an inspection program to ensure compliance with the standards. *See id.* at 270.

[53] *See id.* Only those states that submitted a plan demonstrating the state's ability to ensure continued compliance with federal regulations would be approved to take over during the permanent phase. *See id.* at 271. SMCRA required the Secretary to continue administering the program within any state that had not submitted an approved plan. *See id.* at 272.

[54] *See id.* at 290-91. The Virginia Surface Mining and Reclamation Association had asserted that SMCRA interfered with the ability of the state to regulate land use—a traditional government function. *See id.* at 289.

[55] *See id.* at 288.

[56] *See id.* at 289. Cooperative federalism recognizes that "where Congress has the authority to regulate private activity under the Commerce Clause, . . . [it may] offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." New York v. United States, 505 U.S. 144, 167 (1992) (citations omitted).

[57] *See Hodel*, 452 U.S. at 289. The Court explained that under SMCRA states could administer the program consistent with government guidelines, or alternatively, the federal government would implement the Act. *See id.* at 288-89.

[58] *See id.* at 287-88. The Court reformulated the *National League of Cities* framework into a three-part test. *See id.* Under the test, a statute enacted pursuant to the commerce power would be invalid if it (1) regulated the states as states; (2) addressed matters that were indisputable "'attribute[s] of state sovereignty'"; or (3) impaired the ability of the state "'to structure integral operations in areas of traditional government functions.'" *Id.* (citations omitted).

[59] *See id.* at 290-91.

[60] 16 U.S.C. §§ 2603, 2611 (1976).

Energy Regulatory Commission v. Mississippi (*FERC*).[61] PURPA encouraged conservation of energy and efficiency in utilities resources, as well as stabilization of consumer energy prices.[62] PURPA directed state utility commissions, along with nonregulated utilities, to consider specific rate schedules and regulatory practices.[63] Although PURPA did not require state or nonregulated utilities to adopt the proposed rate schedule, they were required to report to the Secretary of Energy annually for ten years regarding their consideration of the proposal.[64]

The majority opinion, authored by Justice Blackmun, sustained PURPA against a Tenth Amendment challenge.[65] Justice Blackmun began the Court's Tenth Amendment analysis by distinguishing PURPA from FLSA, the legislation at issue in *National League of Cities*.[66] Whereas *National League of Cities* examined the Tenth Amendment as the basis for state immunity from generally applicable laws,[67] *FERC* considered the novel question of whether the federal government could use the regulatory mechanism of the state to implement federal policy.[68] The majority concluded that the Tenth Amendment presented no bar, because the challenged provisions merely conditioned state involvement in an otherwise preemptive area on consid-

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[61] *See* 456 U.S. 742, 745 (1982).

[62] *See id.* at 746. President Carter signed into law a package of legislation, of which PURPA was a part, to remedy the nation's energy crisis. *See id.* at 745. The Court noted the Senate's findings that

> the generation of electricity consumed more than 25% of all energy resources used in the United States. Approximately one-third of the electricity in this country was generated through use of oil and natural gas, and electricity generation was one of the fastest growing segments of the Nation's economy. In part because of their reliance on oil and gas, electricity utilities were plagued with increasing costs and decreasing efficiency in the use of their generating capacities; each of these factors had an adverse effect on rates to consumers and on the economy as a whole. Congress accordingly determined that conservation by electricity utilities of oil and natural gas was essential to the success of any effort to lessen the country's dependence on foreign oil, to avoid a repetition of the shortage of natural gas that had been experienced in 1977, and to control consumer costs.

Id. at 745-46 (citations omitted).

[63] *See id.* at 746-47. Specifically, PURPA commanded both state regulatory authorities and nonregulated utilities to consider adopting certain rate structures. *See id.*

[64] *See id.* at 749.

[65] *See id.* at 745, 769-70.

[66] *See id.* at 758-59.

[67] *See* National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

[68] *See* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 759 (1982).

eration of the federal proposals.[69] The states could always stop regulating utilities;[70] thus, the Court opined that PURPA did not impair the states' ability to function in the federal system.[71]

Justice O'Connor, however, vehemently disagreed with Justice Blackmun's Tenth Amendment analysis.[72] In partial dissent, the Justice laid the foundation for the federalism doctrine of the *New York* and *Printz* decisions.[73] PURPA, Justice O'Connor argued, would conscript state and local utility commissions into the "national bureaucratic army."[74] Although PURPA did not mandate adoption of the proposed regulations, the Justice maintained that the Tenth Amendment inquiry should not end there.[75]

Therefore, Justice O'Connor applied the traditional government function test[76] and emphasized three points.[77] First, the Justice opined that PURPA set the agenda for local regulatory commissions, forcing them to consider the federal pricing scheme.[78] Justice O'Connor argued that this clearly regulated the states as states.[79] Second, the Justice explained that PURPA violated the second prong of the traditional government function test, because it addressed matters that are indisputably "'attributes of state sovereignty.'"[80] Third, the Justice noted that PURPA violated the final prong of the test, because forcing state and local commissions to consider federal proposals would impair their ability to perform traditional functions.[81]

Having demonstrated why PURPA should fail the traditional government function test, Justice O'Connor articulated the principles that the test sought to protect.[82] First, the Justice stressed that as they comply with federally mandated tasks, local officials have less

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[69] *See id.* at 769-70.

[70] *See id.* at 766.

[71] *See id.* at 765-66.

[72] *See id.* at 775 (O'Connor, J., dissenting in part and concurring in part).

[73] *See id.* at 786-91 (O'Connor, J., dissenting in part and concurring in part).

[74] *FERC*, 456 U.S. at 775 (O'Connor, J., dissenting in part and concurring in part).

[75] *See id.* at 777 (O'Connor, J., dissenting in part and concurring in part).

