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State Sovereignty and the Anti-Commandeering Cases

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ABSTRACT: The anti-commandeering doctrine, recently announced by the Supreme Court in *New York v. United States* and *Printz v. United States*, prohibits the federal government from commandeering state governments: more specifically, from imposing targeted, affirmative, coercive duties upon state legislators or executive officials. This doctrine is best understood as an external constraint upon congressional power—analogous to the constraints set forth in the Bill of Rights—but one that lacks an explicit textual basis. Should the Constitution indeed be interpreted to include a judicially enforceable constraint upon national power—and, if so, should that constraint take the form of an anti-commandeering rule?

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IN *New York v. United States*,[1] the Supreme Court announced a new and highly significant constitutional doctrine: the anti-commandeering doctrine (Adler and Kreimer 1998; Caminker 1995, 1997; Hills 1998; Jackson 1998). The Court stated that "Congress may not simply . . . commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,"[2] and it proceeded to invalidate a federal statute, the Low-Level Radioactive Waste Policy Amendments Act. Five years later, in *Printz v. United States*,[3] the Court confirmed and extended the anti-commandeering doctrine and relied upon it to strike down a second federal statute, the Brady Handgun Violence Prevention Act. The doctrine was at issue yet again in *Reno v. Condon*,[4] which, unlike *New York* and *Printz*, was a unanimous decision. The Court in *Condon* rejected an anti-commandeering challenge to the Drivers' Privacy Protection Act but, also unanimously, reaffirmed "the constitutional principles enunciated in *New York* and *Printz*."[5] In this article, I will explain the importance of the case law just described within our regime of constitutional federalism, and I will explore the grounds for applauding or deploring this new limitation on federal power.

OUR FEDERAL SYSTEM AND ITS SOVEREIGN STATES

It is a shibboleth of the Court's recent federalism cases—not only the anti-commandeering cases but also commerce clause decisions such as *United States v. Lopez*[6] and *United States v. Morrison*[7] and sovereign immunity decisions such as *Seminole Tribe of Florida v. Florida*[8] and *Alden v. Maine*[9]—that in our constitutional system the state governments, and not merely the national government, are sovereigns. State sovereignty means more, I suggest, than the sheer existence of states. One can imagine a constitutional system in which geographically defined subdivisions, called "states," exist; in which the residents of each such subdivision are declared to be "citizens" of that state; in which citizens of each state are protected from discrimination by other states; in which the states have some important constitutional role, for example, in electing key officials in the national government; but in which (1) the national government is a government of unlimited, rather than limited and enumerated, powers, and further (2) the national government, in the exercise of these powers, is free to define the structure of state government and the rights and responsibilities of state officials, just as it is free to define the structure of national administrative agencies and the rights and responsibilities of the persons who staff those agencies (Rubin and Feeley 1994, 910-15). It would be counterintuitive to describe the states of this imaginary federal system as sovereign; and, in any event, these imaginary states do not have the features that the Supreme Court in *Printz*, *New York*, *Lopez*, *Seminole*

Tribe, and other such cases means to identify when it invokes the concept of state sovereignty.

Just as state sovereignty means more than the sheer existence of states, so it means less than sovereignty in the international-law sense (Rapaczynski 1985, 346-59). International sovereigns (nation-states) are coequal; no such sovereign is either legally subordinate, or legally supreme, to any other. Where the laws of two international sovereigns come into conflict, this clash is resolved by neutral choice-of-law rules that refer to the territorial locus of the relevant events, or the citizenry of the persons involved—not by a rule that gives automatic priority to the laws of one nation-state over those of another. If, for example, it were a principle of international choice-of-law that the laws of France always trumped the laws of Italy, then Italy would not be properly described as a full-fledged, international sovereign. But the U.S. Constitution contains, quite explicitly, a choice-of-law rule that gives automatic priority to the laws of the national government over state law (Gardbaum 1994, 770-73). Thus the supremacy clause of Article VI:

