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11-13-2020

## Distinguishing Permissible Preemption from Unconstitutional Commandeering

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### Recommended Citation

96 Notre Dame L. Rev. 351 (2020)

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# DISTINGUISHING PERMISSIBLE PREEMPTION FROM UNCONSTITUTIONAL COMMANDEERING

*Edward A. Hartnett\**

For years, the preemption doctrine and the anticommandeering doctrine lived in an uneasy tension, with each threatening to consume the other. On the one hand, preemption permits Congress to insist that state law give way to congressional demands. On the other hand, the anticommandeering doctrine prohibits Congress from commandeering state legislatures or state executives. Without some way to establish a boundary between the two, preemption could swallow the anticommandeering doctrine by allowing Congress to control state law. Alternatively, absent some boundary, anticommandeering could swallow preemption by empowering states to refuse to be governed by the commands of federal law. Either the autonomy of the states or the supremacy of federal law would have to go.

The conventional way to draw the boundary between permissible preemption and unconstitutional commandeering had been to distinguish between Congress telling the states what they couldn't do and Congress telling the states what they had to do. A negative command was permissible preemption, while an affirmative command was impermissible commandeering.

This distinction was deeply unsatisfying. It is not hard to rewrite a positive command and make it negative in form. If that's all it took to turn unconstitutional commandeering into permissible preemption, the anticommandeering doctrine could be evaded at will.

The problem was posed in stark form by the Professional and Amateur Sports Protection Act (PASPA), a statute that made it unlawful for states to

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authorize sports gambling.<sup>1</sup> When litigation arose about the constitutionality of PASPA, it was obvious that the anticommandeering doctrine would bar Congress from requiring states to prohibit sports gambling. But if Congress could effectively require states to prohibit sports gambling by instead insisting that states not authorize sports gambling, the anticommandeering doctrine would be a dead letter. On the other hand, if Congress were barred by the Constitution from telling the states what they couldn't do, it seemed that preemption would be a dead letter. Rather than risk federal supremacy, the lower courts viewed PASPA as preemption, permissibly telling the states what they couldn't do.<sup>2</sup>

For the challenge to PASPA to prevail in the Supreme Court, the Justices had to be convinced not only that distinguishing between negative prohibitions and affirmative commands was the wrong way to separate permissible preemption from unconstitutional commandeering, but also that there was a better and more principled way to separate permissible preemption from unconstitutional commandeering.

And that's exactly what happened. The Supreme Court, in an opinion written by Justice Alito, rejected the distinction between affirmative commands and negative prohibitions as "empty."<sup>3</sup> Instead, it held that the right distinction is between federal laws that regulate the people directly (and accordingly can permissibly preempt state law) and federal laws that regulate the state's regulation of the people (and are therefore unconstitutional attempts at commandeering).<sup>4</sup>

Strikingly, seven Justices—including Justices Breyer and Kagan—explicitly agreed with this understanding of the Constitution. Even more strikingly, no Justice expressed any different understanding of the Constitution. Although Justices Ginsburg and Sotomayor dissented on severability grounds, they did not express any disagreement with the Court's constitutional analysis. (Justice Breyer also dissented on severability grounds, but expressly agreed with the Court's constitutional analysis.)<sup>5</sup>

Other federalism decisions have produced closer votes, strong dissents, and adherence to dissenting views in subsequent cases—rather than acceptance as a matter of precedent. Why the difference here?

Perhaps a more principled distinction between preemption and commandeering helped make the anticommandeering doctrine more acceptable. Perhaps greater focus on the reasons for the Constitutional Convention's decision in favor of a federal government acting directly on individuals helped make the anticommandeering doctrine more persuasive.

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1 28 U.S.C. § 3702 (2018).

2 *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208, 230 (3d Cir. 2013) ("When Congress passes a law that operates via the Supremacy Clause to invalidate contrary state laws, it is not telling the states what to do, it is barring them from doing something they want to do.").

3 *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018).

4 *Id.* at 1478–79.

5 *See id.* at 1489–90 (Ginsburg, J., dissenting).

Perhaps the changing political valence of the anticommandeering doctrine helped demonstrate its value. And perhaps the majority's willingness to leave some things unsaid also helped move the Court toward consensus.

Whatever the cause, the anticommandeering doctrine emerged from its encounter with PASPA stronger, more principled, and with broader—perhaps unanimous—support on the Supreme Court.

Part I discusses the conventional understanding and critique of the distinction between preemption and commandeering. Part II describes the difficulties that this conventional understanding and critique presented for the constitutional challenge to PASPA. Part III explains the more principled way to distinguish between preemption and commandeering adopted by the Supreme Court in *Murphy v. National Collegiate Athletic Ass'n*. Part IV explores possible reasons why no Justice offered any competing views of this constitutional issue. Part V critically evaluates the implications of *Murphy* across a wide range of areas including state taxation, gun control, and immigration.

## I. THE CONVENTIONAL UNDERSTANDING AND CRITIQUE

Preemption has conventionally been categorized as consisting of three types: express preemption, field preemption, and conflict preemption, with the latter two viewed as forms of implied preemption.<sup>6</sup> A common way for Congress to phrase an express preemption provision is as a prohibition on states establishing or keeping in effect certain kinds of state law.

For example, the National Traffic and Motor Safety Act of 1966 provides that “no State . . . shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.”<sup>7</sup> The Medical Device Amendments Act of 1976 provides that “no State . . . may establish or continue in effect with respect to a device intended for human use any requirement—(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device.”<sup>8</sup> And the Federal Boat

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6 See, e.g., *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (noting that “[p]re-emption may be either expressed or implied,” and that there are “at least two types of implied pre-emption: field pre-emption . . . and conflict pre-emption”); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000) (noting that the three categories “are not ‘rigidly distinct’” (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990))). It is far from clear that this taxonomy does more good than harm, even in its treatment of “field” and “conflict” preemption as inherently “implied.” Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 262–63 (2000) (“If Congress has the constitutional power to occupy a particular field, a federal statute may do so either expressly or by implication; the statute may contain an express preemption clause to that effect, or it may simply imply such a clause. . . . The same goes for what the Court calls ‘conflict’ preemption . . .”).

7 15 U.S.C. § 1392(d) (1988) (repealed 1994); see *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867 (2000).

8 21 U.S.C. § 360k(a) (2018); see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996).

Safety Act of 1971 provides that “a State . . . may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed” by the federal standard.<sup>9</sup>

Other express preemptions provisions are quite similar but use the passive voice. For example, the Public Health Cigarette Smoking Act of 1969 provides that “[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.”<sup>10</sup> And the Federal Meat Inspection Act provides that “[r]equirements . . . with respect to premises, facilities and operations of any establishment at which inspection is provided under [this law], which are in addition to, or different than those made [under this law] may not be imposed by any State.”<sup>11</sup>

Not all express preemption provisions are directed at the states in this way,<sup>12</sup> but such phrasing is common enough that it was easy to think of preemption as a federal directive to states requiring that they not have or enforce certain law. And it was natural for the Supreme Court to say broadly, “Congress has the power to pre-empt state law. There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express pre-emption provision.”<sup>13</sup>

Viewing preemption as involving prohibitions imposed on states by Congress became even more attractive once the modern anticommandeering cases were decided. In *New York v. United States*, the Court held that the take-title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 was unconstitutional because it “commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”<sup>14</sup> The Court relied heavily on the contrast between the Articles of Confederation and the Constitution. Under the Articles, Congress issued commands to the states. This proved ineffective, lead-

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9 46 U.S.C. § 4306 (2012); see *Sprietsma v. Mercury Marine*, 537 U.S. 51, 58–59 (2002).

10 15 U.S.C. § 1334 (2018); see *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 515 (1992).

11 21 U.S.C. § 678 (2018); see *Jones v. Rath Packing Co.*, 430 U.S. 519, 530 n.17 (1977).

12 The express preemption provision of the Copyright Act, for example, is phrased in terms of what rights a person is entitled to under state law. 17 U.S.C. § 301 (2018) (“[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . that are fixed in a tangible medium of expression and come within the subject matter of copyright . . . are governed exclusively by this title. . . . [N]o person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”).

13 *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citations omitted).

14 505 U.S. 144, 176 (1992) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

ing to the Constitution, which empowers Congress to act directly on individuals.<sup>15</sup>

Five years later, in *Printz v. United States*, the Court held that the provision of the Brady Handgun Violence Prevention Act that required local chief law enforcement officers to conduct background checks was unconstitutional. It explained:

We 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 States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.<sup>16</sup>

Given that the statutes held unconstitutional in *New York* and *Printz* imposed affirmative duties on state legislatures and executives, while numerous express preemption statutes were phrased as prohibitions on state lawmaking and law enforcement, it was common to describe the distinction between unconstitutional commandeering and permissible preemption as the difference between affirmative commands and negative prohibitions.

A number of prominent scholars characterized the distinction in these terms.<sup>17</sup> So, too, the United States Court of Appeals for the Second Circuit largely relied on this distinction in upholding federal statutes prohibiting state and local laws that restricted state and local officials from communicating with immigration authorities. It explained that "Congress has not compelled state and local governments to enact or administer any federal regulatory program. Nor has it affirmatively conscripted states, localities, or their employees into the federal government's service."<sup>18</sup> The challenged statutes "do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS."<sup>19</sup>

15 *Id.* at 163.

16 *Printz v. United States*, 521 U.S. 898, 935 (1997); *see also* Transcript of Oral Argument at 51–52, *Printz*, 521 U.S. 898 (Nos. 95-1478, 95-1503) ("[I]t's surprising how . . . rarely [the federal government] tells a State you must do something. . . . As opposed to . . . that you shouldn't do something under the Supremacy [Clause]" (Kennedy, J.)).

17 *E.g.*, Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, *Printz*, and Yeskey, 1998 SUP. CT. REV. 71, 89–94; Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1054 (1995); Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11, 28 (2000). *But see* Erwin Chemerinsky, *Empowering States: A Rebuttal to Dr. Greve*, 33 PEPP. L. REV. 91, 93 (2005).

18 *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999).

19 *Id.* (upholding 8 U.S.C. § 1373 and § 1644); *see Note, States' Commandeered Convictions: Why States Should Get a Veto Over Crime-Based Deportation*, 132 HARV. L. REV. 2322, 2327 (2019) (describing *City of New York* as drawing roughly the same distinction that *Murphy* rejected); Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and*

Viewing the distinction between permissible preemption and unconstitutional commandeering as the difference between affirmative commands and negative prohibitions left the anticommandeering doctrine vulnerable. Such a distinction is unprincipled and completely manipulable, leading some to argue that the anticommandeering doctrine should be rejected.<sup>20</sup>

In addition, simply because the Constitution empowered Congress to regulate individuals directly does not mean that it eliminated the power of Congress to issue commands to the states. If one kind of power is insufficient, that's a good reason to add a different kind of power, but it's hardly a reason to conclude that the preexisting power was eliminated.

As Justice Stevens put it:

Under the Articles of Confederation, the Federal Government had the power to issue commands to the States. See Arts. VIII, IX. Because that indirect exercise of federal power proved ineffective, the Framers of the Constitution empowered the Federal Government to exercise legislative authority directly over individuals within the States, even though that direct authority constituted a greater intrusion on state sovereignty. Nothing in that history suggests that the Federal Government may not also impose its will upon the several States as it did under the Articles. The Constitution enhanced, rather than diminished, the power of the Federal Government.<sup>21</sup>

## II. CHALLENGING PASPA

The Professional and Amateur Sports Protection Act makes it “unlawful” for “a governmental entity to . . . authorize by law” sports gambling.<sup>22</sup> Under the conventional understanding of the distinction between permissible preemption and unconstitutional commandeering, this sounded like a negative prohibition and therefore permissible preemption. A challenge to PASPA,

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*Immigration Localism*, 119 COLUM. L. REV. 837, 853 (2019) (describing *Murphy* as “the recent expansion of the anticommandeering doctrine by the Supreme Court to cover not only federal mandates for affirmative state or local action but also federal efforts to prohibit states and localities from taking specific actions”); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 869 (N.D. Ill. 2018) (referring to the “pre-*Murphy* command-versus-proscription dichotomy”); *New York v. U.S. Dep’t of Just.*, 343 F. Supp. 3d 213, 234 (S.D.N.Y. 2018) (“It is clear that *City of New York* cannot survive the Supreme Court’s decision in *Murphy*.”), *rev’d and remanded*, 951 F.3d 84, 113 (2d Cir. 2020) (acknowledging that “*Murphy* may well have clarified that prohibitions as well as mandates can manifest impermissible commandeering” but upholding 8 U.S.C. § 1373 as applied to a federal funding requirement).

20 Adler & Kreimer, *supra* note 17, at 143 (concluding that “[t]here is simply no difference . . . between permissible preemption and impermissible commandeering” and expressing hope that the anticommandeering doctrine will soon be outgrown); Caminker, *supra* note 17, at 1088–89 (concluding that the “Court’s antagonism towards . . . commandeering is driven by attitude, not analysis” and that the doctrine “disserves all concerned”); Tushnet, *supra* note 17, at 40 (concluding that the distinction between commandeering and preemption is “difficult to sustain”).

21 *New York v. United States*, 505 U.S. 144, 210 (1992) (Stevens, J., concurring in part).

22 28 U.S.C. § 3702 (2018).

then, could not rely on the conventional distinction between permissible preemption and unconstitutional commandeering. Instead, it would have to reject that conventional distinction.