[76] *See id.* at 778 (O'Connor, J., dissenting in part and concurring in part).

[77] *See id.* at 778-82 (O'Connor, J., dissenting in part and concurring in part).

[78] *See id.* at 779 (O'Connor, J., dissenting in part and concurring in part).

[79] *See id.*

[80] *FERC*, 456 U.S. at 779 (O'Connor, J., dissenting in part and concurring in part) (citations omitted).

[81] *See id.* at 781 (O'Connor, J., dissenting in part and concurring in part).

[82] *See id.* at 787-91 (O'Connor, J., dissenting in part and concurring in part).

time to spend on matters to which they were elected to attend.[83] Second, the *FERC* Court pointed out that, because the lines of political accountability are blurred when Congress compels local action, state and local officials might be unfairly blamed by their electorates for the adverse effects of a federal policy.[84] Third, the Court reasoned that, because federalism encourages states to experiment with new social, political, and economic ideas, mandating a federal policy would stifle innovation.[85] Fourth, Justice O'Connor noted that, because citizens have more direct access to the political process at the local level, federalism allows citizens to participate more actively in government.[86] Fifth, the Justice emphasized that, because sovereign states protect the interests of their citizens from overreaching by the national government, federalism exists as a check against tyranny.[87] Justice O'Connor charged the majority with endangering these values of federalism by ignoring the concerns set forth in *National League of Cities*.[88]

While sustaining the traditional government function test and reaffirming the doctrine of cooperative federalism,[89] *FERC* exemplified the problems inherent in applying that test consistently.[90] Consequently, whether Congress had legislated in an area of integral

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[83] *See id.* at 787 (O'Connor, J., dissenting in part and concurring in part).

[84] *See id.*

[85] *See id.* at 782-88 (O'Connor, J., dissenting in part and concurring in part).

[86] *See FERC*, 456 U.S. at 789 (O'Connor, J., dissenting in part and concurring in part).

[87] *See id.* at 790 (O'Connor, J., dissenting in part and concurring in part).

[88] *See id.* at 775 (O'Connor, J., dissenting in part and concurring in part).

[89] *See supra* note 56 and accompanying text (discussing the *Hodel* case analysis).

[90] *See FERC*, 456 U.S. at 779 (O'Connor, J., dissenting in part and concurring in part). Justice O'Connor maintained that PURPA commanded the states to act and therefore impermissibly regulated the "States as States." *See id.* The Justice opined that

> [w]hile the statute's ultimate aim may be the regulation of private utility companies, PURPA addresses its *commands* solely to the States. Instead of requesting private utility companies to adopt lifeline rates, declining block rates, or other PURPA standards, Congress directed state agencies to appraise the appropriateness of those standards. It is difficult to argue that a statute structuring the regulatory agenda of a state agency is not a regulation of the "State."

Id. (emphasis added); *cf.* New York v. United States, 505 U.S. 144, 149, 161 (1992) (citing *FERC* for the proposition that the Court "'never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations'") (citation omitted). Most significant for this Note is the apparent difficulty the Court may have in determining when a state has in fact been commanded.

state function was open to broad interpretation—apparently too open for the test to remain viable.[91]

In *Garcia*, the Court overruled *National League of Cities* and its traditional government function test.[92] *Garcia* considered the same minimum wage provisions at issue in *National League of Cities*.[93] Writing for the majority, Justice Blackmun opined that the traditional government function test was unworkable because there was no principled way to distinguish between a traditional and a nontraditional government function.[94] As *Garcia* demonstrated, the traditional government function test failed, in large part, because it did not express any guiding principle.[95] As a result, lower courts were unable to apply it consistently.[96]

In dissent, Justice O'Connor argued that the Court should not abandon its efforts to protect the essential elements of state sovereignty.[97] The Justice maintained that, rather than leave the matter to Congress's "underdeveloped capacity for self-restraint," the Court should weigh state autonomy as a factor when reviewing a law whereby Congress seeks to regulate the "States as States."[98] Justice

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[91] *See infra* note 96 and accompanying text.

[92] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985). The Court held that

> the principle and basic limit on the federal commerce power is that inherent in all congressional action–the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.

Id. at 556.

[93] *See id.* at 530. The trial court ruled that the municipality's ownership and operation of its mass-transit system constituted a traditional government function. *See id.* Therefore, the municipality was exempt from the Fair Labor Standards Act (FLSA) wage requirements under the *National League of Cities* test. *See id.*

[94] *See id.* at 531.

[95] *See generally* TRIBE, *supra* note 34, at 395 (stating that the decisions after *National League of Cities* demonstrated that the Court "could neither justify [the traditional function test] by reference to the Constitution nor elaborate it by reference to any workable principles of federalism").

[96] *See Garcia*, 469 U.S. at 538 (enumerating lower court opinions, which have made contradictory conclusions as to whether particular government functions were traditional).

[97] *See id.* at 588 (O'Connor, J., dissenting).

[98] *Id.* Justice O'Connor urged that

> [t]he problems of federalism in an integrated national economy are capable of more responsible resolution than holding that the States as States retain no status apart from that which Congress chooses to let them retain. The proper resolution, I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States.

O'Connor, joined by Justices Powell and Rehnquist, predicted a judicial return to a substantive interpretation of the Tenth Amendment if Congress continually reached into the states' domain.[99]

II. THE ANTI-COMMANDEERING DOCTRINE

Consistent with the predictions of Justices O'Connor and Rehnquist, the Court returned to federalism jurisprudence through the non-commandeering doctrine in *New York v. United States* and *Printz v. United States*.[100] Perhaps cognizant of the demise of the traditional government function test, the Court dispensed with a balancing test and promulgated an absolute bar against congressional commands to states.[101]

In the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWAA),[102] the *New York* Court explained that Congress addressed the danger that many states no longer had a viable outlet for low-level radioactive waste produced within their borders.[103] In 1985, the Court pointed out, only three states had disposal sites for low-level radioactive waste—all other states relied on those three states for disposal of their waste.[104] LLRWAA, the Justice noted, sought to end this reliance by setting out a seven-year timetable, at the end of which each state would have a regional outlet for its low-level radioactive waste.[105] The Court acknowledged that Congress enacted a combination of incentives and penalties to advance its purposes.[106]

Id.