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

What might state sovereignty involve, if not full coequality with the national government, at one extreme, and the mere existence of the states, at the other? I have already hinted at the answer. First, states could be seen as sovereign in possessing governmental powers that are not held by the national government (Rapaczynski 1985, 350-51). For example, if a unitary national government would have the power to regulate all activities within the territorial confines of the nation that affect the welfare of its citizenry or some part thereof, the national government might be empowered to regulate only those activities with multistate welfare impacts—activities that affect the well-being of citizens from multiple states—while the power to regulate activities whose welfare effects are wholly intrastate would be reserved to the states. Second, states could be sovereign in holding certain rights or entitlements against duly empowered national action (Merritt 1988). The Constitution could grant the national government various powers (perhaps a wide set, perhaps a narrower subset) but then constrain the national government from exercising these powers in a way that infringed certain, constitutionally protected interests of the states, just as the First Amendment constrains the national government from exercising its powers in a way that infringes the constitutionally protected interest of individuals in free speech.

A particularly robust scheme of state sovereignty would employ both these strategies, while a yet stronger scheme would employ both and then add the feature of judicial enforcement (Sager 1978); constitutional

courts would be authorized to invalidate a federal statute that was unsupported by any power constitutionally granted to the national government or that was supported by some such power but nonetheless violated a state sovereignty constraint (Yoo 1997).

So much for hypothetical constitutions. What about our actual Constitution? First, does our Constitution limit the powers of the national government and reserve regulatory powers to the states? The answer—and it is hard to see how there could even be reasonable disagreement on this score—is yes. Article I, Section 8, enumerates the powers of Congress—most significantly the power set forth in the so-called commerce clause of Section 8, the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Implicit in the fact of enumeration, and explicit in the Tenth Amendment, is the proposition (1) that Congress cannot legitimately enact a statute unless the statute is grounded in some power-conferring clause contained in Article I, Section 8, or elsewhere in the Constitution, and the further proposition (2) that some federal statutes will fail to be thus grounded. Why not say that Article I, Section 8, embodies the Framers' view of the entire set of powers justifiably held by unitary governments—and that state legislation, like federal legislation, is unconstitutional unless grounded in some clause of Article I, Section 8? The Tenth Amendment clearly precludes this weird interpretation of that section. "The powers not delegated to the United States by the Constitution . . . are reserved to the States." In short, there are at least some types of legislation (such as laws regulating wholly intrastate activities) that the Constitution permits states to enact but disempowers the national government from enacting.[10]

More controversial is whether the national-power-limiting feature of the Constitution should be enforced by the U.S. Supreme Court or the lower federal courts (Moulton 1999; Yoo 1997). It would be quite possible and, arguably, quite legitimate to have a system of judicial review where Article I, Section 8, challenges to federal legislation were simply nonjusticiable. Indeed, during the years between 1937 and the *Lopez* case, the Supreme Court uniformly rejected all such challenges (Tribe 2000, 811-17), and some sophisticated constitutional thinkers argued that this was proper: the federal courts should simply defer to Congress on the question of whether a national statute fell within the terms of a constitutionally enumerated power, or so it was and still is claimed (Wechsler 1954; Choper 1980). But the more ambitious claim—that Article I, Section 8, is unbounded or bounded only by a proper understanding of the powers that a unitary national state would possess—is very hard to swallow.

The states, then, are clearly sovereign in the limited-national-power sense. Are they also sovereign in the constrained-national-power sense? This is not an easy question. To begin, the Constitution is colorably interpreted as lacking any (non-

minimal) state sovereignty constraint. And even if that interpretation is rejected, it remains quite unclear how we ought to delineate the contours of the (nonminimal) constraint—how we should distinguish between permitted and prohibited uses of the powers laid out in Article I, Section 8.

A STATE SOVEREIGNTY CONSTRAINT?

Let me start with the first point. Places in the constitutional text where the states are explicitly accorded rights against the national government are few in number and relatively minimal in importance—notably, Article I, Section 9's prohibition of federal taxes on exports from any state and of federal preferences for the ports of one state over another; Article IV, Section 3's ban on the creation of new states through the division or merger of old ones; and various references to the state legislatures, implying that Congress cannot validly abolish them. Further, I see nothing unreasonable or plainly wrong in a reading of the Constitution that envisions these as the only such constraints. Indeed, such a reading was seemingly adopted by the Court in 1985, in the *Garcia* case.[11] The question in *Garcia* was whether the Fair Labor Standards Act (FLSA), a national statute that regulates the hours and wages of employees, could constitutionally be applied to certain state employees as well as the employees of private firms. *Garcia* answered the question in the affirmative, thus overruling an earlier decision, *National League of Cities v. Usery*,[12] in which the Court had held that considerations of state sovereignty barred the application of the FLSA to state employees.