Articulating reasons to reject that conventional distinction was straightforward: if a prohibition on authorization were treated as permissible preemption, the anticommandeering doctrine would be eviscerated. Congress could simply reframe anything it wanted to require states to do as a prohibition. A distinction between “Thou shalt” and “Thou shalt not” is easily circumvented, as even the Bible itself illustrates. The famous prohibition in Exodus—“Thou shalt not covet thy neighbour’s house, thou shalt not covet thy neighbour’s wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour’s”—is rephrased in the Bible itself as a positive command: “Let your conversation be without covetousness; and be content with such things as ye have . . . .”<sup>23</sup>

States could be required to take title to radioactive waste by prohibiting states from authorizing anyone but the state to own and possess radioactive waste. States could be required to run background checks by prohibiting states from authorizing anyone to carry a gun without local law enforcement first completing background checks. States could be required to enact a fifty-five-mile-per-hour speed limit by prohibiting states from authorizing anyone to drive more than fifty-five miles per hour. States could be required to enact a fifteen dollar minimum wage by prohibiting states from authorizing anyone to employ another unless the employee is paid a minimum of fifteen dollars per hour. And so on.

But there was a big problem.

By rejecting the conventional distinction between permissible negative prohibitions and unconstitutional affirmative commands, the challengers echoed and embraced the critics of the anticommandeering doctrine. Yet if the critics were right that the conventional distinction was unprincipled and manipulable, weren’t they also right the anticommandeering doctrine should be rejected? Challenging PASPA could lead to the death of the very anticommandeering doctrine the challengers relied on as the basis of their challenge.

To avert this result, the challengers could point to a much earlier case that the *New York* Court had relied upon to show that the anticommandeering was not an “innovation.” That 1911 case, *Coyle v. Smith*, was cited in *New York* for the proposition that “[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”<sup>24</sup> *Coyle* involved a 1906 federal statute that admitted Oklahoma to the Union but barred Oklahoma from moving its capital from the city of Guthrie prior to 1913. The equal-footing doctrine—the principle that newly admitted

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23 Compare Exodus 20:17 (King James), with Hebrews 13:5 (King James).

24 *New York*, 505 U.S. at 162 (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)).



states stand on an equal footing with all others—was the immediate ground of decision. But the premise for applying that doctrine was a firm assertion: “That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained.”<sup>25</sup>

Although Congress issued a negative prohibition, telling Oklahoma what it could not do, the Supreme Court held that prohibition unconstitutional. It did not matter that Oklahoma was told that it could not move its capital from Guthrie, rather than that it had to have its capital at Guthrie. The negative prohibition was unconstitutional. And the *New York* Court treated that holding in *Coyle* as proof that the anticommandeering doctrine was no innovation.

But that then led to another big problem: if the anticommandeering doctrine not only prevents Congress from issuing positive commands to the states, but also prevents Congress from issuing negative commands to the states, what would happen to preemption? A host of preemption statutes tell states what they have no authority to do. If the choice was between undermining preemption or adhering to a dubious distinction, the odds are good that the distinction would survive, with *Coyle* limited to federal laws that threatened the “separate and independent existence” of the states.<sup>26</sup>

A better way to distinguish between permissible preemption and unconstitutional commandeering was required. And that required a return to first principles.

### III. A BETTER WAY

A central flaw in the Articles of Confederation was the reliance on a national power of issuing commands to the states.<sup>27</sup> As James Madison put it at the Convention, “The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands.”<sup>28</sup> Madison and Hamilton made the same point during the ratification debates, explaining that “a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity.”<sup>29</sup>

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25 *Coyle*, 221 U.S. at 565.

26 *New York*, 505 U.S. at 204 (White, J., concurring in part) (first citing *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869); and then citing *Coyle*, 221 U.S. at 580). This was the path taken by the Court of Appeals in the first round of litigation challenging PASPA. *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208, 230 (3d Cir. 2013) (“When Congress passes a law that operates via the Supremacy Clause to invalidate contrary state laws, it is not telling the states what to do, it is barring them from doing something they want to do.”).

27 See ARTICLES OF CONFEDERATION of 1781, arts. VIII, IX.

28 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 9 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

29 THE FEDERALIST NO. 20, at 138 (James Madison) (Clinton Rossiter ed., 1961).

The Constitution repudiated the Articles of Confederation by empowering the national government to regulate the people directly. This central principle is reflected in the various enumerated powers given to Congress in Article I and reflects the overall structure of the Constitution. The Commerce Clause is a prominent example. It provides that Congress shall have power to regulate commerce among the several states.<sup>30</sup> By its terms, the Commerce Clause “authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”<sup>31</sup> Congress has the power to lay and collect taxes, but not the power to requisition funds from the states and command them to impose taxes.<sup>32</sup> Similarly, Congress has the power to provide for the common defense and general welfare of the United States, but no power to command the states to spend state money as Congress demands.<sup>33</sup>

The decision to create a national government acting directly on the people was profound, for it meant that the Constitution had to be made in the name of the people rather than the states, and had to be ratified by the people, assembled in convention, rather than by the state legislatures.<sup>34</sup> As Chief Justice Marshall put it, “The government of the Union . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them.”<sup>35</sup> The Constitution thus “created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”<sup>36</sup>

The Framers did seriously consider—at Madison’s repeated insistence—giving Congress the additional power “to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union.”<sup>37</sup> On May 31, 1787, the Committee of the Whole approved

30 U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .”).

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

32 U.S. CONST. art. I, § 8 (“The Congress shall have power To lay and collect Taxes . . . .”); *see, e.g.*, MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 148 (2016) (“The consensus among delegates for empowering Congress to levy taxes—rather than simply requisition funds—which would obviate the need for a power to coerce states, was so strong that little discussion was devoted to the subject.”).

33 *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576–77 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ.) (noting that because Spending Clause legislation is in the nature of a contract, the “legitimacy of Congress’s exercise of the spending power” depends on “whether the State voluntarily and knowingly accepts the terms of the ‘contract’” (first quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002); and then quoting *Penhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981))).

34 *See* U.S. CONST. pmb., art. VII.

35 *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404–05 (1819).

36 *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

37 1 FARRAND’S RECORDS, *supra* note 28, at 21.

this proposal without debate.<sup>38</sup> In July, however, the delegates reversed their approval of the congressional veto because the negative would be “terrible to the States,” “unnecessary,” and “improper.”<sup>39</sup>

A nation in which two sovereign governments are both empowered to operate directly on the people needs a rule of priority to resolve conflicts between the two sets of laws. The traditional default rule would have been that the later statute prevailed.<sup>40</sup> That was unacceptable because it would have failed to overcome the vices of the Articles—at least absent Madison’s beloved but rejected veto over state legislation.

Instead, the Framers adopted the Supremacy Clause.<sup>41</sup> The Supremacy Clause is not a grant of power to Congress. It is, instead, a rule of priority establishing that a valid federal law displaces contrary state law.<sup>42</sup> It

is critically important to note the Supremacy Clause itself does not authorize Congress to preempt state laws [because it] only prescribed a constitutional choice-of-law rule . . . . If the Clause were meant to be an affirmative grant of congressional power, it would likely reside in the metropolis of congressional power, Article I, Section 8, rather than in the suburbs of Article VI.<sup>43</sup>

As a choice-of-law rule, the Supremacy Clause and its “doctrinal descendent preemption” have “no substantive component” and are not a power or means of exercising congressional power.<sup>44</sup>

Once it is understood that preemption is not a power of the national government, but only the byproduct of the rule of priority established by the Supremacy Clause, a better way to understand the distinction between permissible preemption and unconstitutional commandeering emerges: preemption can occur only when Congress establishes a valid federal rule governing the people, pursuant to some other constitutionally enumerated

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38 *Id.* at 61.

39 2 *id.* at 27; see *Fed. Energy Regul. Comm’n v. Mississippi*, 456 U.S. 742, 794 (1982) (O’Connor, J., dissenting) (tracing this history).

40 See Nelson, *supra* note 6, at 237 (2000) (citing authorities from Blackstone to Federalist 78).

41 See, e.g., JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 81–82, 171–77 (1996).

42 See *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–25 (2015) (describing the Supremacy Clause as a “rule of decision” that “instructs courts what to do when state and federal law clash”); *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2262 (2020) (stating that the Supremacy Clause “‘creates a rule of decision’ directing state courts that they ‘must not give effect to state laws that conflict with federal law’” (quoting *Armstrong*, 575 U.S. at 324)).

43 Viet D. Dinh, *Reassessing the Law of Preemption*, 88 *Geo. L.J.* 2085, 2088 (2000).

44 Allison H. Eid, *Preemption and the Federalism Five*, 37 *RUTGERS L.J.* 1, 6–8 (2005).

power.<sup>45</sup> The federal rule preempts because it displaces state law and replaces the state law with a valid federal rule.<sup>46</sup>

The federal law stands on its own bottom, can be enforced without regard to state law, and requires nothing of state law or state action other than to give way to superior federal law.<sup>47</sup> The people must obey that federal law. And the courts, both state and federal, must decide cases in accordance with that federal law, “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>48</sup> But unless there is a federal rule directly governing the people’s conduct, there is no predicate for preemption.

If the national government directly regulates the people, and requires a state to stand aside, that is permissible preemption.<sup>49</sup> However, if the national government attempts to require a state to govern according to Congress’s instructions by using a state against its will to regulate its people, that is impermissible commandeering.

45 See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (describing the commerce power as “the power to regulate; that is, to prescribe the rule by which commerce is to be governed”).

The federal government may also insist that it, its instrumentalities, its officers, and its transactions be governed by federal law rather than state law. See, e.g., *Dawson v. Steager*, 139 S. Ct. 698, 702 (2019); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 501 (1988); *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 367 (1943); *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 360–62 (1819). Where rights and obligations of private parties are involved, this is easily viewed as a form of preemption. Where rights and obligations of private parties are not involved, it is more commonly described as intergovernmental immunity.

46 Nelson, *supra* note 6, at 250–52. See *Petersburg Cellular P’ship v. Bd. of Superiors of Nottoway Cnty.*, 205 F.3d 688, 703 (4th Cir. 2000) (Niemeyer, J.) (“Congress may govern directly the people . . . . But it may not govern the states for the purpose of indirectly exacting its will on the people. Preemption involves the direct federal governance of the people in a way that supersedes concurrent state governance of the same people, not a federal usurpation of state government . . . for federal ends.” (emphasis omitted) (first citing *Alden v. Maine*, 527 U.S. 706, 710 (1999); then citing *Printz v. United States*, 521 U.S. 898, 919–20 (1997); and then citing *New York v. United States*, 505 U.S. 144, 162 (1992))).

47 See Nelson, *supra* note 6, at 252 (“[T]he Supremacy Clause says that courts must apply all valid rules of federal law. To the extent that applying state law would keep them from doing so, the Supremacy Clause requires courts to disregard the state rule and follow the federal one.”); Eid, *supra* note 44, at 38 (noting that preemption is the “doctrinal descendant of the Supremacy Clause,” which “acts as a conflict-of-laws principle that instructs courts to apply federal law in the event of a conflict with state law”).

48 U.S. CONST. art. VI, § 2.

49 A police officer commandeers a car whether he gets in the passenger seat and orders the driver to “follow that car!” or pulls the driver out of the car and drives it himself—with or without issuing an affirmative command, the officer is using the car for his own ends, not the driver’s. By contrast, a police officer does not commandeer anything if he stays in his own patrol car, turns on the siren, and affirmatively commands drivers blocking his way to move to the side. Cf. *Jed Rubinfeld*, *Usings*, 102 YALE L.J. 1077, 1114–15 (1993).

Permissible preemption is predicated on Congress telling the people what they can't do, what they must do, or what they may do. Most laws are some combination of these requirements.

Some laws look like prohibitions. For example, federal law prohibits paying less than a minimum wage,<sup>50</sup> employing children,<sup>51</sup> or distributing (even possessing) marijuana.<sup>52</sup>

Some laws look like regulations. For example, federal law regulates the production of medical devices,<sup>53</sup> the generation of nuclear power,<sup>54</sup> and the sale of securities.<sup>55</sup>

Some laws look like requirements. For example, federal law requires people to file income tax returns,<sup>56</sup> to pay income taxes,<sup>57</sup> to include headlights on cars,<sup>58</sup> to print warnings on cigarettes,<sup>59</sup> and to provide disclosures before extending credit.<sup>60</sup>

But no prohibition prohibits everything, and all regulations prohibit something. The prohibition on paying less than a minimum wage does not apply to adequately tipped employees,<sup>61</sup> the bar on child labor does not apply to a broad range of agricultural work,<sup>62</sup> and even the ban on distributing marijuana does not apply to certain preapproved research studies.<sup>63</sup> The laws governing medical devices,<sup>64</sup> nuclear power,<sup>65</sup> and securities<sup>66</sup> set out both what the people can't do, and what they may do.

Plus, requirements are almost always conditional: include headlights *if* you manufacture a car; print warnings *if* you sell cigarettes; provide disclo-

50 29 U.S.C. § 206 (2018); *see* *United States v. Darby*, 312 U.S. 100, 117 (1941).

51 29 U.S.C. § 212 (2018); *see Darby*, 312 U.S. at 116 (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918)).

52 21 U.S.C. §§ 812, 841(a), 844 (2018); *see Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (upholding federal prohibition of marijuana possession and distribution).

53 *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 316 (2008) (describing the Medical Device Amendments of 1976 as “impos[ing] a regime of detailed federal oversight”).

54 Atomic Energy Act, 42 U.S.C. §§ 2011–2023 (2018); *see Va. Uranium v. Warren*, 139 S. Ct. 1894, 1902 (2019).

55 *E.g.*, 15 U.S.C. §§ 78j, 77q (2018); *see Lorenzo v. SEC*, 139 S. Ct. 1094, 1100 (2019).

56 26 U.S.C. §§ 7203, 6012 (2018).

57 *Id.* § 1.

58 49 U.S.C. § 30111 (2012); 49 C.F.R. § 571.108 (2019).

59 15 U.S.C. § 1333 (2018); *see Altria Grp., Inc. v. Good*, 555 U.S. 70, 77–78 (2008).

60 Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1693 (2018); *see Wolfington v. Reconstructive Orth. Assocs.*, 935 F.3d 187, 196 (3d Cir. 2019).