[99] *See id.* at 580, 589 (O'Connor, J., dissenting) (stating that "I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility."); *id.* at 580 (Rehnquist, J., dissenting) (pronouncing that concern for state sovereignty would someday garner the support of a majority on the Court).

[100] *See* New York v. United States, 505 U.S. 144, 188 (1992) (explaining that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."); Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (noting that "[w]e held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly.").

[101] *See New York*, 505 U.S. at 188.

[102] 42 U.S.C. § 2021 (1982).

[103] *See New York*, 505 U.S. at 151. In 1980, Congress authorized states to join regional compacts for disposal of their low-level radioactive waste. *See id.* Beginning in 1986, this Act would have given certain disposal facilities the right to exclude waste not produced by its members. *See id.* Because 31 states would have been left without an approved waste disposal cite under the original act, Congress passed the amendment at issue in *New York*. *See id.*

[104] *See id.* (pointing out that in 1985 only South Carolina, Washington, and Nevada had approved disposal facilities).

[105] *See id.* at 151-52. Congress based the 1985 amendment on a plan proposed by

First, the Justice stressed that a monetary incentive taxed the waste produced by a state and reimbursed those states who met certain goals.[107] Second, the Court noted that Congress authorized sited states[108] to increase surcharges against, and ultimately deny access to, states that failed to meet their deadlines.[109] Lastly, the *New York* Court explained that the take-title provision required a state to take title to any waste produced in-state if no other provisions had been made by the state for the waste's disposal.[110] The state, explained the Court, would be held liable for any damages caused by the state's failure to take possession of the waste.[111]

The Court upheld the first two provisions as proper exercises of the spending and commerce powers.[112] The Court held that the take-title provision, however, amounted to an unconstitutional command to state legislatures either to accept ownership of the waste or to regulate pursuant to Congress's instructions.[113] This "take-title" mandate provided Justice O'Connor with the opportunity to promulgate the non-commandeering doctrine.[114] The Court ruled that even though Congress may regulate commerce directly it may not dictate how the states regulate commerce.[115]

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the National Governors' Association. *See id.* at 151. Under the plan, sited states (those states that will be accepting waste) agreed to receive waste from unsited states for an additional seven years, provided the unsited states ended their reliance by 1992. *See id.*

[106] *See id.* at 152-54.

[107] *See id.* at 152-53. Under LLRWAA, sited states collected a surcharge for their services and deposited one-quarter of those surcharges in a fund managed by the Secretary of Energy. *See id.* at 152. The Secretary paid monetary incentives to those states that had met their deadlines. *See id.*

[108] *See supra* note 105 and accompanying text (explaining the meaning of sited versus unsited states).

[109] *See New York*, 505 U.S. at 153.

[110] *See id.* at 153-54 (citing 42 U.S.C. § 2021e(d)(2)(C) (1982)).

[111] *See id.*

[112] *See id.* at 173-74. The Court held that the second incentive, which authorized sited states to eventually deny access to unsited states, comported with the doctrine of cooperative federalism—offering states a choice between regulating consistent with the federal regulation or being preempted. *See id.*

[113] *See id.* at 176.

[114] *See id.* at 177-78.

[115] *See New York*, 505 U.S. at 177-78. The Court exhorted that

> whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable *federal* regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact *state* regulation. No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead

Justice O'Connor predicated this rule on two lines of reasoning.[116] First, the Justice examined prior case law and the Framers' intent.[117] Second, the Court expounded the normative rationales prohibiting Congress from exercising its commerce power in this manner.[118]

Based on the Court's precedent, Justice O'Connor announced that Congress could not commandeer a state's legislature by compelling it to implement a federal regulatory program.[119] Citing *Hodel*[120] and *FERC*,[121] the Court suggested that the laws in these cases were upheld because neither statute at issue commandeered state legislatures.[122] Next, the Court suggested that the *Hodel* and *FERC* holdings were not innovations because they were consistent with the Framers' intent in drafting the Tenth Amendment.[123] The Court quoted several cases, dating as far back as 1868,[124] noting that the United States relies on the preservation of strong constituent states for its well being.[125]

After discussing prior case law, the Court addressed the Framers' intent, asserting that Congress's ability to use states as its agents had been a matter of heated debate among the Framers.[126] Justice O'Connor quoted Alexander Hamilton, who observed in *Federalist*

> gives Congress the authority to regulate matters directly and to preempt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

Id. at 178 (emphasis in original).

[116] *See id.*, 505 U.S. at 155-69.

[117] *See id.* at 155-59.

[118] *See id.* at 159-69.

[119] *See id.* at 161.

[120] *See supra* notes 49-59 and accompanying text (discussing the facts and holding of *Hodel*).

[121] *See supra* notes 60-91 and accompanying text (discussing the facts and holding of *FERC*).

[122] *See New York*, 505 U.S. at 161.

[123] *See id.* at 162. *But see supra* note 90 and accompanying text (discussing Justice O'Connor's partial dissent in *FERC* that asserted that PURPA compelled the states to act).

[124] *See* Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868).

[125] *See New York*, 505 U.S. at 162-63. As the Court stated in *Lane County*:

> Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, *directly upon the citizens*, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States.

Id. at 162 (quoting *Lane County*, 74 U.S. at 76).

[126] *See id.* at 163.