The reader might wonder why Congress has the constitutional authority to prescribe minimum wages and maximum hours even for private firms, let alone for states and state subdivisions. The answer is that the post–New Deal Court has consistently interpreted the commerce clause as empowering congressional regulation of intrastate activities that "substantially affect" interstate commerce (Tribe 2000, 811-24). It was clear in *Garcia* that the application of the FLSA to the state employees at issue in the case satisfied this well-established test—and this was sufficient for constitutionality, in the Court's view. *Garcia* declined to find, in the Constitution, a state sovereignty constraint that would warrant the judicial invalidation of statutes satisfying the "substantial effect" test. The Court explained:

> Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. . . . The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. . . . They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. . . .
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> . . . against this background, we are convinced that the fundamental limitation

> that the constitutional scheme imposes on the Commerce Clause . . . is one of process [that is, the federal political process] rather than one of result.[13]

The excerpt from *Garcia* just quoted appears to adopt the view that the Constitution lacks any state sovereignty constraints (beyond the explicit and minimal constraints set forth in Article I, Section 9, and in Article IV, which the *Garcia* Court mentioned only in passing and presumably did not mean to disparage). Congress is constitutionally permitted to exercise its commerce clause powers in a way that changes the structure of state government, sets the qualifications for state officers, and so forth; the states are not shielded from these outcomes by constitutional guarantees, but rather by the structure of the national political process, which makes such outcomes unlikely. Elsewhere, the *Garcia* Court seems to take a different and less striking view: namely, that a state sovereignty constraint does or may exist but is unenforceable by courts.[14] Either way, the judicial outcome is the same: the Court in *Garcia* held that no enforceable state sovereignty constraint barred the application of the FLSA to state employees, and it more generally suggested that considerations of state sovereignty would never (or almost never)[15] warrant judicial invalidation of those federal statutes that Article I, Section 8, empowered Congress to enact.

This is the backdrop for the anti-commandeering decisions, *New York* and *Printz*. The statutory provision struck down in *New York* basically required each state's legislature to enact legislation providing for the disposal of low-level radioactive waste produced within that state. Crucially, the Court held that this provision was permissible under the substantial-effect test but nonetheless invalidated the provision as an unconstitutional "commandeering" of state legislatures. *Printz* extended *New York* by holding that the anti-commandeering doctrine protected the executive branch of state government as well as the state's legislature. The Brady Act, in relevant part, required certain state law enforcement officials to take "reasonable" steps to investigate the legality of pending gun sales. Such a requirement violated state sovereignty, or so the Court in *Printz* opined.

> We held in *New York* that Congress cannot compel the states to enact . . . a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's 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. . . . such commands are fundamentally incompatible with our constitutional system of dual sovereignty.[16]

THE ANTI-COMMANDEERING DOCTRINE

What is commandeering? Paradigmatically, commandeering occurs when Congress imposes a duty of legislation upon state legislatures or a duty of enforcement upon the state executive branch. More generally, it seems, the Court in *Printz* and *New*

York means to preclude federal statutes that have the following characteristics: (1) the statutes are targeted at state legislative or executive officials, rather than being generally applicable both to private parties and to state officials; (2) the statutes impose coercive duties upon state legislative or executive officials (by contrast, for example, with statutes that merely require certain actions by these officials as a condition for state receipt of federal moneys); and (3) the statues impose affirmative duties on the state officials, duties of action, rather than negative duties, duties of inaction (Adler and Kreimer 1998, 74-95).

As for the constitutional status of the anti-commandeering rule, there are two possible readings of *New York* and *Printz*. According to the first reading, the anti-commandeering rule is a constitutional "constraint" (in the sense I have been discussing): a prohibition on targeted, coercive, and affirmative federal duties that is additional to, and separate from, the requirement that federal legislation be grounded in an Article I, Section 8, power. On this reading, the anti-commandeering rule is analogous to the First Amendment, or the explicit constraint on export taxes set out in Article I, Section 9. According to the second reading of *New York* and *Printz*, the anti-commandeering rule is not a separate such requirement but instead is an internal limitation on the scope of the commerce clause. On this reading, the substantial-effect doctrine is only one part of the test for deciding whether a statute is empowered by the commerce clause. The full test runs as follows: the federal statute must (1) regulate an activity with a substantial effect on interstate commerce and (2) not constitute a commandeering of state officers.