61 29 U.S.C. §§ 203(m)(2)(A), 206(a) (2018).

62 *Id.* § 213(c)(1).

63 *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (first citing 21 U.S.C. §§ 823(f), 841(a)(1), 844(a) (2018); and then citing *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001)).

64 *E.g.*, 21 U.S.C. § 353 (2018).

65 *E.g.*, 42 U.S.C. § 2131 (2012).

66 *E.g.*, 15 U.S.C. § 78n (2018).

sure *if* you extend credit. Even the laws requiring the filing of tax returns and paying taxes are conditioned on earning enough income.<sup>67</sup>

If a federal rule operates directly on the people by telling them what they can't do, what they must do, what they may do, or some combination of these, it can act as a predicate for preemption.

To the extent a federal rule tells the people what they can't do, states cannot immunize people from the obligation to obey federal law—as they could have under the traditional last-in-time rule. But the states need not (and in some instances, may not) enact or maintain similar prohibitions as a matter of state law.

To the extent that a federal rule tells the people what they must do, states cannot immunize people from the obligation to obey federal law. But the states need not (and in some instances, may not) enact or maintain similar requirements as a matter of state law.

To the extent that a federal rule tells the people what they may do, an important additional question must be answered: Is the federal determination that the people may do something merely a determination that the federal government has no objection to that conduct? Or is it a federal determination that the people have a right to engage in that conduct? If the former, there is merely a withholding of a federal prohibition, and states are free to impose their own prohibitions and limitations on that conduct. But if the latter, states may not prevent the people from exercising that federal right.<sup>68</sup>

The famous case of *Gibbons v. Ogden* provides an early example of the latter, interpreting a federal law permitting certain vessels to engage in the coasting trade as conferring a right to engage in that trade.<sup>69</sup>

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67 26 U.S.C. §§ 1, 63, 6012.

68 In Hohfeldian terms, one might say that the question is whether federal law has merely created a federal “privilege” in those allowed to engage in that conduct, with a correlative federal “no-right” in the state to stop that conduct or has gone further and created a federal “right” to engage in that conduct, with a correlative federal “duty” of the state to refrain from interfering with that conduct. See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

69 22 U.S. (9 Wheat.) 1, 212 (1824) (“To the Court it seems very clear, that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade.”). The Court toyed with the idea that, in the area subject to federal authority under the Commerce Clause, all federal rules that allow conduct create federal rights to engage in that conduct. *Id.* at 209 (noting that there is “great force” to the argument that “as the word ‘to regulate’ implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.”). Again, in Hohfeldian terms, the Court toyed with idea that the jural relationship of privilege/no-right was not available. That idea never fully took root (although a truncated version

It might be thought that federal *deregulatory* statutes preempt without establishing a federal rule. But a moment's analysis reveals this to be in error. When Congress chooses to deregulate an area, such as the routes and prices of airlines and trucks, it does establish a federal rule telling the people what they may do, in the strong sense of telling the people what they have a right to do. The federal rule is that the people have a federal right to engage freely in that activity (as delimited by federal law).<sup>70</sup> Of course, Congress could deregulate in a much weaker sense, simply by removing an existing federal regulation, without creating a right to engage in that conduct. Imagine, for example, if Congress were to remove marijuana from the schedule of controlled substances: it would not thereby create a federal right to possess or distribute marijuana.<sup>71</sup>

This better way of understanding the distinction between permissible preemption and unconstitutional commandeering was adopted by seven members of the Supreme Court, with no Justice expressing disagreement with it.<sup>72</sup>

In an opinion written by Justice Alito, the Court observed that the defenders of PASPA argued that “the laws challenged in *New York* and *Printz* ‘told states what they must do instead of what they must not do,’ [and] that commandeering occurs ‘only when Congress goes beyond precluding state action and affirmatively commands it.’”<sup>73</sup> The Court flatly rejected this conventional understanding: “This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded ‘affirmative’ action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event.”<sup>74</sup>

Having rejected the conventional understanding, it adopted the better understanding described above. First, the Court noted that “[p]reemption is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress. Instead, it simply provides ‘a rule of deci-

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became the negative (or dormant) Commerce Clause doctrine) and would be completely untenable under modern views of the scope of the Commerce Clause.

70 See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (quoting 49 U.S.C. app. § 1302(a)(4) (1988)); *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 367 (2008) (noting that Congress had chosen “maximum reliance on competitive market forces” (quoting *Morales*, 504 U.S. at 378)).

71 See *Marijuana Justice Act of 2019*, S. 597, 116th Cong. (2019) (recognizing implicitly that descheduling marijuana would leave states free to regulate it).

72 Justice Ginsburg, joined by Justice Sotomayor, assumed arguendo that the challenged portions of PASPA were unconstitutional and dissented on severability grounds. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1489 (2018) (Ginsburg, J., dissenting).

73 *Murphy*, 138 S. Ct. at 1478 (quoting Brief for Respondents at 19, *Murphy*, 138 S. Ct. 1461 (Nos. 16-476, 16-477), 2017 WL 4684747, at \*19).

74 *Id.*

sion’” that “federal law is supreme in case of a conflict with state law.”<sup>75</sup> As a result, for a federal law to preempt state law, there has to be a basis for it other than the Supremacy Clause. And, because the Constitution empowers Congress to regulate individuals, not states, for a federal law to be valid, it “must be best read as one that regulates private actors.”<sup>76</sup>

Rather than get bogged down in the frequently unhelpful task of classifying preemption as “conflict,” “express,” or “field,” the Court cut through their differences to the fundamental similarity at their core: “[A]ll of them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.”<sup>77</sup>

This key insight not only adopts the better understanding of the difference between permissible preemption and unconstitutional commandeering but also clarifies the nature of preemption more generally. A deregulatory statute works the same way; “[i]t confers on private entities . . . a federal right to engage in certain conduct subject only to certain (federal) constraints.”<sup>78</sup>

Turning to the particular provision at issue in *Murphy*, the Court explained:

Once this is understood, it is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors. It certainly does not confer any federal rights on private actors interested in conducting sports gambling operations. (It does not give them a federal right to engage in sports gambling.) Nor does it impose any federal restrictions on private actors. If a private citizen or company started a sports gambling operation, either with or without state authorization, § 3702(1) would not be violated and would not provide any ground for a civil action by the Attorney General or any other party. Thus, there is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow.<sup>79</sup>

The Court also clarified the basis for its decision in *Reno v. Condon*, which upheld a federal law restricting the disclosure and dissemination of personal information provided in applications for driver’s licenses.<sup>80</sup> That law, the Driver Privacy Protection Act, did not violate the anticommandeering doctrine because it “applied equally to state and private actors” and “did

75 *Id.* at 1479 (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015)).

76 *Id.*

77 *Id.* at 1480.

78 *Id.*

79 *Id.* at 1481. The Court recognized “that a closely related provision of PASPA, § 3702(2), *does* restrict private conduct, but that is not the provision challenged by petitioners,” and in a later part of the opinion (not joined by Justice Breyer), decided “whether § 3702(2) is severable from the provision directly at issue in these cases.” *Id.*

80 528 U.S. 141, 143 (2000).



not regulate the States' sovereign authority to 'regulate their own citizens.'<sup>81</sup> These two ideas work together: if a law applies equally to state and private actors, it must be because the law applies to activity that the state undertakes in some role other than its role as sovereign, such as in its role as market participant. "The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage."<sup>82</sup> Private actors do not act as sovereign regulators, but states often act as market participants: buying and selling goods and services, borrowing money, employing labor.

#### IV. EXPLAINING THE ABSENCE OF ANY COMPETING VIEW OF THE CONSTITUTION

Justices Breyer and Kagan joined Justice Alito's opinion on this constitutional issue. Justices Ginsburg and Sotomayor did not join but did not offer any competing view on this constitutional issue. Instead, they simply assumed *arguendo* that the challenged provision was unconstitutional, and dissented "from the Court's determination to destroy PASPA rather than salvage the statute," contending that the challenged provision should be severed from the rest of the statute which could still be enforced.<sup>83</sup>

This approach stands in stark contrast to other federalism decisions, including prior anticommandeering cases, Commerce Clause cases, and sovereign immunity cases.<sup>84</sup>

*Anticommandeering*: *New York* was a 6–3 decision,<sup>85</sup> and *Printz* was 5–4, with Justice Souter switching from majority in *New York* to dissent in *Printz*—no dissenter (or his replacement) switched the other way.<sup>86</sup> Justice Stevens dissented in both, and Justices Ginsburg and Breyer (replacing Justices White and Blackmun) dissented in *Printz*, as their predecessors had dissented in *New York*.

*Commerce Clause*: *Lopez* was a 5–4 decision,<sup>87</sup> as was *Morrison*.<sup>88</sup> Not only did the *Lopez* dissenters continue to dissent in *Morrison*, but they indicated that they would continue to do so: "All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to

81 *Murphy*, 138 S. Ct. at 1479 (quoting *Reno*, 528 U.S. at 151).

82 *Id.* at 1478.

83 *Id.* 1489–90 (Ginsburg, J., dissenting). "Thus no justice actually disagreed with the majority's core holding." Mark Brnovich, *Betting on Federalism: Murphy v. NCAA and the Future of Sports Gambling*, 2017–2018 CATO SUP. CT. REV. 247, 254; *cf.* *Murphy*, 138 S. Ct. at 1482 n.30 ("The dissent apparently disagrees with our holding that the provisions forbidding state authorization and licensing violate the anticommandeering principle, but it provides no explanation for its position.").

84 See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 164 (2004) ("[T]he Five and the Four seem 'dug in' to their respective positions, to the point that the Four refuse even to accept the stare decisis force of their past defeats.").

85 *New York v. United States*, 505 U.S. 144, 147 (1992).

86 *Printz v. United States*, 521 U.S. 898, 900–01 (1997).

87 *United States v. Lopez*, 514 U.S. 549, 550 (1995).

88 *United States v. Morrison*, 529 U.S. 598, 600 (2000).

doubt that the majority's view will prove to be enduring law."<sup>89</sup> *NFIB v. Sebelius*, too, was a 5–4 decision on the Commerce Clause issue (as well as on the Spending Clause issue involving the so-called individual mandate).<sup>90</sup>

*Sovereign immunity, including Congressional abrogation power.* Numerous sovereign immunity decisions have been 5–4, with dissenters repeatedly refusing to acquiesce. Examples include *Seminole Tribe of Florida v. Florida*,<sup>91</sup> *Alden v. Maine*,<sup>92</sup> *Kimel v. Florida Board of Regents*,<sup>93</sup> *Federal Maritime Commission v. South Carolina State Ports Authority*,<sup>94</sup> *Central Virginia Community College v. Katz*,<sup>95</sup> *Franchise Tax Board of California v. Hyatt*.<sup>96</sup> As Justice Breyer put it for four dissenting Justices in *Federal Maritime Commission*, “I do not simply reiterate the dissenting views set forth in many of the Court’s recent sovereign immunity decisions. For even were I to believe that those decisions properly stated the law—which I do not—I still could not accept the Court’s conclusion here.”<sup>97</sup>

Given this context, it is striking that Justices Breyer and Kagan joined Justice Alito’s opinion regarding commandeering, and even more striking that Justices Ginsburg and Sotomayor, while not joining that opinion, said not a word contending that its understanding of preemption and commandeering was wrong.<sup>98</sup>

How can we explain this?

One possible explanation is that once a more principled distinction between permissible preemption and impermissible commandeering was articulated, Justices who were previously (or would otherwise be) opposed to the anticommandeering doctrine found the doctrine more acceptable. This might be particularly true to the extent that the anticommandeering doc-

89 *Id.* at 654 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting).

90 *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 524 (2012). The Medicaid expansion aspect of the *NFIB* decision might be viewed as a forerunner of *Murphy*, in that Justices Breyer and Kagan joined that part of Chief Justice Roberts’s opinion.

91 517 U.S. 44, 46 (1996).

92 527 U.S. 706, 710 (1999).

93 528 U.S. 62, 65 (2000).

94 535 U.S. 743, 746 (2002).

95 546 U.S. 356, 358 (2006).

96 139 S. Ct. 1485, 1490 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).

97 *Federal Maritime Commission*, 535 U.S. at 772 (Breyer, J., dissenting) (citations omitted). Two terms after *Murphy*, Justice Breyer concurred in a judgment based on a state’s sovereign immunity and stated, “recognizing that my longstanding view has not carried the day, and that the Court’s decision in *Florida Prepaid* controls this case, I concur in the judgment.” *Allen v. Cooper*, 140 S. Ct. 994, 1009 (2020) (citing *Fla. Prepaid Post. Edu. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627 (1999)). *Florida Prepaid* involved patent; *Allen* involved copyright.

98 See Josh Blackman, *Improper Commandeering*, 21 U. PA. J. CONST. L. 959, 978–79 (2019) (“Justices Ginsburg and Breyer . . . joined the *Printz* dissent two decades earlier. Yet, they now accepted—or at least declined to reject—a doctrine that Justice Stevens concluded had no basis in the text or history of the Constitution. Justice Kagan joined *Murphy* without reservation.” (footnote omitted) (citing *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018))).

trine was formulated by the Court in a way that no longer threatened to swallow up preemption (and risk federal supremacy).

But even if the anticommandeering doctrine seemed more principled and less dangerous, that wouldn't answer the fundamental critique articulated by Justice Stevens in *New York* noted above:

Under the Articles of Confederation, the Federal Government had the power to issue commands to the States. See Arts. VIII, IX. Because that indirect exercise of federal power proved ineffective, the Framers of the Constitution empowered the Federal Government to exercise legislative authority directly over individuals within the States, even though that direct authority constituted a greater intrusion on state sovereignty. Nothing in that history suggests that the Federal Government may not also impose its will upon the several States as it did under the Articles. The Constitution enhanced, rather than diminished, the power of the Federal Government.<sup>99</sup>

Providing an answer to that critique could make the anticommandeering doctrine not only more principled and less dangerous, but also more persuasive. And there is an answer to that critique, an answer found in one of the reasons why the Constitutional Convention opted for a national government operating directly on individuals.