No. 15 that the great shortcoming of the Articles of Confederation was that it only authorized the Constitutional Congress to legislate against states in their corporate capacities, rather than against the individuals that comprised the states.[127] The Justice noted that Hamilton concluded that the new government must operate directly against individuals.[128]

Next, the Court examined the Constitutional Convention of 1787 and its consideration of the Virginia and New Jersey Plans.[129] The *New York* Court pointed out that, whereas the New Jersey Plan would have required Congress to obtain state approval before legislating, the Virginia Plan would permit national legislation directly over individuals.[130] Legislating directly against the states had proved ineffectual under the Articles of Confederation; the Justice noted that the Convention therefore adopted the Virginia Plan.[131] The Court ended its analysis of the Framers' intent by quoting several delegates to the convention who reiterated that laws, to be effective, must be enforced against individuals rather than against states.[132] Justice O'Connor concluded that, because the Framers had abandoned legislating against the states as an effective means of governance, they had foreclosed Congress from considering that option.[133]

Having determined that prior case law and the Framers' intent both supported a non-commandeering rule, the Justice addressed the normative arguments in favor of such a rule.[134] Concerns over tyranny and accountability animated Justice O'Connor's analysis.[135] First, the Justice contended that, if the federal government could command the states to legislate in a certain fashion, it would raise the same concerns about tyranny that led the Framers to adopt the Virginia Plan.[136] More importantly, the Justice stressed, LLRWAA greatly endangered accountability.[137] After *New York*, the Court

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[127] *See id.* (citing THE FEDERALIST No. 15, at 108 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[128] *See id.*

[129] *See id.* at 164.

[130] *See id.*

[131] *See New York*, 505 U.S. at 165.

[132] *See id.*

[133] *See id.* at 166.

[134] *See id.* at 164-69.

[135] *See id.*

[136] *See id.* at 164.

[137] *See New York*, 505 U.S. at 169. Justice O'Connor distinguished between the effects of traditional preemption and commandeering. *See id.* at 168. The Justice argued that when a state law is preempted local officials are free to pursue their electorate's other priorities. *See id.* When Congress mandates legislation, however,

barred Congress from infringing upon a state's sovereignty by mandating specific state legislation.[138]

Five years later in *Printz v. United States*, the Court again endeavored to define the proper scope of Congress's authority in our system of dual sovereignty.[139] *Printz* signifies that Congress may not command state or local officials to implement federal policies, thereby expanding the holding in *New York*.[140] Although it first appears that *Printz* strikes a severe blow to federal power, on closer inspection the damage is not so grave for several reasons.[141] First, Congress rarely commands state officials.[142] Second, Congress can usually accomplish the same ends by more traditional means.[143] Nevertheless, *Printz* has serious ramifications because it may foil the efforts of Congress to implement certain important policy objectives.[144]

In *Printz*, the Court addressed the interim provisions of the Brady Handgun Violence Prevention Act of 1993 (Brady Act),[145] which required local law enforcement officials to perform background checks on potential gun purchasers.[146] Congress exceeded the Tenth Amendment limit on its commerce power, the Court declared, by commanding local officials to act.[147]

The Brady Act ordered the Attorney General to implement by 1998 a uniform national background check system.[148] In the interim, the Brady Act required states' chief law enforcement officers (CLEOs) to conduct background checks on prospective gun pur-

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local officials are unable to pursue other policy preferences. *See id.* The concern over accountability is particularly strong where, as here, the decision is not made in full view of the public and the local official may unfairly bear the burden of the local electorate's disapproval. *See id.* at 168-69.

[138] *See id.* at 177.

[139] *See* Printz v. United States, 117 S. Ct. 2365, 2383 (1997) (extending the Court's holding in *New York*); *see also* United States v. Lopez, 514 U.S. 549, 566-67 (1995) (holding for the first time in 50 years that Congress had exceeded the scope of its commerce power).

[140] *See Printz*, 117 S. Ct. at 2384.

[141] *See infra* notes 199-200 and accompanying text.

[142] *See Printz*, 117 S. Ct. at 2375 (noting the absence of commandeering statutes in our nation's history until recent years).

[143] *See New York*, 505 U.S. at 167-68 (recognizing that Congress may encourage states to execute or legislate either through conditional spending measures or by threatening preemption).

[144] *See infra* note 217 and accompanying text (discussing the cost-benefit analysis Congress employs when deciding whether to enact a new policy).

[145] *See* PUB. L. No. 103-159, 107 STAT. 1536 (1993) (amending the Gun Control Act of 1968, 18 U.S.C. §§ 921-922, 924 (Supp. 1998)).

[146] *See Printz*, 117 S. Ct. at 2368-69.

[147] *See id.* at 2384.

[148] *See id.* at 2368.

chasers.[149] Nevertheless, the Brady Act did not require CLEOs to prevent the firearm sale regardless of the background check results.[150] If a prospective purchaser was found ineligible, however, the Brady Act required the CLEO to provide the prospective purchaser with a written reason for the rejection.[151]

Authoring the plurality opinion, Justice Scalia held the interim provisions unconstitutional under the Tenth Amendment.[152] *Printz* expanded the Court's holding in *New York* by finding that a state's area of inviolable sovereignty extended to its executive officials as well as to its legislature.[153] The Court's reasoning, as in *New York*, rested both on textual and normative explanations.[154]

Justice Scalia began by addressing the government's contention that the earliest Congresses had enacted statutes requiring state officials to implement federal laws.[155] The Justice dispensed with this argument by asserting that these laws only implied a power of the federal government to oblige state judges to enforce federal law.[156] Such power was implicit, the Justice argued, in the Supremacy Clause.[157] The Court further argued that the absence of any federal command to state officials by early Congresses evidenced that the Framers did not intend for Congress to have such power.[158]

The Court analyzed the government's reliance on several passages from *The Federalist Papers* in which Hamilton and Madison suggested that the federal government would be able to use state officials in implementing its policies.[159] Justice Scalia noted that these

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[149] *See id.* at 2369.