I am inclined to adopt the first reading of *New York* and *Printz*; the anti-commandeering rule is best understood, I think, as a constraint on the commerce power rather than an internal limitation. The constraint view is better supported by the text of the commerce clause. The clause empowers Congress to "regulate Commerce . . . among the Several States," which (together with the necessary and proper clause of Article I, Section 8, Clause 18) leads to the substantial-effect test rather than the more complicated disjunctive test posited by the internal-limitation view. Further, the internal-limitation view gives rise to two structural problems that are avoided by the constraint view:

1. According to the internal-limitation view, if Congress is prohibited from exercising any of its Article I, Section 8, powers to impose affirmative, targeted, and coercive duties on the states (as presumably Congress is), then the no-commandeering rule shows up as a second clause in each of the Article I, Section 8, doctrines; this creates not only unnecessary complexity but also the risk that the substance of the anti-commandeering prohibition might vary from clause to clause within Article I, Section 8.

2. The powers set forth in Article I, Section 8, can be seen to embody or reflect prima facie justifications for

federal lawmaking—for example, the federal government is prima facie justified in regulating interstate activities, since such activities have multistate welfare impacts—which must be balanced against the countervailing considerations that are set forth elsewhere in the Constitution (for example, in the Bill of Rights) or are implicit in the Constitution's overall design, and which may render a particular instance of federal lawmaking unjustified, all things considered. The internal-limitation view muddies this understanding of constitutional powers by construing the commerce clause to incorporate both a prima facie justification for federal lawmaking (the existence of a substantial effect on interstate commerce) and one but not all of the countervailing considerations that may undermine a particular federal law.

I therefore interpret *Printz* and *New York* as (re)establishing an enforceable and nonminimal state sovereignty constraint. I say "(re)establishing" because some such constraint had been intermittently recognized by the Court during earlier periods of constitutional law, albeit not in the specific shape of the anti-commandeering rule. The pre–New Deal Court repeatedly invoked state sovereignty to invalidate federal taxation of state institutions or officers (Tribe 2000, 861-62, 866-67). State sovereignty was not an important consideration in the post–New Deal case law prior to *National League of Cities*. That case set forth a constraint (or perhaps an internal limitation on the commerce clause) prohibiting federal action that impaired the states' ability to "structure integral operations in areas of traditional governmental functions" and that satisfied a few other criteria.[17] But the Court found it difficult to specify the content of the "traditional governmental function" constraint (Tribe 2000, 863-73), and *National League of Cities* was overruled by *Garcia*. A decade later, in *New York* and then *Printz*, the Court shifted course once more and established the anti-commandeering rule. These cases did not overrule *Garcia*, since the statute upheld there was not commandeering (the duties it imposed were generally applicable to state and private actors alike, rather than being targeted at the states), but *New York* and *Printz* did depart from the general view about state sovereignty articulated in *Garcia*, the view that the Constitution creates no enforceable (and nonminimal) state sovereignty constraint. Even if I am incorrect in construing the anti-commandeering rule as a constraint rather than an internal limitation on the scope of the commerce clause, *New York* and *Printz* remain highly significant cases since in either event they (re)introduce state sovereignty as a consideration that can prompt judicial invalidation of national statutes satisfying the substantial-effect test.

IS THE ANTI-COMMANDEERING DOCTRINE JUSTIFIED?

Are *New York* and *Printz* rightly decided? One line of criticism denies the existence of any state sovereignty constraint, beyond the constraints

explicitly set forth in the text of the Constitution. This view, as I have already said, is a colorable one. The view is colorable because it flows from a colorable theory of constitutional interpretation, namely, textualism. The textualist insists that constitutional rights, powers, duties, constraints, and other elements of the legal structure that we call constitutional law derive from the text of the Constitution. More precisely, the textualist (as I am using that term) insists that constitutional rights, powers, duties, and so on derive from the text of the Constitution with a fairly high degree of clarity and determinacy—paradigmatically, by flowing from discrete and reasonably specific constitutional clauses (Bork 1990). A right, power, and so forth that cannot be linked to a discrete such clause—like the anti-commandeering rule or, more generally, any nonminimal state sovereignty constraint—is suspect.