One reason the Framers opted for national power operating directly on individuals was that it would be more effective than one operating on the states. But that wasn't the only reason. They also concluded that making national power operating on the states truly effective was dangerous.

The Constitutional Convention considered that one way to make the national government more effective was to give the national government coercive means of enforcing its demands on the states. But it firmly rejected that approach.

The choice made by the Convention is commonly described as a choice in favor of the Virginia Plan, under which the national government would operate on individuals, over the New Jersey Plan, under which the national government would operate on states.<sup>100</sup>

Less frequently noted, however, is that under the original Virginia Plan, the national government would have been given the power "to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof."<sup>101</sup> Further discussion led Madison to realize that

99 *New York v. United States*, 505 U.S. 144, 210 (1992) (Stevens, J., concurring in part); see also *States' Commandeered Convictions*, *supra* note 19, at 2325 (referring to "the debatable inference that by empowering the federal government to regulate individuals, the Constitution implicitly rescinded its prior powers to regulate states as states").

100 See *New York*, 505 U.S. at 164–65.

101 1 FARRAND'S RECORDS, *supra* note 28, at 21 (notes of James Madison on May 29, 1787); see Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1844 (2010) ("Madison included power to regulate and coerce states in the Virginia Plan."); *id.* at 1841–42 (recounting a similar proposal by Madison in 1781 to amend the Articles of Confederation); see also Anthony J. Bellia, Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 875, 917–23

such a coercive constitutional provision risked civil war. The provision was postponed without dissent.<sup>102</sup>

The New Jersey Plan had a similar provision,<sup>103</sup> which Hamilton criticized as one that would not only lead to civil war, but to foreign intervention and dissolution of the Union.<sup>104</sup>

That is, both the Virginia Plan and the New Jersey plan had provisions that would empower enforcement against the states. The Framers rejected this power not only by rejecting the New Jersey plan, but also by eliminating it from the Virginia Plan due to a fear of civil war and foreign intervention. Madison had “arrived in Philadelphia favoring legislative power over states and the introduction of coercive power to ensure their compliance with federal commands,” but “left the Convention in favor of a central government with legislative power over individuals rather than states, and opposed to coercive power over states,” viewing “the Constitution’s novel approach as the only viable plan of government.”<sup>105</sup>

From today’s perspective, it can be hard to grasp the seriousness of this fear.<sup>106</sup> Today, the United States is a global superpower, having survived a civil war and prevailed in two world wars, sitting astride a continent from sea to shining sea and beyond. But at the Framing of the Constitution, the United States was a weak, new nation, surrounded by territory controlled by European powers—powers that would be happy to gobble up bites of the new nation if the states turned against each other.

The choice to empower the national government to act directly on individuals was made not only as a way to make the national government more

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(2020) (describing Madison’s early proposal to authorize Congress to commandeer the states and its later rejection). The Sixth Resolution read:

Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.

I FARRAND’S RECORDS, *supra* note 28, at 21.

102 I FARRAND’S RECORDS, *supra* note 28, at 54 (notes of James Madison on May 31, 1787).

103 *Id.* at 245 (June 15, 1787).

104 *Id.* at 285 (June 18, 1787); *see also* THE FEDERALIST NO. 20, *supra* note 29, at 138 (James Madison) (“[A] sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity . . .”).

105 Clark, *supra* note 101, at 1852–53.

106 Or perhaps not. *See, e.g.,* Jelani Cobb, *Why Trump, Facing Impeachment, Warns of Civil War*, NEW YORKER (Oct. 5, 2019), <https://www.newyorker.com/news/daily-comment/why-trump-facing-impeachment-warns-of-civil-war>; Tom O’Connor, *Russian Official Cancels U.S. Visit, Saying ‘Second American Civil War’ Is Underway*, NEWSWEEK (Jan. 10, 2019), <https://www.newsweek.com/russia-cancel-visit-american-civil-war-1287282>.

efficient. It was also part of a deliberate decision not to empower the national government to make enforceable demands on the states in order to avoid the risks of civil war and dismemberment that such a power would create.<sup>107</sup>

Another factor that may have contributed to the absence of any challenge to the anticommandeering doctrine as articulated by Justice Alito is the changing political valence of federalism.<sup>108</sup> For many years, federalism was associated with conservative political views at best, and white supremacy at

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107 Some have argued that the persistence of arguments for requisitions rather than federal taxation of the people demonstrates that the anticommandeering doctrine is inconsistent with the original understanding of the Constitution. See Erik M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power: New York v. United States Revisited*, 15 CONST. COMMENT. 355, 374 (1998). A full originalist defense of the anticommandeering doctrine is beyond the scope of this Article. For discussion, see Bellia & Clark, *supra* note 101, at 917–40 (arguing that the Constitution’s use of the word “States,” in the context of background principles of international law, supports the anticommandeering doctrine); Young, *supra* note 84, at 127 & n.624 (noting that the “most persuasive justification arises not from the historical arguments . . . but rather from its functional relation to the political safeguards of federalism,” because it “requires the national government to internalize two kinds of costs,” political and administrative); 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, 943–44 (1998) (criticizing the reasoning of *New York* and *Printz* while endorsing their result, because “the entitlement . . . simply allows nonfederal governments to extract a fair price for their services—an entitlement already enjoyed by private persons and organizations when they deal with the national government”). Compare Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 Nw. U. L. REV. 819 (1999) (supporting anticommandeering doctrine on textualist and originalist grounds), with Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993) (distinguishing between commandeering of legislatures and executives on originalist grounds).

However, it is worth noting that the examples cited by Jensen and Entin all seem to treat federal taxation of the people—not compulsion of the states—as the appropriate response if states do not pay what is requisitioned. That is, such requisitions seem to effectively be requests for voluntary cooperation. Cf. Prakash, *supra*, at 2034 (noting that, under the Articles of Confederation, “requisitions were really only supplications”). Jensen and Entin suggest that the Constitution gave the states a political choice, but not a legal choice, to decline to pay requisitions. Jensen & Entin, *supra*, at 376 n.92. But none of their examples contemplates the possibility of a judicially enforceable legal duty—which is what is at stake in the anticommandeering cases. Although the government in *Printz* took the position that local law enforcement officers were not subject to criminal penalties for failing to carry out the required background checks, it did envision judicial enforcement of that duty by mandamus. See *Printz v. United States*, 854 F. Supp. 1503, 1511 n.19 (D. Mont. 1994), *aff’d in part, rev’d in part, dismissed in part sub nom. Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995), *rev’d sub nom. Printz v. United States*, 521 U.S. 898 (1997); see also Transcript of Oral Argument at 45, *Printz*, 521 U.S. 898 (No. 95-1478) (Solicitor General Dellinger) (“[W]e do not take the position that it is voluntary.”).

108 See Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1301 (2019) (“Back when federalism was more generally perceived as a conservative cause, the most liberal justices dissented from key anti-commandeering decisions. . . . [T]hat view looks short-sighted; the contin-

worst.<sup>109</sup> But that has changed. One major contributor has been the trajectory of the gay rights movement, particularly regarding marriage—achieving victory after victory at the state level well before (controversially) daring to seek a federal victory—that made federalism look quite different. And it was both easy to see and highlighted in the briefing that the anticommandeering doctrine could be used by states and localities that disagreed with federal immigration and marijuana policies.<sup>110</sup>

To the extent that the anticommandeering doctrine in particular came to be seen as a principle of constitutional structure that functions to protect a range of political perspectives, it could be seen as either correct (Justices Breyer and Kagan) or at least not so unacceptable as to be worth criticizing unnecessarily (Justices Ginsburg and Sotomayor).<sup>111</sup> From a functional approach, the virtues of the anticommandeering doctrine may have come into sharper focus for some in the era of President Trump: imagine if the President had (or could be given) command authority not only over the ICE

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gency of the doctrine’s political valence in any given instance should have been apparent even then.” (footnote omitted)).

109 See Ilya Somin, *Making Federalism Great Again: How the Trump Administration’s Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1291 (2019) (“[L]ong-standing conventional wisdom [held] that federalism is a disaster for racial and ethnic minority groups, while the growth of federal power was a great benefit to them.”).

110 E.g., Brief for Petitioners at 29, *Christie v. Nat’l Collegiate Athletic Ass’n*, 832 F.3d. 389 (3d Cir. 2016) (No. 16-476), 2017 WL 3774486, at \*29 (“[I]n recent years, States repeatedly have responded to the wishes of their citizens by enacting policies in areas including medical marijuana, immigration, and surveillance that might be viewed as ‘unfriendly’ to those of the national government.”), *rev’d sub nom* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018); Supplemental Brief Submitted by New Jersey Thoroughbred Horsemen’s Association, Inc. in Response to Brief of the United States at 10–12, *N.J. Thoroughbred Horsemen’s Ass’n v. Nat’l Collegiate Athletic Ass’n*, *rev’d sub nom* *Murphy*, 138 S. Ct. 1461 (No. 16-477), 2017 WL 2459691, at \*10–12 (discussing state marijuana cases). The briefing also made a point of citing supportive statements about the anticommandeering doctrine from scholars who would be known (at least to Justices Breyer and Kagan) as left of center. See Brief for the Petitioner, at 23–24, 28, *N.J. Thoroughbred Horsemen’s Ass’n*, *rev’d sub nom* *Murphy*, 138 S. Ct. 1461 (No. 16-477), 2017 WL 3774488, at \*23–24, \*28 (citing Akhil Reed Amar, Jack M. Balkin, Paul Brest, Erwin Chemerinsky, Sanford Levinson, and Reva B. Siegel).

111 See Vikram D. Amar, “*Clarifying*” *Murphy’s Law: Did Something Go Wrong in Reconciling Commandeering and Conditional Preemption Doctrines?*, 2018 SUP. CT. REV. 299, 346 (“[I]t bears mention also that *Murphy* represents the first case in which the Court has applied the anticommandeering principle to strike down a federal law that was not associated with progressive policies in the way environmental protection and gun control are, a fact that might portend the durability of the doctrine.”); Price, *supra* note 108, at 1300 (“*Murphy’s* strong reaffirmation of the anti-commandeering principle provides a textbook example of bipartisan symmetry.”). A similar recognition of the virtues of federalism may be at play in *Allen v. Cooper*, 140 S. Ct. 994 (2020), where Justice Kagan wrote the Court’s opinion holding that Congress could not abrogate a state’s sovereign immunity under the copyright clause. Justice Sotomayor joined her opinion, and Justices Breyer and Ginsburg concurred in the judgment. Or *Allen* might be explained as bolstering stare decisis.

agents, Custom and Border Patrol agents, and FBI agents, but also over every police officer (state and local) in the country.<sup>112</sup>

In *Printz*, Justice Scalia worried about the erosion of presidential power if Congress could bypass the President's control and impress state officers into enforcing federal law.<sup>113</sup> But the far greater threat of tyranny would be if the President could control not only the federal officers for which Congress was willing to provide the funding, but also the entire network of state and local police forces.<sup>114</sup> Justice Scalia also wondered whether "meaningful Presidential control is possible without the power to appoint and remove."<sup>115</sup> But if state and local police officials could be made legally obligated to obey the President's commands regarding the enforcement of federal law, it is not clear what (that is, other than the anticommandeering doctrine or something akin to it) would prevent the President from removing them for failure to obey those legal orders. In any event, if state and local police officials could be made legally obligated to obey the President's commands regarding the enforcement of federal law, at least those officials could be required by federal courts, on pain of contempt, to obey those commands.

The breadth of federal criminal law is nearly limitless; a major brake on federal law enforcement is the unwillingness of Congress to provide the resources to fully enforce that law. Imagine if the President could enforce federal immigration laws by issuing commands to state and local police rather than having to rely on Immigration and Customs Enforcement or could enforce the federal drug laws by issuing commands to state and local police rather than having to rely on the Drug Enforcement Administration.<sup>116</sup> In 1997, when *Printz* was decided, Justice Breyer may have seen the anticommandeering doctrine as an inappropriate way of "reconciling central authority with the need to preserve the liberty-enhancing autonomy of a

112 See David Landau, Hannah J. Wiseman & Samuel R. Wiseman, *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1231 (2020) ("[E]liminating the anti-commandeering doctrine . . . would give a would-be despot an additional tool with which to consolidate power rapidly.").

113 *Printz v. United States*, 521 U.S. 898, 922–23 (1997) ("The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws." (footnote omitted) (first citing THE FEDERALIST NO. 70, *supra* note 29 (Alexander Hamilton); and then citing 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 495 (Merrill Jensen ed., 1976) (statement of James Wilson))).

114 See *id.* at 922 ("The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.").

115 *Id.*

116 Cf. Landau et al., *supra* note 112, at 1204–05 ("[T]he core protection provided by U.S. federalism against tyranny lies in the large number of state and local officials, not subject to direct control from Washington, who carry out key functions that would-be tyrants cannot rapidly or easily take over.").

smaller constituent governmental entity.”<sup>117</sup> But two decades later, the world might look a little different.

Finally, and more speculatively, Justice Alito might have secured the agreement of Justices Breyer and Kagan, and the silence of Justices Ginsburg and Sotomayor, by leaving some things unsaid.