[150] *See id.*

[151] *See id.*

[152] *See Printz*, 117 S. Ct. at 2368, 2383.

[153] *See id.* at 2384.

[154] *See id.* at 2370-82.

[155] *See id.* at 2370.

[156] *See id.* at 2371.

[157] *See id.* Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.

[158] *See Printz*, 117 S. Ct. at 2372.

[159] *See id.* (quoting THE FEDERALIST No. 36, at 221 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961), both of which opine that local officials would aid in collecting federal taxes).

passages were consistent with an interpretation that required states to consent before the federal government could use state officials to advance federal goals.[160]

Of particular importance to Justice Scalia's discussion in *Printz* were concerns about tyranny and accountability.[161] As to tyranny, the Justice opined that federal commands to local officials undermine the autonomy that is an essential attribute of state sovereignty.[162] Likewise, *Printz* explained that the Brady Act strongly endangered accountability because CLEOs would be blamed for any errors in administering the Act's provisions.[163]

Thus, the *Printz* Court determined that Congress offends the principles of federalism and exceeds its authority where it commands a state to act; the Court should not consider the compelling national interest asserted.[164] This unbending rule implies that there is strong textual and historical support; a closer examination, however, reveals that both the Framers' intent and the historical record are more equivocal than the rule suggests.[165]

III. CHALLENGING THE RATIONALES

The most persuasive evidence that the Framers did not intend to prohibit Congress from commandeering the states is that none of the Framers ever mentioned such a rule.[166] Indeed, many passages in *The Federalist Papers* suggest that the Framers expected Congress to use state officers to execute federal laws.[167] For example, both Hamilton and Madison suggested that the federal government would use

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[160] *See id.* at 2372-73.

[161] *See id.* at 2377.

[162] *See id.* at 2381.

[163] *See id.* at 2382. The Justice instructed that

> [u]nder the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.

Id.

[164] *See Printz*, 117 S. Ct. at 2384.

[165] *See infra* notes 166-90 (challenging the rationales).

[166] *See Printz*, 117 S. Ct. at 2386, 2393-94 (Stevens, J., dissenting) (chiding that at least one of the Framers would have mentioned an anti-commandeering rule had they intended it).

[167] *See id.* at 2389 (Stevens, J., dissenting) (asserting that the Framers intended to empower the central government to act both directly on individuals and against the states).

state officials to collect taxes.[168] Hamilton also contended that state officials would stand ready to enforce national laws in general.[169] Hamilton further asserted that state officers would be bound to enforce federal laws; this represents the most convincing evidence of the Framers' intent.[170] Despite the Court's efforts to offer alternative readings of these passages, Justice Scalia could offer no affirmative proof that the Framers intended to proscribe commandeering.[171]

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[168] *See* THE FEDERALIST No. 27, at 176-77 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each in the execution of its laws."). As James Madison explained:

> It is true that the Confederacy is to possess, and may exercise, the power of collecting internal as well as external taxes throughout the States; but it is probable . . . that the eventual collection, under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States. Indeed it is extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union.

THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

[169] *See* THE FEDERALIST No. 16, at 117 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The magistracy, being equally the ministers of the law land from whatever source it might emanate, would doubtless be as ready to guard the national as the local regulations from the inroads of private licentiousness.").

[170] *See* THE FEDERALIST No. 27, at 177 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton stated that

> [i]t merits particular attention in this place, that the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws.

Id.

[171] *See Printz*, 117 S. Ct. at 2368, 2372 (arguing that *The Federalist Nos.* 27 and 45 do not imply congressional power to command state compliance; rather they "rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government"). Justice Souter contends that, because the plain reading of the phrases "'will be incorporated into the operations of the national government'" and "'will be rendered auxiliary to the enforcement of its laws,'" the federal government could require state officers and magistrates to implement federal law. *Id.* at 2402 (Souter, J., dissenting) (citation omitted). Justice Scalia suggests two problems with Justice Souter's interpretation. *See id.* at 2373. First, Justice Scalia argues that if such a reading were correct state executives would be bound to implement federal law without any directive; the Justice maintains that no one has ever suggested that the law requires this. *See id.* *But see* Prakash, *supra* note 13, at 2000-01 (instructing that federal law can never commandeer state officers, because their duties are to enforce the laws of the land without regard to the source of the

Therefore, *The Federalist Papers* undermine any argument for the non-commandeering doctrine relying on the Framers' intent.[172]

Likewise, the history of the early Congresses offers scant support for the non-commandeering rule, except that Congress rarely conscripted state officials.[173] Justice Scalia acknowledged that there were some early instances of commandeering of judges by Congress, but maintained that those commands were permissible under the Supremacy Clause.[174] Additional examples of early Congresses commandeering executive officers include a 1790 statute conscripting state justices of the peace to evaluate vessels for seaworthiness[175] and a 1798 Act directing state judges to deport alien enemies of the United States.[176]

Justice Scalia placed considerable emphasis on the absence of commandeering statutes in the historical record, noting that these statutes are a recent invention.[177] Indeed, the Court suggested that the absence of such early congressional enactments evidences that the Constitution prohibits such behavior.[178] More likely, the dearth of congressional commands evidences the impracticality of such measures in the early years of the republic, rather than their unconstitutionality.[179] The Framers, responding to the failure of the Articles of Confederation, empowered the federal government to act di-

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law). Second, Justice Scalia maintains that Justice Souter's reading would likewise make state governing bodies subject to federal direction and that the Court foreclosed such a possibility in *New York*. *See Printz*, 117 S. Ct. at 2373. Of course, even though the Court held commandeering of state legislatures unconstitutional in *New York*, that holding does little to illuminate the Framers' intent. *See* Prakash, *supra* note 13, at 2006-07 (concluding, after a thorough historical review of the founding period, that the proponents of the Constitution drew a distinction between commandeering state executives and commandeering state legislatures).