I am skeptical of textualism, for reasons developed at length by the various scholars who have advanced non-textualist accounts of constitutional interpretation (Brest 1980; Dworkin 1977; Fallon 1987; Grey 1975; Perry 1982; Richards 1989). Some constitutional issues simply cannot be determinately resolved by the text of the Constitution. (For example, the fundamental, methodological debate between textualists and non-textualists cannot be thus resolved. Even if the Constitution were to contain a pro-textualism clause, the non-textualist could legitimately ask why the clause should be binding, and the textualist would have to answer that question through general political and moral argument.) Many other constitutional issues are not, in fact, determinately resolved by the text of our Constitution. To give two famous examples: *Marbury v. Madison*[18] held that the Supreme Court had the power of judicial review, even though no discrete clause in the Constitution creates such a power; and the right of privacy recognized in *Griswold v. Connecticut*[19] was located by the Court in the "penumbra" of the Bill of Rights, since there is no separable language in the Bill of Rights or elsewhere from which a privacy right could be said readily to derive. Even those constitutional rights, powers, and so forth that do derive from separable constitutional clauses often are not *determinately* derivable. For example, the connection between existing free speech doctrine, or equal protection doctrine, and the language of the First Amendment, or the equal protection clause, is highly indeterminate and contestable.

If textualism is, indeed, an incorrect account of constitutional interpretation, why think that state sovereignty constraints are limited to those minimal constraints set forth in Article I, Section 9, and in Article IV? The Constitution, read as a whole, suggests that the states are political communities: they have "legislatures" (for example, Article I, Section 4) and "citizens" (for example, Article IV, Section 2), and their powers are guaranteed by the Constitution itself, rather than being delegated and revocable by Congress. States are vehicles for political participation and democratic self-

governance; all this is a reasonable inference from the text of the Constitution and from constitutional history (Friedman 1997, 389-94; Jackson 1998, 2221; Merritt 1988, 7-8; McConnell 1987, 1507-11; Rapaczynski 1985, 395-408; Shapiro 1995, 139). Imagine a federal law that pursues a legitimate federal end (thus falling within an Article I, Section 8, power) and does not run afoul of the explicit state sovereignty constraints but pursues its legitimate federal end in a way that subverts—deeply subverts—the character of states as political communities. (For example, imagine a federal law that requires Louisiana citizens to vote in favor of amending their state constitution to eliminate a provision that has hindered commercial ties between Louisiana and other states.) Why insist that such a law is constitutionally valid? Assume the *Garcia* Court was correct in its claim that states are well represented in the national political process (Wechsler 1954). It does not follow that the national political process is constitutionally unconstrained, qua state sovereignty. Presumably, the states are given a special role in the national political process just because they are sovereign, and the recognition of an implicit, nonjusticiable state sovereignty constraint would not function to truncate the national political process.

The key word in the last sentence is "nonjusticiable." A justiciable—judicially enforceable—state sovereignty constraint would truncate the national political process, since the question of whether a given statute violated that constraint would be finally resolved by the Supreme Court rather than Congress. *Garcia*'s political-process argument is best seen as an argument for the unenforceability of state sovereignty constraints rather than for their nonexistence. But is the argument, thus understood, a persuasive one? I think not. The Constitution does indeed structure the national political process in a way that is protective of states. Yet the most salient such feature—the election of senators on a state-by-state basis—does not protect state institutions. Rather, it serves to advance the shared interests of those persons who reside in each state; it makes each such collectivity a potent "interest" group (Kramer 2000, 221-27). If a senator can maximize the satisfaction of his constituents' interests through federal legislation that interferes with state governments—for example, by commandeering state officers, as did the Brady Act—he will vote in favor of that legislation.[20] Other constitutional provisions give state legislators some role in national politics, for example, in designing congressional electoral districts. Here, too, it is questionable whether the states qua political communities are significantly protected (Kramer 2000, 226-27). First, the role of state legislators in shaping the national government has significantly diminished over the last century; state legislators no longer choose senators (as they did prior to the Seventeenth Amendment) and, as a result of the Court's voting rights jurisprudence, are much less free to shape electoral districts. Second, a state legislator will presumably use his various constitutionally

allocated powers to maximize the satisfaction of *his* constituents' interests and therewith his own chances of reelection. Whether a reelection-maximizing state legislator is likely to advance, or impair, state sovereignty is an open question.