First, no mention was made of *Prigg v. Pennsylvania*, the 1842 decision that is sometimes thought to be the first articulation of the anticommandeering doctrine.<sup>118</sup> In that case, Justice Story not only upheld the constitutionality of the Fugitive Slave Act of 1793, and held the Pennsylvania personal liberty law unconstitutional, but also stated that the Fugitive Slave Clause “does not point out any state functionaries, or any state action, to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them.”<sup>119</sup> Moreover, “it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution.”<sup>120</sup>

In avoiding reliance on *Prigg*, Justice Alito by no means broke new ground. Instead, he merely followed the path taken in *New York* and *Printz*, neither of which mentioned the decision.<sup>121</sup> So, too, the parties in *Murphy* avoided mention of *Prigg*. Apparently, the advantages of association with Justice Story are outweighed by the disadvantages of association with what Paul Finkelman has called “the most important judicial support for slavery in our constitutional jurisprudence,” other than *Dred Scott*.<sup>122</sup>

Justice Alito also avoided any mention of *Coyle*, the case that Justice O’Connor had cited in *New York* as proof that the anticommandeering doctrine was not new.<sup>123</sup> Instead, he noted that “[a]lthough the anticommandeering principle is simple and basic, it did not emerge in our cases until relatively recently, when Congress attempted in a few isolated instances to extend its authority in unprecedented ways,” and described *New York* as the “pioneering case.”<sup>124</sup>

While *Coyle* can be seen as an anticommandeering case, it is also a case about the equality of the states. As an anticommandeering case, it held that

117 *Printz*, 521 U.S. at 977 (Breyer, J., dissenting).

118 See Blackman, *supra* note 98, at 968; Paul Finkelman, *The Roots of Printz: Proslavery Constitutionalism, National Law Enforcement, Federalism, and Local Cooperation*, 69 BROOK. L. REV. 1399, 1409 (2004).

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

120 *Id.* at 616.

121 See Blackman, *supra* note 98, at 979 (“Justice Alito, like Justice Scalia before him, did not identify the application of the anticommandeering doctrine in *Prigg v. Pennsylvania*.”).

122 Finkelman, *supra* note 118, at 1410; see also Blackman, *supra* note 9898, at 970 (“*Prigg*, perhaps due to its odious subject matter, is seldom cited in discussions about commandeering.”); cf. Hills, *supra* note 107, at 842 (“Ironically, the problem is not that *Prigg* is too devoted to states’ rights, but rather that *Prigg* and its intellectual foundation in the Marshall Court’s jurisprudence . . . are too nationalistic . . .”).

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

124 *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1476 (2018).



The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained.<sup>125</sup>

But as a state equality case, it held that a state could not be deprived of this power and “be placed upon a plane of inequality with its sister States in the Union” as a condition of admission.<sup>126</sup>

Its rhetorical commitment to state equality was powerful. *Coyle* stated that our nation “was and is a union of States, equal in power, dignity and authority,”<sup>127</sup> and concluded with this peroration: “[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.”<sup>128</sup>

When *Shelby County v. Holder* held that the coverage formula in the Voting Rights Act was unconstitutional, it relied on the principle of equal sovereignty, citing *Coyle*.<sup>129</sup> Indeed, “*Shelby County* relied primarily on two cases for its discussion of the equal sovereignty doctrine: *Coyle* . . . and *Northwest Austin*.”<sup>130</sup>

Given the importance of the Voting Rights Act, and the impassioned dissent in *Shelby County*,<sup>131</sup> avoiding any mention of *Coyle* might have helped Justices Breyer and Kagan join the anticommandeering aspects of the *Murphy* opinion, and helped keep Justices Ginsburg and Sotomayor from saying anything about commandeering. In this connection, it might be worth noting that certiorari petitions in an earlier round of litigation had raised both an anticommandeering challenge and an equal sovereignty challenge to PASPA. Those petitions were denied;<sup>132</sup> the later petitions that were granted dropped the equal sovereignty question.

Justice Alito also did not address whether the anticommandeering doctrine applies, or applies in the same way, when Congress exercises its power under the Reconstruction Amendments, particularly Section 5 of the Fourteenth Amendment. His opinion is written in broad terms and does not

125 *Coyle v. Smith*, 221 U.S. 559, 565 (1911).

126 *Id.*

127 *Id.* at 567.

128 *Id.* at 580.

129 570 U.S. 529, 544 (2013).

130 *Mayhew v. Burwell*, 772 F.3d 80, 94 n.12 (1st Cir. 2014) (first citing *Coyle*, 221 U.S. 559; and then citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009)).

131 Justice Ginsburg’s dissent in *Shelby County* is what led to the moniker, “The Notorious RBG.” See *A Conversation with Justice Ruth Bader Ginsburg and Professor Aaron Saiger*, 85 FORDHAM L. REV. 1497, 1503–04 (2017).

132 See *Petition for Writ of Certiorari, Christie v. Nat’l Collegiate Athletic Ass’n* (3d Cir. 2013) (No. 13-967), 2014 WL 572929, *cert. denied*, 573 U.S. 931 (2014); *Petition for Writ of Certiorari, N.J. Thoroughbred Horsemen’s Ass’n, Inc. v. Nat’l Collegiate Athletic Ass’n* (3d Cir. 2013) (No. 13-979), 2014 WL 636390, *cert. denied*, 573 U.S. 931 (2014).

reserve the question. For that reason, it might well be understood to apply to all congressional powers.

However, in light of its context—an enactment purportedly under the Commerce Clause—the opinion does not foreclose the possibility that it might be distinguished in the context of the Reconstruction Amendments.<sup>133</sup> Under current precedent, Congress lacks the power to abrogate a state’s sovereign immunity under its Article I, Section 8, powers.<sup>134</sup> But it may abrogate a state’s sovereign immunity under its power to enforce the Fourteenth Amendment.<sup>135</sup> Section 5 of the Fourteenth Amendment is not, under current precedent, a grant of power to regulate the people.<sup>136</sup> Instead, it is a grant of power to enforce limitations on the states.

With a power structured so differently, the logic of the anticommandeering doctrine may not apply. That is, exercise of congressional power under Section 5 is not an exercise of power directly over the people, with contrary state law displaced by operation of the Supremacy Clause. Instead, it is an exercise of power targeted at the states themselves. Preemption may not even be the right word for the operation of that kind of power; certainly, it operates differently than ordinary preemption and is not a mere rule of priority.

On the other hand, the provisions contained in Article I, Section 10, are also prohibitions on the states. Although there is no express power given to Congress to enforce those prohibitions, the power to do so is implied, at least according to *Prigg*.<sup>137</sup> This may be yet another reason to avoid discussion of *Prigg*.

Perhaps Justice Alito did not even consider Section 5 of the Fourteenth Amendment. Or perhaps, by not addressing this issue at all—not even to

133 See William D. Araiza, *Reciprocal Concealed Carry: The Constitutional Issues*, 46 HASTINGS CONST. L.Q. 571, 606 (2019) (“[T]here is a real question whether laws based on Congress’s Fourteenth Amendment enforcement power are subject to the anti-commandeering restriction.”); Rappaport, *supra* note 107, at 854 (“[T]he immunity against regulating the states . . . does not limit Congress’s power under section 5 of the Fourteenth Amendment.”). As Rappaport notes, the anticommandeering doctrine also does not appear to apply where Congress provides for the calling forth of the militia to execute the laws of the union, *id.*, but the Constitution here protects the states by reserving to them “the Appointment of the Officers, and the Authority of training the Militia.” U.S. CONST. art. I, § 8.

134 See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58–60, 66 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)). Compare *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378–79 (2006) (concluding that states lack sovereign immunity with regard to the Bankruptcy Clause itself), with *Allen v. Cooper*, 140 S. Ct. 994, 1002–03 (2020) (“[E]verything in *Katz* is about and limited to the Bankruptcy Clause; the opinion reflects what might be called bankruptcy exceptionalism[,] . . . a good-for-one-clause-only holding.”).

135 *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

136 See *United States v. Morrison*, 529 U.S. 598, 621 (2000); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

137 *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842) (“[If an] end [is] required, . . . the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end.”).

expressly reserve it—he avoided igniting a battle that could instead be left for another day.

Whatever the reasons, at the end of the day, and at least as applied to congressional power under the Commerce Clause, the basic principle of the anticommandeering doctrine may now be settled law.<sup>138</sup>

## V. EXAGGERATIONS AND MISUNDERSTANDINGS

Perhaps because *Murphy*'s approach to the distinction between permissible preemption and impermissible commandeering was contrary to the conventional approach, there have already been exaggerations and misunderstandings of its impact.

*Preemption of State Tax Laws.* Some have argued that *Murphy* calls into question a wide range of federal laws that are phrased as prohibitions on state taxes.<sup>139</sup> One particular worry is that *Murphy* prevents Congress from taking action in the area opened to states by the decision in *Wayfair*,<sup>140</sup> which permits states to require out-of-state vendors to collect use taxes.

These fears are unfounded. Sure, Congress lacks the power to simply negate a state tax. But it continues to have the power to regulate interstate commerce. And as part of the power to regulate interstate commerce, it can give private parties a right to engage in certain kinds of interstate commerce free from state regulation or taxation.

What matters is not whether an act of Congress is phrased as a command or a prohibition—*Murphy* is emphatic about that.<sup>141</sup> What matters is whether an act of Congress under the Commerce Clause is best understood as a regulation of a private party even if, as the illustrations above show, Congress commonly phrases the granting of private rights in the language of state prohibition.<sup>142</sup> And an act of Congress that gives private parties a right

138 As Mark Graber explains, “[s]ettlements take place, not when official law is pronounced, but when persons opposed to that constitutional status quo abandon efforts to secure revision.” Mark A. Graber, *Settling the West: The Annexation of Texas, The Louisiana Purchase, and Bush v. Gore*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803–1898*, at 83, 84–85 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005); see also William Baude, *Constitutional Liquidation*, 71 *STAN. L. REV.* 1, 18 (2019) (“The key idea of acquiescence was that the losers in some sense gave up.”).

139 E.g. Brnovich, *supra* note 83, at 262; Daniel Hemel, *Justice Alito, State Tax Hero?*, *MEDIUM* (May 15, 2018), <https://medium.com/whatever-source-derived/justice-alito-state-tax-hero-333830d097ab>.

140 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

141 *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018) (“[The Airline Deregulation Act] might appear to operate directly on the States, but it is a mistake to be confused by the way in which a preemption provision is phrased. . . . And if we look beyond the phrasing employed . . . , it is clear that this provision operates just like any other federal law with preemptive effect. It confers on private entities (*i.e.*, covered carriers) a federal right to engage in certain conduct subject only to certain (federal) constraints.”).

142 This understanding of preemption also helps explain when parties can use § 1983 to raise preemption claims. See *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S.

to engage in certain forms of interstate commerce without being subject to certain kinds of state regulation or state taxation is permissible and commonplace. That's just *Gibbons v. Ogden* again.<sup>143</sup>

Daniel Hemel claims,

Any federal law that says “states cannot regulate X” can be redescribed as a law that says “private actors have the right to do X notwithstanding any state law to the contrary”; any law that says “states cannot authorize X” can be redescribed as a law that says “private actors are prohibited from doing X notwithstanding any state law that authorizes them.”<sup>144</sup>

The first claim may well be true. If so, that would mean that the anticommandeering doctrine presents no obstacle to federal grants of liberty. (Of course, the grant must otherwise be within an enumerated power of Congress—not a high bar, particularly where commercial activities are at issue.)

But the second claim is certainly not true. Consider a federal law that says “states cannot authorize any person to possess marijuana.” That does not create a federal law prohibition on the possession of marijuana. It creates no federal crime. It creates no federal duty on any person to refrain from possessing marijuana. It gives no person a right of action to prevent another from possessing marijuana. It does nothing at all to change the legal status of marijuana possession under federal law.

To be sure, such a statute might be read to obligate a state to prohibit the possession of marijuana. But that is precisely what the anticommandeering doctrine insists Congress cannot do.<sup>145</sup>

103, 108 (1989); see also Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 260 (1991).

143 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211–12 (1824). To the extent that the federal government insists that itself, its instrumentalities, its officers, and its transactions be governed by federal law rather than state law (including state tax law), it is just *M'Culloch v. Maryland* again. 17 U.S. (4 Wheat.) 316 (1819). Both *Gibbons* and *M'Culloch* would be easier cases, not harder cases, if the respective acts of Congress had expressly provided that the state law at issue must give way to federal law, rather than leave that to implication.

144 Hemel, *supra* note 139.

145 Some have found it not clear whether *Murphy* means that Congress “could prevent a state from legalizing marijuana.” Matthew A. Melone, *Murphy v. NCAA & South Dakota v. Wayfair, Inc.: The Court's Anticommandeering Jurisprudence May Preclude Congressional Action with Respect to Sales Taxes on Internet Sales*, 67 DRAKE L. REV. 413, 447 n.204 (2019). But there is no uncertainty here: Congress cannot prohibit a state from legalizing marijuana because that is the same thing as requiring a state to prohibit marijuana. Congress can, and has, prohibited the possession of marijuana as a matter of federal law. But that prohibition in no way obligates—or empowers Congress to obligate—the states to have a similar prohibition. See, e.g., *In re State Question No. 807, Initiative Petition No. 423*, 2020 OK 57, ¶ 26, 468 P.3d 383, 391 (“Further, the federal government lacks the power to compel Oklahoma, or any other state, . . . to criminalize possession and use of marijuana under state law.” (citing *Murphy*, 138 S. Ct. at 1475–79)). Some think that Congress has *already* effectively prohibited the states from legalizing marijuana because the existing federal prohibition on marijuana does regulate the conduct of private actors, making anticommandeering principles irrelevant and leaving only obstacle preemption principles in play.

If this seems asymmetrical, it is an asymmetry biased toward liberty. While Congress can give liberty rights that states must respect, it cannot compel states to restrict liberty. And finding that a constitutional doctrine has an asymmetry biased toward liberty shouldn't be the least bit surprising.

Matt Melone contends that in “the absence of a national sales tax, it is unclear whether Congress can impose” uniform standards establishing the circumstances in which states can collect sales tax from remote sellers.<sup>146</sup> But completely apart from the congressional power to impose a tax (and without entering into the debate about the constitutionality of a national sales tax), Congress has the power to regulate interstate commerce. And as part of that power, Congress can give participants in that commerce a federal right to be free of state regulation and taxation. Again, that has been clear since at least *Gibbons v. Ogden*.

