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# COMMANDEERING, COERCION, AND THE DEEP STRUCTURE OF AMERICAN FEDERALISM

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*The anti-commandeering and anti-coercion principles announced in New York v. United States and NFIB v. Sebelius have great potential importance, but the most prominent justification for them is seriously flawed. This Article elaborates a more persuasive and largely neglected alternative, grounded in the deep structure of American federalism. Simply put, both commandeering*

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and coercive conditional spending transfer control of state governments from their constitutionally designated electoral constituencies to Congress. This threat is probably insufficient to justify the anti-commandeering and anti-coercion principles—it is only one element of a more complex federalism calculus—but any persuasive critique or defense of these doctrines must take account of it.

#### INTRODUCTION

The anti-commandeering principle announced in *New York v. United States*<sup>1</sup> prohibits Congress from compelling state governments to enact, enforce, or administer federal policies.<sup>2</sup> Until recently, this doctrine has been of mostly academic interest.<sup>3</sup> Congress has seldom sought to commandeer state legislatures or executive officials, and the Supreme Court has invalidated only two statutes on this ground.<sup>4</sup> Two recent developments, however, have rendered the anti-commandeering principle far more important.

The first is marijuana legalization. Since 1996, twenty-three states and the District of Columbia have legalized the use of marijuana for medical purposes.<sup>5</sup> Two of these, Washington and Colorado, have also legalized recreational use, subject to certain regulations.<sup>6</sup> The possession, use, and sale of marijuana remain illegal under federal law for any purpose.<sup>7</sup> But without the

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<sup>1</sup> 505 U.S. 144 (1992).

<sup>2</sup> *Id.* at 188.

<sup>3</sup> See, e.g., Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*, 1998 SUP. CT. REV. 71; Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813 (1998) (arguing that commandeering poses different and greater threats to state autonomy than conditional spending or preemption); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

<sup>4</sup> Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified at 42 U.S.C. §§ 2021b-2021j (2012)), *invalidated in part by New York*, 505 U.S. 144; Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536, *invalidated in part by Printz v. United States*, 521 U.S. 898 (1997).

<sup>5</sup> *State Medical Marijuana Laws*, NCLS (Oct. 20, 2014), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>, *archived at* <http://perma.cc/8KU6-DDYR> (documenting state legislation on medical marijuana).

<sup>6</sup> Eliza Gray, *New Laws Chart Course for Marijuana Legalization*, TIME (Oct. 19, 2013), <http://nation.time.com/2013/10/19/new-laws-chart-course-for-marijuana-legalization/>, *archived at* <http://perma.cc/3ZC6-A8MQ> (discussing Colorado’s and Washington’s governance of legal marijuana and surmising that the states will be test cases for other states and countries).

<sup>7</sup> Controlled Substances Act, 21 U.S.C. § 812(c) (2012) (listing marijuana as a Schedule I drug).

active cooperation of state law enforcement, the vast majority of offenses in legalization states seem likely to go unprosecuted. Federal law enforcement simply lacks the resources to undertake such an effort on its own.<sup>8</sup> The anti-commandeering principle, however, prohibits Congress from compelling state officials to enforce the federal drug laws.<sup>9</sup>

The other important recent development is the Supreme Court's decision in *National Federation of Independent Business v. Sebelius (NFIB)*.<sup>10</sup> In the course of invalidating the Affordable Care Act's Medicaid expansion<sup>11</sup> as unconstitutionally coercive of the states, the Court drew an explicit line between Congress's conditional spending power and the anti-commandeering principle. At bottom, the Court held coercive exercises of the conditional spending power and commandeering amount to the same thing.<sup>12</sup> In both cases, "[p]ermitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system."<sup>13</sup> The nub of the Court's accountability concern is the potential for political confusion: "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."<sup>14</sup>

The extension of this logic to the conditional spending power is important because it calls into question an enormous quantity of federal legislation.<sup>15</sup> It is troubling because the Court's political accountability argument has been roundly discredited. Indeed, it is difficult to think of a more frequently and

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<sup>8</sup> See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1464-65 (2009); David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 633 (2013) (stating that as of 2008, state law enforcement agents outnumbered federal law enforcement agents 765,000 to 120,000).

<sup>9</sup> Of course, political as well as legal considerations might prevent Congress from overtly conscripting state officials in this context. But even if that is the case, the anti-commandeering principle is likely to influence how broadly or narrowly courts construe the Controlled Substances Act, with very important implications for the practical ability of states to resist federal drug enforcement. See *infra* Part I.A.3.

<sup>10</sup> 132 S. Ct. 2566 (2012).

<sup>11</sup> 42 U.S.C. § 1396(c) (2012).

<sup>12</sup> *NFIB*, 132 S. Ct. at 2602 ("[T]he Constitution simply does not give Congress the authority to require the States to regulate. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.") (quoting *New York v. United States*, 505 U.S. 144, 178 (1992)).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (quoting *New York*, 505 U.S. at 169).