I thus believe that *Printz* and *New York* were correct to recognize *some* enforceable state sovereignty constraint not derivable from discrete constitutional clauses.[21] The cases are, on this level, rightly decided. But they remain vulnerable to a different, less sweeping criticism, namely, that considerations of state sovereignty justify some enforceable rule other than an anti-commandeering rule (Jackson 1998, 2246-59).

ALTERNATIVE FORMULATIONS FOR A STATE SOVEREIGNTY CONSTRAINT

To begin, there is plenty of evidence that the Framers of the Constitution intended to recognize sovereign states—genuine political communities, not merely subdivisions of the national government—but no strong evidence that they intended to implement notions of state sovereignty through an anti-commandeering rule. The putative historical case for that rule, set forth by the Court in *Printz*, is unpersuasive (Caminker 1995, 1042-50; 1997, 209-12). To be sure, the anti-commandeering rule would be constitutionally justified, even absent strong textual or historical grounding, if it were the case that the concept of state sovereignty implied such a rule; but this is not the case, as Professor Seth Kreimer and I recently argued at length in an article entitled "The New Etiquette of Federalism: *New York*, *Printz* and *Yeskey*" (Adler and Kreimer 1998). We there tried to show that the distinctions central to the anti-commandeering rule—between permissible negative duties and impermissible affirmative ones; between the permissible enactment of generally applicable laws and the impermissible targeting of the states; between permissible encouragement of state officials to take action and the impermissible coercion of such officials; between the permissible imposition of targeted, coercive, affirmative duties on state judges and the impermissible imposition of such duties on state legislators and executive officials—are not *relevant* distinctions in light of federalism values and, specifically, in light of the states' status as political communities.

Consider the affirmative-negative distinction. The anti-commandeering rule prohibits the federal government from coercing state legislators or executive officials to enact or enforce a particular law, but it does not prohibit the federal government from coercing state legislators or executive officials to refrain from enacting or refrain from enforcing a law. Why the difference? In either event, the state officials and, derivatively, the state citizenry are deprived of a policy choice. Absent federal intervention, the state may choose between regulating a given activity and leaving it unregulated. Impermissible federal commandeering deprives the state of the deregulatory option; the permissible imposition of negative federal duties

deprives the states of the regulatory option. But the concept of state sovereignty is not biased toward deregulation; each type of federal intervention reduces the state's vitality and autonomy as a political community. Kreimer and I flesh out this analysis in "The New Etiquette" and present parallel critiques of the coercion-encouragement, targeted–generally applicable, and judge-legislator or executive distinctions.

What are the alternatives to the anti-commandeering rule? Consider some possibilities. First, the Supreme Court and lower federal courts might simply decide, on a case-by-case basis, whether a particular federal statute seriously undermined state sovereignty or political community; the concepts of state sovereignty and political community could play a direct role in constitutional adjudication, rather than being translated into doctrinal rules like the anti-commandeering rule or *National League of Cities*' "traditional governmental function" rule. Such rules are more determinate, and easier to apply, than the underlying concepts, but precisely for that reason the rules are not completely faithful to the concepts; some federal statutes that are genuinely violations of state sovereignty will be permissible under a given rule, and vice versa. Second, the Court could put in place a rule different from the anti-commandeering rule. The subsequent history of *National League of Cities* impeaches the "traditional governmental function" rule, but it is hardly the case that this is the only rule-based alternative to *Printz* and *New York*. Some commentators have suggested that the Court should invalidate federal statutes that change the structure of state governments, as opposed to statutes that merely impose duties on (or otherwise induce action or inaction by) state officials (Tribe 2000, 912-20). Paradigmatic would be federal statutes (enacted under the commerce clause, as opposed to Congress's special power to enforce the Fourteenth and Fifteenth Amendments) that specified state voting qualifications or electoral districts, the size of the state legislature, the procedures for legislation, or the separation of powers between the legislature and the state's executive branch (Merritt 1988, 37-55).