Melone is particularly concerned about the impact of *Murphy* in the aftermath of the decision in *South Dakota v. Wayfair, Inc.*<sup>147</sup> In *Wayfair*, the Supreme Court overruled its prior precedent that had understood the dormant Commerce Clause to prohibit states from imposing the duty to collect sales and use taxes on those without a physical presence in the state. *Wayfair* held that a physical presence was not required.<sup>148</sup>

Melone believes that prior to *Wayfair*, Congress could have established standards that, if met by a state, would empower that state to collect sales and use taxes from sellers without a physical presence in the state.<sup>149</sup> However, he contends that such legislation would be unconstitutional after *Wayfair* and *Murphy* because it “does not confer rights or impose obligations on private actors.”<sup>150</sup> But that is just wrong: a federal act that sets standards for when

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*E.g., In re State Question No. 807*, 468 P.3d at 398 (Kane, J., dissenting) (“Here, there is no question the CSA regulates the conduct of private actors . . . . Therefore, the only inquiry is whether the proposed state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA . . . .”); *id.* at 399 (Rowe, J., dissenting). But if a decision by a state to decline to prohibit certain conduct counts as an “obstacle” to federal law, we are right back to federal law requiring a state to prohibit that conduct—precisely what the anticommandeering doctrine forbids. There is no reason to think that courts are somehow authorized to infer from a statute what Congress is constitutionally prohibited from stating directly in a statute.

146 Matthew A. Melone, *New Jersey Beat the Spread: Murphy v. National Collegiate Athletic Association and the Demise of PASPA Allows for States to Experiment in Regulating the Rapidly Evolving Sports Gambling Industry*, 80 U. PITT. L. REV. 315, 353 (2018).

147 Melone, *supra* note 145; see *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).  
 148 *Wayfair*, 138 S. Ct. 2080 (overruling *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967)).

149 Melone, *supra* note 145, at 458 (“[T]he Remote Transactions Parity Act of 2015 would have passed constitutional muster had it been enacted in 2015 and challenged at that time. Because *National Bellas Hess, Inc.* and *Quill Corp.* were controlling precedent, the federal government had the authority to dictate terms to states in order for states to take action that would otherwise have violated the dormant Commerce Clause.”).

150 *Id.* at 459. Melone has made a parallel argument—with identical flaw—about a different federal statute that, in some circumstances, prohibits a state from imposing on persons who are neither residents nor domiciliaries of that state “a net income tax on the

state taxes may be collected on an interstate sale is a regulation of that interstate commerce and gives private parties a federal right to be free of state taxation when engaging in that commerce unless the states meet the federal standard.<sup>151</sup>

And the decision in *Wayfair* does nothing to change this analysis. All *Wayfair* does is change the burden of overcoming congressional inertia. Prior to *Wayfair*, private parties without a physical presence in a state had a federal right to engage in interstate transactions with those in that state free of a state-law obligation to collect sales tax, unless Congress said otherwise. After *Wayfair*, private parties without a physical presence in a state lack a federal right to engage in interstate transactions with those in that state free of a state-law obligation to collect sales tax, unless Congress says otherwise.

That is the way the dormant Commerce Clause works: the question in such cases is whether or not the dormant, sleeping, unexercised, power of Congress to regulate commerce should be understood to give private parties a right to engage in the commerce at issue free from the challenged state regulation.<sup>152</sup> If so, the private parties have such a federal right; if not, they don't. But either way, Congress can exercise its power to regulate interstate commerce either to remove the federal right that the judiciary found or to grant the federal right that the judiciary did not find. Perhaps more bluntly: if courts can find a federal right to be free of state regulation in the *unexercised* power of Congress, of course Congress can *exercise* its power to grant such a federal right. The very premise of a judicial recognition of such a right in congressional silence is that Congress has the power to grant such a right.

*Proportionality.* Darien Shanske, noting that “all nine Justices in *Wayfair* seemed to believe that Congress can (and should) provide uniform ground rules” dealing with the collection of sales taxes, contends that *Murphy* should

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income derived within such State by any person from interstate commerce.” Matthew A. Melone, *Pub. L. No. 86-272 and the Anti-Commandeering Doctrine: Is This Anachronism Constitutionally Vulnerable After Murphy v. NCAA?*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 201, 216 (2020) (quoting Interstate Income Act of 1959, Pub. L. No. 86-272, 73 Stat. 555 (1959) (codified at 15 U.S.C. §§ 381–383 (2019))). Under the Commerce Clause, Congress can give private parties a right to engage in interstate commerce free of state regulation or taxation, and a prohibition on state taxation of certain kinds of interstate commerce is easily construed as a grant of exactly that right.

151 If there are limits to the power of Congress to grant the right to engage in interstate commerce free of state taxation, they are not to be found in the anticommandeering doctrine. The Commerce Clause itself is not unlimited, so (for example) a right of a state resident to own real property free of state taxation in that state might be beyond the scope of the Commerce Clause, thus insulating state property taxes from Commerce Clause preemption.

152 Thus, it is not correct to say that the “dormant Commerce Clause authorizes federal regulation of state laws.” David M. Driesen, *Inactivity, Deregulation, and the Commerce Clause: A Thought Experiment*, 53 WAKE FOREST L. REV. 479, 497 (2018). Instead, the dormant Commerce Clause recognizes, in some instances, a right to engage in interstate commerce.

be read as embodying a “proportionality principle.”<sup>153</sup> While proportionality as an approach to constitutional adjudication—and more generally trying to move judicial review under the United States Constitution closer toward the European model of freestanding constitutional courts—is all the rage these days,<sup>154</sup> it is not a persuasive account of the anticommandeering doctrine.

To the extent that Shanske relies on concerns about what *Murphy* means for federal preemption of state taxes, the discussion above need not be repeated. Beyond this, the opinions in *New York* and *Printz* could not be clearer that they do not call for a judicial determination of whether “the federal government [went] too far,” as opposed to “a formal test” for commandeering.<sup>155</sup>

*New York:*

But 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 gives Congress the authority to regulate matters directly and to pre-empt 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.<sup>156</sup>

*Printz:*

Finally, the Government puts forward a cluster of arguments that can be grouped under the heading: “The Brady Act serves very important purposes, is most efficiently administered by CLEOs during the interim period, and places a minimal and only temporary burden upon state officers.” . . . But where, as here, it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a “balancing” analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect. We expressly rejected such an approach in *New York* . . . We adhere to that principle today and conclude categorically, as we concluded categorically in *New York* . . .<sup>157</sup>

It is true that Justice Alito’s opinion in *Murphy* does not repeat these passages from *New York* and *Printz*. But there is not a word in *Murphy* to repudiate them. Shanske observes that the opinion early on states that “Americans have never been of one mind about gambling, and attitudes have

153 Darien Shanske, *Proportionality as Hidden (but Emerging?) Touchstone of American Federalism: Reflections on the Wayfair Decision*, 22 CHAP. L. REV. 73, 83 (2019).

154 See, e.g., Jamal Greene, Foreword, *Rights as Trumps?*, 132 HARV. L. REV. 28 (2018).

155 Shanske, *supra* note 153, at 83.

156 *New York v. United States*, 505 U.S. 144, 178 (1992).

157 *Printz v. United States*, 521 U.S. 898, 931–33 (1997) (footnote and citations omitted).

swung back and forth.”<sup>158</sup> But Justice Alito bookends this with his concluding statement that

[t]he legalization of sports gambling is a controversial subject. . . .

The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.<sup>159</sup>

Shanske reads *Murphy* as effectively holding that “[t]he federal government has thus taken a position on a controversial topic on which there is considerable disagreement and on which there seems to be little imperative for a national solution.”<sup>160</sup> Shanske’s phrasing seems to suggest that a direct national prohibition of sports betting would also be unconstitutional, but that result would be flatly inconsistent with Justice Alito’s closing passage.<sup>161</sup>

*Clarity.* Vikram Amar has described *Murphy* as “perplexing” and argued that it should be understood not on its own terms, but as instead standing for an unstated constitutional requirement of “clarity” in conditional preemption statutes.<sup>162</sup> His primary target is Justice Alito’s statement that “*even if*” PASPA could be interpreted to permit complete repeals while prohibiting (some) partial repeals, “*it would still violate the anticommandeering principle.*”<sup>163</sup> As he sees it, there would be no constitutional problem (other than a lack of clarity) if PASPA were understood to give the states the following choices:

(1) states can continue to prohibit sports gambling, and if they do they won’t be preempted by federal law . . . ;

(2) states can repeal their prohibitions on sports gambling entirely if they like;

(3) they may not enforce a selective repeal of their prohibitions in a way that favors certain entities, such as casinos and racetracks; and

(4) if they do selectively repeal and discriminate in favor of some entities, state law will be preempted by federal law, and federal law will kick in to prohibit sports gambling by those favored entities.<sup>164</sup>

But as his phrasing of the fourth option reveals, this approach still wouldn’t save § 3702(1), the challenged section of PASPA—which doesn’t

158 Shanske, *supra* note 153, at 84 (quoting *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1468 (2018)).

159 *Murphy*, 138 S. Ct. at 1484–85.

160 Shanske, *supra* note 153, at 84.

161 Note that this passage in the Alito opinion does not address whether the Commerce Clause permits Congress to reach all sports gambling, or whether there is some sports gambling that is insufficiently connected to interstate commerce to permit congressional regulation. *Cf. Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring) (joining the Alito opinion “in its entirety,” while stating, “[u]nlike the dissent, I do ‘doubt’ that Congress can prohibit sports gambling that does not cross state lines”).

162 Amar, *supra* note 111, at 299–301.

163 *Id.* at 306 (quoting *Murphy*, 138 S. Ct. at 1475).

164 *Id.* at 313.



call for the federal law to kick in against the private entities, but instead makes the state's action the basis of a right of action under § 3703 against state officials to control the state's actions.<sup>165</sup> And as reflection on the third option reveals, an injunction against state executives not to “enforce” a repeal of state law is equivalent to an injunction to enforce the repealed law. In the end, Amar's approach does not justify § 3702(1) but is instead a variant of the dissent's argument that § 3702(2)—which prohibits a private person from engaging in a sports betting scheme “pursuant to the law . . . of a government entity”—is severable from § 3702(1).<sup>166</sup>

Amar provides good reasons “to harmonize conditional spending and conditional preemption by requiring particular clarity in both settings, where the applicability of federal law will depend on legislative choices states are being encouraged—indeed invited—to make.”<sup>167</sup> But there is no need to rewrite *Murphy* to rest on that principle.

*Reciprocal Concealed Carry.* William Araiza has argued that a portion of the proposed (but not enacted) Concealed Carry Reciprocity Act of 2017 would be unconstitutional under *Murphy*.<sup>168</sup> That Act would provide, in general, that a person who is not prohibited by federal law from possessing a firearm, and who is carrying both a valid photo identification and a valid state-issued concealed carry permit, may carry a concealed handgun in other states.<sup>169</sup> It also provides that a person who carries a concealed handgun in accordance with the Act may not be arrested for violation of state law regarding the carrying of firearms “unless there is probable cause to believe that the person is doing so in a manner not provided for in this section.”<sup>170</sup> Moreover, it provides that presentation of “facially valid” photo identification and

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165 See *Murphy*, 138 S. Ct. at 1488 (Breyer, J., concurring in part and dissenting in part) (“[Section] 3702(2) applies federal policy directly to individuals while the challenged part of § 3702(1) forces the States to prohibit sports gambling schemes (thereby shifting the burden of enforcing federal regulatory policy from the Federal Government to state governments).”).

166 28 U.S.C. § 3702(2) (2018). See *Murphy*, 138 S. Ct. at 1489 (Ginsburg, J., dissenting) (“Leaving out the alleged infirmity, *i.e.*, ‘commandeering’ state regulatory action by prohibiting the States from ‘authoriz[ing]’ and ‘licens[ing]’ sports-gambling schemes, 28 U.S.C. § 3702(1), two federal edicts should remain intact.” (alterations in original)). Evaluating the severability aspect of *Murphy* is beyond the scope of this Article.

There was no injunction in *Murphy* against a private party under § 3702(2) because to issue such an injunction the district court would have had to address the argument that the sports leagues were not entitled to equitable relief because of their unclean hands. See *Nat'l Collegiate Athletic Ass'n v. Christie*, 61 F. Supp. 3d 488, 497 n.7 (D.N.J. 2014) (“[N]o injunction is being entered against the NJTHA. Therefore, it is unnecessary for the Court to determine the validity of the NJTHA's assertion of unclean hands.”). The injunction against the state officials, however, effectively constrained the private party by putting state officials at risk of contempt if they failed to enforce the repealed state law against the private party.

167 Amar, *supra* note 111, at 320.

168 Araiza, *supra* note 133, at 603–07.

169 Concealed Carry Reciprocity Act of 2017, H.R. 38, 115th Cong. § 101(a) (2017).

170 *Id.*

concealed carry permit “is prima facie evidence that the individual has a license or permit as required by this section.”<sup>171</sup>

Araiza correctly acknowledges that one “could analogize the holder of the federally-endorsed state-issued concealed carry permit with Thomas Gibbons from *Gibbons v. Ogden*, who held a federal coasting license that the Supremacy Clause required New York authorities to recognize as superseding Aaron Ogden’s conflicting state-granted monopoly.”<sup>172</sup> But he thinks that the “prescription of particular police procedures” cannot be read as a grant of a license to private parties “if *Murphy*’s distinction between regulation of states and regulation of individuals is to be accorded any force.”<sup>173</sup>

But the proposed Act can easily be read as a grant of a (limited) federal license to be free from state arrest. The point would perhaps be clearer if the right were less limited: suppose Congress were to provide that a holder of a federal gun permit could not be arrested by state officials at all for gun possession. That would plainly be a grant of a federal right to a private party, and (assuming federal power to grant the license in the first place) not commandeer the states in any way. For example, the Civil Rights Act of 1964 not only provided private parties with a federal right to “full and equal enjoyment of the goods, services, . . . and accommodations of any place of public accommodation,”<sup>174</sup> but also provided that no person shall “punish or attempt to punish any person for exercising or attempting to exercise” that federal right.<sup>175</sup>

Nothing changes with the more limited federal license in the proposed Act. The states and their officials must stand aside and recognize the federal right, unless they have probable cause to believe that the person is not entitled to that federal right. This is a limitation on the federal right and no more commandeers a state to regulate the people than a commonplace saving clause in a preemption provision commandeers a state to regulate the people.<sup>176</sup> And if the proposed Act ever becomes law, it may prove to be an especially valuable limitation on the federal right for state officials, because

171 *Id.*

172 Araiza, *supra* note 133, at 603 (footnote omitted).

173 *Id.* at 604.