[172] *See* Powell, *supra* note 2, at 664 (arguing that Justice O'Connor's vision of federalism contradicts the plain reading of *The Federalist Papers*).

[173] *See Printz*, 117 S. Ct. at 2375.

[174] *See id.* at 2371. *But see* Prakash, *supra* note 13, at 2006 (arguing that the original understanding was that state executives were more like judges than legislators).

[175] *See* Caminker, *supra* note 2, at 1044-45.

[176] *See id.* at 1045 & n.175.

[177] *See Printz*, 117 S. Ct. at 2375. Justice Scalia addressed the World War I Draft Act of 1917, which the government cited as an instance of executive commandeering. *See id.* The Act authorized the President to enlist any state or federal officers or agencies to implement the Act. *See id.* The Act further provided a misdemeanor penalty for any official that failed to comply. *See id.* The Justice remarked that in executing the Act President Wilson solicited the state governors to give orders to their subordinate officers. *See id.*

[178] *See id.* at 2370.

[179] *See* Caminker, *supra* note 2, at 1057.

rectly for the people.[180] Logic does not dictate, however, that the Constitution therefore sought to deprive Congress of the power to obligate states to execute federal law.[181] Ultimately, the Court relied on a creative reading of *The Federalist Papers* and dubious logic, asserting that because Congress did not exercise such power in the past such power never existed.[182] Of course, given the inefficacy of direct coercion during the period when Congress operated under the Articles, it would be more surprising if early Congresses had attempted to conscript the states as their agents.

Even if textual and historical analyses do not support a non-commandeering rule, the Court might justify the rule on normative grounds.[183] As far back as *FERC*, Justice O'Connor identified four guiding principles of federalism that have guided the Court's decisions.[184] These principles (1) ensure that both state and federal officials remain accountable to their respective electorates,[185] (2) permit states to serve as laboratories for experimentation,[186] (3) encourage political involvement and thereby foster democracy,[187] and (4) prevent tyranny.[188] Although the Court announced that the Constitution would prohibit commandeering even if federalism provided no benefits to anyone,[189] astute commentators have noted that interpre-

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[180] *See supra* notes 126-27 and accompanying text (discussing Alexander Hamilton's comments in *The Federalist*).

[181] *Compare* New York v. United States, 505 U.S. 144, 166 (1992) (arguing that the Constitution forecloses the possibility of Congress conscripting state legislatures and executives) *with* Powell, *supra* note 2, at 652-53 (maintaining that the Framers' decision to confer powers on Congress to regulate individuals rather than states does not signify that they intended to deprive Congress of the powers it possessed under the Articles).

[182] *See Printz*, 117 S. Ct. at 2370, 2372.

[183] *See supra* note 98 and accompanying text (suggesting that state autonomy should be weighed as a factor in determining the scope of Congress's enumerated powers).

[184] *See* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 787-90 (1982) (O'Connor, J., concurring in part and dissenting in part).

[185] *See supra* note 9 and accompanying text (discussing accountability as a principle of federalism).

[186] *See supra* note 11 and accompanying text (analyzing experimentation as a principle of federalism).

[187] *See supra* note 12 and accompanying text (examining democracy as a principle of federalism).

[188] *See supra* note 10 and accompanying text (highlighting the reduced risk of tyranny as a principle of federalism).

[189] *See* New York v. United States, 505 U.S. 144, 157 (1992) (stating that the Court's task is not to devise the best system of government, but to apply the framework erected in the Constitution).

tations of the Constitution that benefit no one are rarely persuasive.[190]

IV. TESTING THE FRAMEWORK

Concurring in *Printz*, Justice O'Connor noted that, although a provision directly compelling the administration of a federal regulatory program by a state official violates the Constitution, the Court properly refrained from ruling if a purely ministerial reporting requirement on state officials would be equally invalid.[191] Because purely ministerial reporting requirements nonetheless command state and local officials to act, it is unclear under what theory such mandates might be saved from the rule in *Printz*.[192] This section examines the theories under which the reporting provision of NCSAA might be distinguished from the interim background check provision of the Brady Act.[193] The analysis concludes that the acts are similar in kind, and are different only in degree.[194] Consequently, the Court cannot uphold one and overturn the other while remaining true to the holding in *Printz*.

Post-*Printz*, Congress has three valid means for affecting the actions of state legislatures and executive officers.[195] First, Congress may threaten to preempt a field if a state refuses to implement a specific policy.[196] Second, Congress may condition spending on state compliance with a federal program.[197] Third, Congress may force states to comply with laws of general application.[198]

In many situations, the *Printz* holding merely dictates that Congress must choose one of these alternate routes rather than abandon

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[190] *See* Rubin & Feeley, *supra* note 8, at 906.

[191] *See* Printz v. United States, 117 S. Ct. 2365, 2385 (1997) (O'Connor, J., concurring).

[192] *See id.* at 2376. Justice Scalia distinguished between statutes that "require only the provision of information to the Federal Government" and those that force "participation of the States' executive in the actual administration of a federal program." *Id.*

[193] *See* 18 U.S.C. § 922(s)(2) (Supp. 1998) (struck down by the *Printz* Court, 117 S. Ct. at 2283-84).

[194] *See infra* notes 223-26 and accompanying text (showing that not all commands endanger federalism).

[195] *See infra* notes 199-201 and accompanying text (discussing the various tools through which Congress can encourage state compliance).

[196] *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288-89 (1981).

[197] *See* South Dakota v. Dole, 483 U.S. 203, 207-08 (1987).