Perhaps the structural-nonstructural distinction would prove as ineffable as the distinction between traditional and nontraditional state functions. If so, a more specific rule or set of rules might be crafted that distinguished between those processes and institutions that are central to the democratic self-governance of the state (the voting process, the legislature) and those processes and institutions that are less central. Consider, for example, a doctrine that prohibited Congress from imposing any duties (positive or negative) on state legislators, on the state governor (insofar as he or she has a role in the legislative process), or on state voters but permitted the imposition of any duties (positive or negative) on state enforcement officials or judges. Such a rule would be no more difficult to apply than the anti-commandeering rule; it would cohere with the supremacy clause (since the state officials who apply state law to

particular cases—that is, enforcement officials or judges—would in any case of conflict between federal and state law give effect to the federal law); and it would better effectuate the underlying concept of state sovereignty than the anti-commandeering rule, since it would leave the state's legislative process entirely unconstrained by federal statutory law.

I believe, then, that the Court's adoption of the anti-commandeering rule in *Printz* and *New York* was mistaken; but let me also emphasize that this was not an obvious or clear error. *Printz* and *New York* are not only significant decisions, for reinstating a nonminimal state sovereignty constraint within enforceable constitutional doctrine. They are also hard decisions, hard because the doctrinal specification of state sovereignty is subtle and difficult—as the tortuous path from the immediate post–New Deal period, to *National League of Cities*, to *Garcia*, and finally to *Printz* and *New York* demonstrates. Note that there has been no comparable vacillation in defining the basic structure of many other constitutional doctrines, such as equal protection doctrine (which since the New Deal has been grounded on the prohibition against discrimination) or free speech doctrine.

Is the game worth the candle? Does the vacillation amount to a persuasive argument for the nonenforcement of the state sovereignty constraint—an argument more cogent than the political-process argument sketched in *Garcia*—namely, that the Supreme Court is incompetent to specify the content of state sovereignty? I think not. The issue is not absolute but relative competence (Komesar 1994), and I see no reason why Congress is best positioned to decide the hard issues posed in the anti-commandeering cases. The Court should, I suggest, continue to struggle with the meaning of state sovereignty; and the decisions in *Printz* and *New York* mean that the Court will continue thus to struggle, at least for now.

Notes

1. 505 U.S. 144 (1992).
2. Id. at 161.
3. 521 U.S. 898 (1997).
4. 120 S. Ct. 666 (2000).
5. Id. at 672. An important recent case closely related to *New York*, *Printz*, and *Condon* is *Alden v. Maine*, 527 U.S. 706 (1999), in which the Court grounded so-called sovereign immunity doctrine—a doctrine that shields the states from lawsuits—in unwritten constitutional principles of state sovereignty rather than in the text of the Eleventh Amendment. Space limitations prevent me from discussing in this article sovereign immunity doctrine and its interesting connections to the anti-commandeering doctrine.
6. 514 U.S. 549 (1995).
7. 120 S. Ct. 1740 (2000).
8. 517 U.S. 44 (1996).
9. 527 U.S. 706 (1999).
10. See, for example, *Morrison*, 120 S. Ct. at 1754 ("The Constitution requires a distinction between what is truly national and what is truly local. . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.").
11. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).
12. 426 U.S. 833 (1976).
13. *Garcia*, 469 U.S. at 550-51, 554.
14. See id. at 547.
15. See id. at 556.
16. *Printz*, 521 U.S. at 935.
17. *Garcia*, 469 U.S. at 537.

18. 5 U.S. (1 Cranch) 137 (1803).

19. 381 U.S. 479 (1965).

20. More precisely, senators can be predicted to be responsive to the politically mobilized or organized segments of the state citizenry, rather than to the state citizenry as a whole. This qualification does not change the basic point here, that the state-by-state election of senators does not function to safeguard the sovereignty of state governments.

21. I do not have the space here to fully defend this view. I have just sketched a rebuttal to *Garcia*'s argument for the nonjusticiability of state sovereignty constraints; but there are other plausible arguments for nonjusticiability (Kramer 2000), and a full defense of the claim that such constraints should be judicially enforced would need to rebut these arguments.

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