174 42 U.S.C. § 2000a(a) (2012).

175 42 U.S.C. § 2000a-2 (2012); *see* *Hamm v. City of Rock Hill*, 379 U.S. 306, 311 (1964) (“In effect the Act prohibits the application of state laws in a way that would deprive any person of the rights granted under the Act.”); *see also* *Johnson v. Mississippi*, 421 U.S. 213, 235 (1975) (Marshall, J., dissenting) (describing *Rachel* as requiring “that the federal law invoked by the petitioners . . . do more than merely provide a defense to conviction: it must immunize them from arrest and prosecution for the conduct in question”); *Georgia v. Rachel*, 384 U.S. 780, 804 (1966) (“*Hamm* emphasized the precise terms of § 203(c) that prohibit any ‘attempt to punish’ persons for exercising rights of equality conferred upon them by the Act.”).

176 *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867–68 (2000) (interpreting a saving clause providing that compliance with a federal safety standard “does not exempt any person from liability under common law”) (quoting 15 U.S.C. § 1397(k) (1988)).

the proposed Act also creates a private right of action for damages against those who deprive a person of the rights it creates.<sup>177</sup>

This understanding of the proposed Act does not deprive *Murphy*'s distinction of force. If the proposed Act were to require states to prohibit concealed carry—whether phrased as a duty to prohibit concealed carry or a prohibition on licensing concealed carry—the anticommandeering doctrine would be violated. If the proposed Act were to require states' officials to enforce federal limitations on the possession of guns—whether phrased as a duty to do so or a prohibition on failing to do so—the anticommandeering doctrine would be violated.<sup>178</sup>

Again, if this seems asymmetrical, it is an asymmetry biased toward liberty. While Congress can give liberty rights that states must respect, it cannot compel states to restrict liberty. And finding that a constitutional doctrine has an asymmetry biased toward liberty shouldn't be the least bit surprising.

*Deregulation.* Despite Justice Alito's explanation of how deregulatory statutes operate to create federal rights,<sup>179</sup> David Driesen has argued that *Murphy* means that "stand-alone" federal deregulatory laws—by which he means laws "that deregulates for some purpose other than advancing regulation"—are unconstitutional.<sup>180</sup> He points to the Graves Amendment, which deregulates rental car companies, and to the Protection of Lawful Commerce in Arms Act, which deregulates companies providing guns.<sup>181</sup>

But both of those statutes create (limited) federal rights to engage in interstate commerce: renting cars and selling guns. And it has been clear since at least *Gibbons v. Ogden* that creating a federal right to engage in interstate commerce *is* a regulation of interstate commerce. The "power to regulate" interstate commerce is the power "to prescribe the rule by which commerce is to be governed."<sup>182</sup> And the "rule by which commerce is to be governed" can be freedom within the limits set by Congress.<sup>183</sup>

177 Concealed Carry Reciprocity Act of 2017, H.R. 38, 115th Cong. § 101(a) (2017).

178 Nor can Congress evade this with wordplay, such as attempting to create a "private right" consisting of a requirement that the States prohibit someone else's action. *Cf.* Melone, *supra* note 146, at 348 (suggesting that PASPA could be read to "confer rights on the professional sports leagues and the National Collegiate Athletic Association . . . to conduct their affairs free of any state sanctioned activity to which they are opposed").

179 *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018) (stating that the Airline Deregulation Act "confers on private entities (*i.e.*, covered carriers) a federal right to engage in certain conduct subject only to certain (federal) constraints").

180 Driesen, *supra* note 152, at 509; *id.* at 506 n.225 ("I use the term 'stand-alone' deregulation to refer to a law that deregulates for some purpose other than advancing regulation.").

181 *Id.* at 481; *see* 15 U.S.C. §§ 7901–7903 (2018); 49 U.S.C. § 30106 (2012).

182 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

183 *See* *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 367 (2008) (noting that Congress had chosen "maximum reliance on competitive market forces" (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992))); *Gonzales v. Raich*, 545 U.S. 1, 19 n.29 (2005) (noting that it is "of no constitutional import" whether Congress seeks "to protect and stabilize" or "eradicate" a market); *Wickard v. Filburn*, 317 U.S. 111, 128

Perhaps some might seize on Justice Alito's description of the Airline Deregulation Act as conferring "a federal right to engage in certain conduct subject only to certain (federal) *constraints*"<sup>184</sup> and contend that there must be some federal *constraint* in order to be a constitutionally valid regulation of interstate commerce triggering preemption. But such a "constraint" need be nothing more than the federal law limits that "constrain" that right. And such constraints are clearly present in both the Graves Amendment and the Protection of Lawful Commerce in Arms Act. The Arms Act, for example, limits its protection of gun manufacturers to those who are federally licensed.<sup>185</sup> The Graves Amendment similarly protects only those "engaged in the trade or business of renting or leasing motor vehicles," to the extent that they engage in "no negligence or criminal wrongdoing."<sup>186</sup>

*Immigration.* There has been substantial discussion and litigation concerning the impact of the *Murphy* decision on immigration. Three aspects are of particular note. First, there is ongoing litigation between the United States and California, with the United States contending that California law limiting cooperation between its jailers and federal immigration authorities is preempted, and not protected by the anticommandeering doctrine. Although the Supreme Court has denied certiorari over two dissents—after considering the case at more than a dozen conferences stretching from January to June<sup>187</sup>—the case continues because the Court was asked to review the affirmance of a preliminary injunction. Second, numerous courts and commentators have addressed the constitutionality of a federal statute that bars states and local governments from restricting certain communication regarding immigration by government entities or officials.<sup>188</sup> Third, a *Harvard Law Review* note argues that the anticommandeering doctrine prevents the

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(1942) ("The stimulation of commerce is a use of the regulatory function quite as definitively as prohibitions or restrictions thereon.").

184 *Murphy*, 138 S. Ct. at 1480 (emphasis added).

185 15 U.S.C. § 7903(2) (2018).

186 49 U.S.C. § 30106(a)(1)–(2) (2012).

187 *United States v. California*, No. 19-532, 2020 WL 3146844, at \*1 (U.S. June 15, 2020), *denying cert. to* 921 F.3d 865 (9th Cir. 2019). Justices Thomas and Alito dissented from the denial without opinion. The case was distributed for conference on January 10, January 17, March 5, March 20, March 27, April 3, April 17, April 24, May 1, May 15, May 21, May 28, June 4, and June 11, 2020. No. 19-532, SUPREMECOURT.GOV, <https://www.supremecourt.gov/search.aspx?filename=/Docket/docketfiles/html/public/19-532.html#> (last visited Sept. 12, 2020).

188 8 U.S.C. § 1373 (2018). *See, e.g.*, *New York v. Dep't of Just.*, 951 F.3d 84, 111 (2d Cir. 2020); *United States v. California*, 921 F.3d 865, 893 n.19 (9th Cir. 2019); Bernard W. Bell, *A New Sheriff's in Town: The Trump Administration and "Sanctuary" Jurisdictions*, 87 UMKC L. REV. 629, 649–51 (2019); Blackman, *supra* note 98, at 982–89; Nelson Lund, *The Constitutionality of Immigration Sanctuaries and Anti-Sanctuaries: Originalism, Current Doctrine, and a Second-Best Alternative*, 21 U. PA. J. CONST. L. 991, 1015–17 (2019). Rehearing en banc of *New York* was denied by a vote of eight to four, with two of the eight voting against rehearing only because they viewed certiorari and reversal as more efficient. *New York v. U.S. Dep't of Just.*, 964 F.3d 150, 156 (2d Cir. 2020) (Lohier, J., concurring) ("Under these circumstances, the better course, in my view, is for the Supreme Court to grant certiorari

national government from relying on state convictions as a basis for deportation.<sup>189</sup>

*Limiting Cooperation.* The California law at issue in the litigation between the United States and California restricts the authority of state and local officials to inform immigration officials about a person's release date from state custody, as well as their authority to transfer individuals in their custody to immigration officials.<sup>190</sup> The United States contends that this state law is preempted because it is an obstacle to federal immigration law, which both prevents the Attorney General from removing an alien from the United States while that alien is serving time in state prison<sup>191</sup> and requires the Attorney General to take custody of certain aliens "when the alien is released."<sup>192</sup> By blocking communication about release dates and cooperation about transfer of custody, the result is that immigration officials must, in

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and reverse. It can do so faster than we can, and it alone can forestall the spread of this grievous error.").

Many of the cases arise in the context of challenges to the Attorney General's insistence that recipients of certain federal funds comply with § 1373. In that context, some courts avoid deciding the anticommandeering question by holding that the Attorney General lacks the statutory authority to impose the condition. *See, e.g., City of Chicago v. Barr*, 961 F.3d 882, 898 (7th Cir. 2020) ("[W]e need not address the district court's compelling analysis of that Tenth Amendment issue, because we hold that the term 'all other applicable federal law' cannot be construed so broadly as to encompass § 1373."); *City of Philadelphia v. Att'y Gen. of U.S.*, 916 F.3d 276, 279 (3d Cir. 2019) ("The City attacked the government's ability to impose the Challenged Conditions on several statutory and constitutional fronts. But we need only reach the threshold statutory question."); *cf. Colorado v. U.S. Dep't of Just.*, 2020 WL 1955474, at \*18, \*20 (D. Colo. Apr. 23, 2020) (rejecting argument that "§§ 1373 and 1644 merely preempt states and local governments from interfering with federal immigration regulation and enforcement," because "they do not regulate private actors," but "stop[ping] short of ruling the statutes unconstitutional because I otherwise find the challenged conditions unlawful and need not do so").

The Court of Appeals for the Second Circuit has held that the Attorney General has statutory authority to impose the condition, requiring it to reach the constitutional question. *New York*, 951 F.3d at 111 ("This court, however, cannot avoid the issue in light of our ruling that the Certification Condition is statutorily authorized."). But it reached only a narrow constitutional question, concluding that § 1373 "does not violate the Tenth Amendment as applied here to a federal funding requirement." *Id.* at 114 (emphasis omitted). On petition for rehearing en banc, three judges stated that "[e]very other court to have considered the issue post-*Murphy* reached the correct conclusion: Section 1373 violates the Tenth Amendment and is unconstitutional, even as applied to the situation at hand." *New York*, 964 F.3d at 165 (Pooler, J., dissenting from denial of reh'g en banc). *See City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 331 (E.D. Pa. 2018); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018); *City & Cnty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 953 (N.D. Cal. 2018); *cf. United States v. California*, 314 F. Supp. 3d 1077, 1101 (E.D. Cal. 2018).

189 *States' Commandeered Convictions*, *supra* note 19, at 2327.

190 CAL. GOV'T CODE § 7284.6 (West 2020).

191 8 U.S.C. § 1231(a)(4) (2018).

192 *Id.* § 1226(c); *see Nielsen v. Preap*, 139 S. Ct. 954, 963–968 (2019).

effect, stake out a jail in order to make a public arrest rather than have a custody hand-off inside a secure facility.<sup>193</sup>

The United States contends that the anticommandeering doctrine cannot apply because there is no federal statute “that orders California to adopt or implement (or refrain from adopting or implementing) a regulatory program.”<sup>194</sup> But that can’t be right, because it would mean that such orders commandeering state legislatures and executives would be permissible so long as they weren’t embodied in a federal statute.

More plausibly, the United States contends that the anticommandeering principle is not violated because the immigration laws do impose restrictions and confer rights on private actors: the aliens whose detention and removal are governed by those laws.<sup>195</sup> But those restrictions and rights are not what is at issue in the case, for no one denies that federal authorities can arrest, detain, and remove the aliens in accordance with federal law. And no one thinks that state law can block the federal officials from doing so. The question is whether state law can prohibit state officials from cooperating in that effort. The United States tries to elide the distinction by describing both federal and state law as addressed to the same question: “the procedures by which aliens are detained and removed.”<sup>196</sup> But this use of the passive voice obscures who is doing the detaining: when someone is in state custody, the state is doing the detaining. The reasoning of the United States would allow a federal statute to require that the alien be detained until removal and preempt state law that required release upon expiration of the sentence—because these would be conflicting schemes governing detention and release. But a federal law that required the state to detain someone—as opposed to empowering the federal government to detain that person itself—would be precisely what the anticommandeering doctrine forbids.

The United States complains, invoking a comparison to *Arizona v. United States*,<sup>197</sup> that it “cannot be that conflict preemption bars a State from adopting its own policies regulating the presence and detention of aliens that are designed to *enhance* federal immigration enforcement, yet permits a State to adopt its own policies on such matters that are designed to *obstruct* federal enforcement.”<sup>198</sup>

But once one clears away the brush and sees that the “obstruction” involved is not blocking federal law enforcement, but simply refusing to assist federal law enforcement,<sup>199</sup> this asymmetry is simply another version of the

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193 Brief for Petitioner at 13, *United States v. California*, 2020 WL 3146844 (2020) (No. 19-532), 2019 WL 5448580.

194 *Id.* at 24.

195 *Id.* at 25.