[198] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985).

its legislative purpose.[199] For instance, rather than command CLEOs to perform background checks, Congress could theoretically condition state receipt of law enforcement funding on satisfactory performance of such checks.[200] Where Congress cannot offer an appealing incentive, where the threat of preemption is hollow, or where compliance is essential, however, a congressional command may be the only effective tool.[201]

NCSAA commands state, local, and federal law enforcement agencies to report all missing-child cases to the Department of Justice's National Crime Information Center.[202] Congress identified two impediments to effective investigation and recovery of missing children.[203] First, prior to NCSAA, many law enforcement agencies observed waiting periods before their officers could take a missing persons report.[204] States that adopted such policies justified the delay by rationalizing that the children were not missing and would return on their own volition.[205] Congress found however that the first twenty-four hours after a child's disappearance was the period of greatest danger; it thus mandated that law enforcement agencies dispense with a waiting period and enter information about the missing child immediately.[206]

Second, Congress found that the interstate movement of abducted children would most likely occur within the first forty-eight hours of abduction.[207] Therefore, entry of information into the National Crime Information Center database would significantly aid law enforcement agencies in locating missing children.[208] Although forty-one states had their own missing children databases, the information was not entered into a national centralized database.[209] Without a national vehicle for disseminating such information, the

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[199] *See* New York v. United States, 505 U.S. 144, 166 (1992) (suggesting that Congress can use several methods to encourage state compliance with a federal plan).

[200] *See Dole*, 483 U.S. at 207-08.

[201] *See infra* notes 212-18 and accompanying text (demonstrating that commandeering is the only tool that can guarantee state compliance under certain circumstances).

[202] *See* 136 CONG. REC. H11,469 (daily ed. Oct. 22, 1990) (statement of Rep. Sensenbrenner).

[203] *See id.* (statement of Rep. Edwards).

[204] *See id.*

[205] *See id.*

[206] *See id.*

[207] *See id.* (statement of Rep. Sensenbrenner).

[208] *See* 136 CONG. REC. H11,469 (daily ed. Oct. 22, 1990) (statement of Rep. Sensenbrenner).

[209] *See id.* at H11,470 (statement of Rep. Erdreich).

information did not adequately assist law enforcement officials in locating children carried across state lines.[210] Consequently, NCSAA's sponsors enacted the measure to remedy the inconsistency in reporting procedures and formats among the states.[211]

NCSAA's reporting requirement exemplifies an instance where a congressional command may be the only effective tool. Congress must have full compliance with the reporting requirement to fulfill the purposes of NCSAA.[212] A conditional spending measure, if designed consistent with *South Dakota v. Dole*,[213] would not assure universal compliance because some states receive little federal aid for local law enforcement.[214] Likewise, Congress presumably could not preempt state and local law enforcement for two reasons.[215] First, Congress's commerce power is not broad enough to preempt the field of local law enforcement.[216] Second, even if Congress were authorized to preempt state law enforcement, doing so merely to carry out the purposes of NCSAA would be prohibitively expensive.[217] Indeed, in

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[210] *See* 136 CONG. REC. S9123 (daily ed. June 28, 1990) (statement of Sen. McConnell).

[211] *See id.*

[212] *See Serial Killers and Child Abductions: Testimony Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong. 66 (1995) (testimony of Ernest E. Allen, President, National Center for Missing and Exploited Children).

[213] 483 U.S. 203, 207-08 (1987). The Court recognized four restrictions on the exercise of the spending power. *See id.* First, "the exercise of the spending power must be in pursuit of 'the general welfare.'" *Id.* at 207. Second, any conditional spending measure must express the condition explicitly so that states are fully aware of the consequences of their decisions. *See id.* Third, the conditions on federal spending must be related to the federal interest. *See id.* Lastly, the condition must not violate any other provision of the Constitution. *See id.* at 208.

[214] *See* OFFICE OF MANAGEMENT & BUDGET, BUDGET INFORMATION FOR STATES 97 (1997). Block grants to states for local law enforcement agencies in 1996 ranged from a high of $71,223,000 in California to a low of $702,000 in West Virginia. *See id.* Thirteen states received less than $1,100,000 in block grants. *See id.* The *Dole* Court noted that a conditional spending measure must not rise to the level where it coerces state compliance. *See Dole*, 483 U.S. at 211. It seems unlikely, at least for the thirteen least subsidized states, that the federal government could offer an incentive large enough to ensure compliance, yet small enough to avoid contravening the limitation imposed by *Dole*. *See id.*

[215] *See* United States v. Lopez, 514 U.S. 549, 561 n.3 (1995); Caminker, *supra* note 2, at 1073.

[216] *See Lopez*, 514 U.S. at 561 n.3 (explaining that the states are the proper sovereign for making and enforcing criminal laws).

[217] *See* Caminker, *supra* note 2, at 1073 (opining that where Congress decides to legislate through a command the decision may merely reflect a belief that "a certain policy is not worth pursuing if its implementation would require establishing a costly, cumbersome, or otherwise intrusive federal enforcement bureaucracy, but worth pursuing if it could be implemented more inexpensively and easily through the states' existing enforcement machinery").

this case, where the costs of preemption are prohibitively high and where spending incentives cannot assure compliance, Congress needs to command.[218]

The question remains whether the Tenth Amendment will permit a command for purely ministerial purposes.[219] In light of the majority's declaration that it is the command itself that offends the Tenth Amendment, it is unclear how there could be enough constitutional breathing room for NCSAA to survive if challenged.[220] The Court has justified its non-commandeering doctrine on textual, historical, and normative grounds.[221] As demonstrated in Part III, the textual and historical explanations are not strong enough to justify the doctrine.[222] Some ministerial mandates however do not implicate these normative considerations.