196 *Id.*

197 567 U.S. 387 (2012).

198 Brief for Petitioner, *supra* note 193, at 19.

199 *United States v. California*, 921 F.3d 865, 888 (9th Cir. 2019) (agreeing with the district court that “refusing to help is not the same as impeding” (quoting *United States v. California*, 314 F. Supp. 3d 1077, 1104 (E.D. Cal. 2018))); *City of Chicago v. Sessions*, 888 F.3d 272, 282 (7th Cir.) (labelling a “red herring” the characterization as thwarting federal

asymmetry in favor of liberty that we saw earlier: the federal government can create a right in a person to be free of state control but cannot create an obligation that a state legislature or executive control a person or help the federal government to control that person. This is true whether we are talking about immigration or pharmaceuticals: the federal government can create an exclusive regulatory regime that gives people the freedom from state regulation (including state regulation that seeks to enhance enforcement of the federal regulatory regime) but cannot require the state legislature or executive to assist in the enforcement of that federal regulatory regime.

And it is an asymmetry reflected in the fundamentals of habeas corpus: a federal writ of habeas corpus can issue to a state jailer to require that the jailer recognize a prisoner's federal right to freedom, but a federal writ of habeas corpus cannot issue to a state jailer to require that a jailer keep a person in prison based on a federal law that demands incarceration.

Less plausibly, the United States contends that Congress gave states a choice between (1) assisting (what the United States calls “not obstruct[ing]”) immigration enforcement and (2) not subjecting aliens to the state criminal justice system at all.<sup>200</sup> It is hard to see how this choice was presented clearly enough to the states for them to have accepted the deal.<sup>201</sup> And it is hard to imagine Congress enacting such a statute, except perhaps as a way of playing chicken with the states. But even if the statute expressly offered the states this choice, it would—almost literally—be a “gun to the head” coercing the states: agree to our conditions or do nothing when criminal aliens murder people with gunshots to the head, or rape them with guns pointed at their heads.<sup>202</sup>

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law enforcement because “nothing in this case involves any affirmative *interference* with federal law enforcement at all, nor is there any interference whatsoever with federal immigration authorities. The only conduct at issue here is the refusal of the local law enforcement to aid in civil immigration enforcement through informing the federal authorities when persons are in their custody and providing access to those persons at the local law enforcement facility”), *reh'g en banc granted in part, vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018).

200 Brief for Petitioner, *supra* note 193, at 29.

201 *Cf. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (“States cannot knowingly accept conditions of which they are ‘unaware’ or which they are ‘unable to ascertain.’” (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981))); Amar, *supra* note 110, at 320 (arguing in favor of “harmoniz[ing] conditional spending and conditional preemption by requiring particular clarity in both settings, where the applicability of federal law will depend on legislative choices states are being encouraged—indeed invited—to make”).

202 *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012) (plurality opinion) (describing the Medicaid condition in the Affordable Care Act as “a gun to the head”). It should go without saying, but just in case: I do not mean to suggest that all or most aliens—or even a disproportionate number of aliens—are murderers and rapists. But obviously some are.

I do not take a position here on whether *Sebelius* should be understood as relying on the amount of dollars involved. *See* Amar, *supra* note 110, at 334–35 (arguing that “a careful reading of *Sebelius* indicates that a sufficient reason Obamacare was deemed coercive

*Limiting Communication.* The federal statute prohibiting states from restricting the communication of information regarding immigration status by state and local entities or officials presents a more difficult question. The statute provides, in relevant part:

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

- (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
- (2) Maintaining such information.
- (3) Exchanging such information with any other Federal, State, or local government entity.<sup>203</sup>

To the extent that this statute limits how the states can control their own governmental entities, it runs afoul of the anticommandeering doctrine for the same reasons the California provisions discussed above are not preempted. It is not a regulation of private conduct, nor a grant of a right to a private person.<sup>204</sup>

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was that Congress was imposing new terms onto a preexisting deal,” rather than “any substantive unfairness that enforcing the terms of an agreed-upon deal would visit upon the states”). But it is hard to imagine Congress suggesting complete immunity from state criminal law for aliens, except as a means of coercing the states. (To the extent that the United States is not suggesting a federally bestowed immunity from state prosecution, but merely suggesting that the national government has the constitutional authority to take custody of and deport aliens without awaiting the result of any state criminal process, the suggestion seems uncontroversial. But it is very hard to find in the statute a condition that the national government will forebear from immediate custody and deportation of an alien charged with state crime only if the state facilitates the transfer of aliens from state to federal custody.)

203 8 U.S.C. § 1373(a)–(b) (2018); *see also id.* § 1644 (“Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”). Section 1644 applies only to government entities; for this reason, it does not present as difficult a question as § 1373.

204 Nor should the federal government be understood to have the power under Article I to create rights in state or local government entities against the state itself (at least absent



To the extent that that this statute limits how the states can control their own officials, it probably runs afoul of the anticommandeering doctrine for the same reasons the California provisions discussed above are not preempted. It is not a regulation of private conduct, nor a grant of a right to a private person.

But this conclusion is less clear, because the statute could be read as creating a federal right in the state official as an individual to communicate with the federal government. And surely the federal government can create rights in state employees as individuals against their employers. Everything from minimum wage laws to whistleblower laws fit that description. If so construed, the prohibition on states limiting their employees' ability to communicate with the federal government might be seen as a constitutionally permissible creation of a right in a private person and preempt contrary state law.

There are two reasons that counsel against this reading, one statutory, the other constitutional. As a statutory matter, it does not appear to be the best reading of the statute: a state official is given no right of action (express

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the state's consent), for that would give the federal government the power to reorganize a state government. From the perspective of the United States Constitution, state and local government entities are simply creatures of the state, with no rights against their creator. *See City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923). As noted above, the result may be different where congressional powers to enforce the Reconstruction Amendments are involved. So, too, the result might be different where Congress is acting on its obligation to guarantee that each state have a republican form of government, U.S. CONST. art. IV, § 4, or where the Constitution itself confers particular powers on a part of the state government. *See, e.g., Leser v. Garnett*, 258 U.S. 130 (1922); *Hawke v. Smith*, 253 U.S. 221 (1920); *McPherson v. Blacker*, 146 U.S. 1 (1892).

The panel in *New York* stated that it "is not so obvious" that there is a relevant power "reserved to the States" regarding immigration. *New York v. U.S. Dep't of Just.*, 951 F.3d 84, 113 (2d Cir. 2020). It did not "pursue the point further because, even assuming some power reserved for the States to prohibit information sharing with federal immigration authorities," it concluded "that § 1373 does not violate the Tenth Amendment *as applied* here to a federal funding requirement." *Id.* at 114. Even assuming that federal authority over immigration is exclusive—but see *Arizona v. United States*, 567 U.S. 387, 419 (2012) (Scalia, J., concurring in part) (observing that in the early years after the founding, the debate was "whether, under the Constitution, the *States* had exclusive authority to enact . . . immigration laws" (emphasis altered))—"the relevant power reserved to the states in this situation is not the power to enact immigration-related legislation. Rather, the reserved power at issue is the authority of the states to refuse the aid of state officials in enforcing federal law," *New York*, 964 F.3d at 165–66 (Pooler, J., dissenting) (denying rehearing en banc), or simply to set the priorities of its own law enforcement personnel. The anticommandeering principle does not evaporate in the face of an exclusive federal power; if anything, the exclusive nature of a federal power is an additional reason to forbid commandeering. Surely Congress could not (say) order the states to issue letters of marque and reprisal. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power to . . . grant Letters of Marque and Reprisal"); *id.* § 10 ("No State shall . . . grant Letters of Marque and Reprisal").

or implied)<sup>205</sup> against the government employer to vindicate that right. Nor is there the sort of rights-creating language that would give rise to a claim under § 1983.<sup>206</sup> In addition, since public officials would typically be discharged without a judicial process, it is not the kind of right that one would expect to be vindicated by way of defense to some state enforcement action. As a constitutional matter, the statute does not apply to private employees—so Congress is not “evenhandedly regulat[ing] an activity in which both States and private actors engage.”<sup>207</sup>

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205 See generally *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017); *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

206 See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (“We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.”).

207 *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478 (2018); see also *New York v. United States*, 505 U.S. 144, 160 (1992) (distinguishing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), as dealing with the “authority of Congress to subject state governments to generally applicable laws”).

Peter Margulies argues, “While § 1373 does not expressly bar states from restricting private individuals’ sharing of immigration status information with federal officials, state attempts at such restrictions would clash with both the INA and the First Amendment,” and therefore that it “merely clarifies that prohibitions on state interference with private individuals’ sharing of information with the federal government also apply to state interference with sub-federal officials’ information-sharing.” Peter Margulies, *Deconstructing “Sanctuary Cities”: The Legality of Federal Grant Conditions That Require State and Local Cooperation on Immigration Enforcement*, 75 WASH. & LEE L. REV. 1507, 1560 n.258 (2018). He does not elaborate, other than to refer to obstacle preemption and cite *Arizona v. United States*, 567 U.S. 387 (2012). Although Margulies does not mention it, a state law restriction on private persons communicating with the federal government might well violate the privileges or immunities clause of the Fourteenth Amendment:

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which own their existence to the Federal government, its National character, its Constitution, or its laws.

One of these is well described in the case of *Crandall v. Nevada*. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, “to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions.”

*Slaughter-House Cases*, 83 U.S. (21 Wall.) 36, 79 (1872) (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867)). But even if there is such a federal right created by some federal law other than § 1373, it is hard to see § 1373 as “evenhanded” regulation of both state and private actors.

Determining whether there is evenhanded regulation of both states and private actors is probably also the best way to approach the question of compulsory sharing of information more generally. See *Printz v. United States*, 521 U.S. 898, 918 (1997) (declining to address statutes that “require only the provision of information to the Federal Government”); *id.* at 936 (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 . . . are similarly invalid”). “‘For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a

Thus, the best conclusion is that the statute is unconstitutional, but a similar result could be achieved, if Congress so chose, by granting employees more generally (state as well as private) a right to communicate with immigration authorities despite the objections of their employers and giving them a right of action against their employers if they suffer adverse action for such communication.

*State Convictions As Predicates.* On the other hand, nothing in the anticommandeering doctrine empowers states to veto deportations that are based on state-court convictions, contrary to the argument in a recent *Harvard Law Review* note.<sup>208</sup> Deportations can be triggered by certain state court convictions,<sup>209</sup> but federal law reliance on state law is ubiquitous, ranging across not only immigration law,<sup>210</sup> but tax law,<sup>211</sup> social security benefits,<sup>212</sup> the law of judgments,<sup>213</sup> civil procedure,<sup>214</sup> assimilative crimes,<sup>215</sup> sentencing,<sup>216</sup> and bankruptcy<sup>217</sup>—to name a few.

More generally, as Henry Hart and Herbert Wechsler put it in 1953:

Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. This was plainly true in the beginning when the federal legislative product (including the Constitution) was extremely small. It is significantly true today, despite the volume of Congressional enactments, and even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish

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right to every man's evidence." *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2192). *See also* *Trump v. Vance*, 140 S. Ct. 2412 (2020) ("In our judicial system, 'the public has a right to every man's evidence.' Since the earliest days of the Republic, 'every man' has included the President of the United States." (footnote omitted)).

208 *States' Commandeered Convictions*, *supra* note 19, at 2327.

209 8 U.S.C. § 1227(a)(2) (2018).

210 *See, e.g.*, Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357, 360 (2002) ("For a marriage to serve as the basis for an immigration visa, for example, the marriage must be valid under state law.").

211 *See Drye v. United States*, 528 U.S. 49, 52 (1999) ("The Internal Revenue Code's prescriptions are most sensibly read to look to state law for delineation of the taxpayer's rights or interests, but to leave to federal law the determination whether those rights or interests constitute 'property' or 'rights to property' within the meaning of § 6321.").

212 42 U.S.C. § 1382c(d) (2018) (providing that, with certain exceptions, "[i]n determining whether two individuals are husband and wife for purposes of this subchapter, appropriate State law shall be applied").

213 28 U.S.C. § 1738 (2018).

214 *E.g.*, FED. R. CIV. P. 4(e), 4(k).

215 18 U.S.C. § 13 (2018).

216 *Id.* § 924.

217 *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450–51 (2007) ("Indeed, we have long recognized that the 'basic federal rule' in bankruptcy is that state law governs the substance of claims, Congress having 'generally left the determination of property rights in the assets of a bankrupt's estate to state law.'" (quoting *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000))).

limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.<sup>218</sup>

While this description is less accurate today than in 1953, there is nothing unconstitutional about this longstanding and traditional approach to the relation between state and federal law. Federal law can “build upon the legal relationships established by the states.” Where federal law builds on the legal relationships established by state law, some states may disagree with that federal law. But disagreement with what federal law does to private individuals—without coercion of any sort against the states or their officials—is not commandeering.

### CONCLUSION

The Supreme Court has clarified the distinction between permissible preemption and unconstitutional commandeering doctrine. In doing so, it rejected the conventional, but deeply unsatisfying, distinction between Congress telling the states what they couldn’t do and Congress telling the states what they had to do.

Instead, preemption involves Congress enacting a law that imposes restrictions or confers rights on private actors. If a state law confers rights or imposes restrictions that conflict with the federal law, the federal law takes precedence and the state law is preempted. On the other hand, if the federal law cannot be understood as imposing restrictions or conferring rights on private actors but is merely a direct command to the states, it is unconstitutional commandeering. So conceptualized, the anticommandeering doctrine is now broadly accepted on the Supreme Court.

While the anticommandeering doctrine does not pose a threat to as many federal laws as some have suggested, it should constrain some actions that are currently attempted by the federal government, particularly regarding immigration. And more importantly, as an important element of our federalism, it now stands as a stronger legal bulwark against the possibility of tyranny.

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218 RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 488–89 (7th ed. 2015) (reprinting a passage from the first edition in 1953).