Congressional commands can raise the normative federalism concerns of accountability, democracy, tyranny, and experimentation.[223] As the cases demonstrate, however, not all congressional commands raise these concerns to the same degree. For instance, LLRWAA, at issue in *New York*, triggered concerns for accountability and democracy, but not for tyranny or experimentation.[224] In contrast, the Brady Act considered in *Printz* implicates the concerns for tyranny and accountability, but not for democracy or experimentation.[225] Although NCSAA would violate the plain reading of the non-commandeering doctrine,[226] it does not raise concerns about any principle of federalism.

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[218] *But see* New York v. United States, 505 U.S. 144, 157 (1992) ("'The question is not what power the Federal Government ought to have but what powers in fact have been given by the people.'") (quoting United States v. Butler, 297 U.S. 1, 63 (1936)).

[219] *See* Printz v. United States, 117 S. Ct. 2365, 2385 (1997) (O'Connor, J., concurring) (suggesting that the Court appropriately refrained from ruling whether purely ministerial mandates should be prohibited).

[220] *See id.* at 2383 (stating that a federal command to a state offends "the very *principle* of separate state sovereignty").

[221] *See supra* notes 100-63 and accompanying text (discussing a brief history of federalism in Part II of this Note).

[222] *See supra* notes 166-90 and accompanying text (challenging the rationales for the anti-commandeering doctrine).

[223] *See supra* notes 9-12 (discussing the principles of federalism).

[224] *See* New York v. United States, 505 U.S. 144, 149, 168-69 (1992).

[225] *See* Printz v. United States, 117 S. Ct. 2365, 2368, 2377 (1997).

[226] *But see* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 769 (1982) (holding that there had been no command to the States, even though the statute required state utilities to consider federal regulations yearly). The Court might make a distinction between statutes that command state officials to enforce a statute and those that require reporting information gathered in the normal course

The overinclusiveness of the non-commandeering doctrine evidences its lack of a guiding principle. An absolute prohibition on commandeering is neither provided for explicitly in the Constitution, nor necessary to secure the values of federalism. Here, purely ministerial reporting requirements are subsumed within the rule, even though some reporting requirements pose none of the dangers the rule was intended to prevent. Such overinclusiveness is indefensible when the Court is capable of protecting those interests in the normal course of judicial review. Therefore, the Court should abandon the non-commandeering doctrine in favor of a balancing test that directly protects the principles the Framers intended the Tenth Amendment to secure.

V. CONCLUSION

Since opening the door to judicial protection of federalism principles, the Court has struggled to find a manageable framework.[227] The traditional government function test proved virtually impossible to apply because the Court could not determine logically what was "traditional."[228] Likewise, the Court's current non-commandeering doctrine will prove unworkable. If the Court applies the rule consistently, it will frustrate some legitimate purposes of Congress without furthering the goals of federalism. If, however, the Court creates unprincipled exceptions to the doctrine, it will become as vague as the test in *National League of Cities*,[229] which prompted the Court to abandon its federalism jurisprudence in 1985. If the Court indeed has a "constitutional responsibility"[230] to protect the states against federal intrusions, it should adopt a test better tailored to protect the underlying principles of the Tenth Amendment.

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of state duties. *See id.* This distinction would narrow the scope of the anti-commandeering doctrine, but it would also lead to the same interpretive problems that prompted Justice O'Connor's dissent in *FERC*. *See* 456 U.S. at 779 (O'Connor, J., dissenting in part and concurring in part).

[227] *See* TRIBE, *supra* note 34, at 395 (arguing that "[t]he notion that the Supreme Court has the obligation to protect against federal incursions on states' rights seems unassailable; but the rickety structure which the Court put in place to protect those rights turned out to do no such thing.").

[228] *See supra* note 94 and accompanying text (summarizing the holding in *Garcia*).

[229] *See supra* notes 31-48 (discussing *National League of Cities*).

[230] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 588-89 (1985) (O'Connor, J., dissenting) (urging that the Court should adjudicate conflicts between the commerce power and states' rights).

The following framework would give courts flexibility to strike down statutes that pose a grave danger to the principles of federalism, while upholding statutes with minimal effects on the federal balance or where the national interest outweighed any threat to state sovereignty. First, does the federal statute regulate the states as states? Second, does the statute have a substantial impact on the accountability of state officials to their electorates, on the ability of states to experiment, or on the ability of citizens to influence the direction of local government? Third, does the federal statute pose a threat of tyranny? Fourth, could the federal interest be served with a lesser impact on the principles of state sovereignty. Finally, is the nature of the federal interest so compelling that the principles of state sovereignty must yield?

The Constitution does not impose specific limits on Congress's power to direct the states, because when the Framers wrote the Constitution they did not conceive that the federal government would take on such an expansive role.[251] The distinction between those powers enumerated and those reserved to the states seemed clear when commerce meant commerce.[252] As the Court interpreted commerce more expansively, however, the line where federal authority ended and state authority began became blurred. The modern Court understands that if the Tenth Amendment is interpreted as merely a truism, and the commerce power as plenary, the federal system cannot fulfill its promise. Therefore, rather than using commandeering as a proxy for preserving federalism, the Court should either move closer to the original meaning of commerce,[253] or explic-

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[251] *See* New York v. United States, 505 U.S. 144, 157 (1992). Justice O'Connor noted that

> [t]he Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities.

Id. (emphasis in original).

[252] *See* United States v. Lopez, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring). Justice Thomas instructed that

> [a]t the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes .... As one would expect, the term "commerce" was used in contradistinction to productive activities such as manufacturing and agriculture.

Id. (citations omitted).

[253] *See id.* at 567 (declining to expand further the scope of the commerce power).

itly balance federal interests against the principles underlying the Tenth Amendment.[234]

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[234] *See* Printz v. United States, 117 S. Ct. 2365, 2383 (1997) (declaring that a law directing a state executive to act compromises the structure of dual sovereignty).