<sup>15</sup> See Andrew B. Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2013 WIS. L. REV. 339, 341 (discussing the number of statutes underwritten by the spending power and the potential flood of challenges to these statutes in federal courts after *NFIB*).

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persuasively criticized element of the Court's modern federalism jurisprudence. Many commentators question whether political accountability is a constitutional value at all.<sup>16</sup> Others have pointed to the dubious empirical premises of the Court's claim that accountability is undermined by commandeering and coercive conditional spending legislation.<sup>17</sup> Still others have noted that non-coercive conditional spending poses a far greater threat to political accountability than commandeering or coercive spending legislation.<sup>18</sup>

These are damningly persuasive criticisms. They do not, however, amount to a comprehensive critique of the anti-commandeering and anti-coercion principles, which now loom so large on the landscape of American federalism. They merely refute the most prominent functional justification for those principles.<sup>19</sup> As it happens, another, more persuasive justification is available—one that is hinted at in some of the Court's decisions but has received much less attention in the academic literature.<sup>20</sup>

Put simply, both commandeering and coercive conditional spending transfer control of state governments from their electoral constituencies to Congress. This is constitutionally problematic because the representational relationship between states and their constituencies is a crucial element of the American constitutional structure. Indeed, nearly all of the supposed benefits of federalism flow, directly or indirectly, from the integrity of this relationship. This constituency-relations argument offers the best explanation for the Court's anti-commandeering and conditional spending decisions and the last,

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<sup>16</sup> See *infra* Part I.C.1.

<sup>17</sup> See *infra* Part I.C.1.

<sup>18</sup> See *infra* Part I.C.2.

<sup>19</sup> Political accountability is not the only justification that has been offered for the anti-commandeering principle. The most important alternative is the cost-internalization argument developed by Roderick Hills and Ernest Young. Hills, *supra* note 3, at 857; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 35 (2004). In brief, Hills and Young contend that the anti-commandeering principle forces Congress to pay the market rate for states' services, rather than taking them without compensation. Hills, *supra* note 3, at 871; Young, *supra*, at 35. This, in turn, reduces the likelihood that Congress will pass legislation whose social costs exceed its benefits. See Young, *supra*, at 128. However persuasive this may be as a justification for the anti-commandeering principle, it cannot explain *NFIB's* anti-coercion principle, which prevents Congress from "purchasing" state services even—indeed, especially—when it is willing to pay the states' reservation price. See Hills, *supra* note 3, at 857. For this reason, and for reasons of space, I put the cost-internalization argument mostly to one side in this Article. *But see infra* note 144.

<sup>20</sup> The most notable exception is Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) (arguing that the Guarantee Clause of the Constitution requires Congress to respect the political autonomy of state governments). Merritt's argument, however, is largely textual, historical, and doctrinal rather than functionalist. For that reason, it largely ignores the insights of political economy and institutional economics that are my principal focus here. Merritt's article also predates *New York*, *Printz*, and *NFIB*, the three decisions most in need of explanation and justification in the contemporary context.

best hope of justifying them.<sup>21</sup> Yet no court or commentator has elaborated it sympathetically and systematically. This Article is the first to do so. It is also the first to subject the argument to sustained critical analysis.

Ultimately, I do not believe that the constituency-relations argument is sufficient to justify the anti-commandeering and anti-coercion principles. Even so, the argument is worth taking seriously for three reasons. First, any persuasive critique of anti-commandeering and anti-coercion principles must engage with their most compelling justification, which no critic has done to date. Second, the anti-commandeering and anti-coercion principles may be around for some time. If they are, the constituency-relations argument provides a better guide to their interpretation and application, both predictively and normatively, than the Court's political accountability argument. Third, the constituency-relations argument helps to refocus attention on the most important aspect of American federalism—the representational relationships established by the Constitution. These relationships are often overshadowed by the enumerated powers and Tenth Amendment questions that preoccupy courts. But without them, the division of power between states and the federal government would be largely irrelevant. The constituency-relations argument gets this much right, if no more.

The discussion proceeds as follows. Part I provides a critical summary of the Court's commandeering and conditional spending decisions. Its main goal is to establish the deficiency of the political accountability argument as an explanation of and justification for the anti-commandeering and anti-coercion principles. This argument was unpersuasive when the Court first offered it in *New York* and *Printz v. United States*,<sup>22</sup> and *NFIB* only makes it look worse. It can neither explain nor justify the Court's commandeering and conditional spending decisions.

Political accountability, however, is not the only argument available. Part II elaborates a new and more compelling explanation of the dangers posed by commandeering and conditional spending—the constituency-relations argument. Unlike the Court's political accountability argument, this explanation is grounded in the deep structure of American federalism. It focuses on the independent relationships that the Constitution establishes between state governments and their local constituencies on the one hand and the federal government and its national constituency on the other.

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<sup>21</sup> Throughout, I use the words “explain” and its variants in the Dworkinian sense, not to make any claims about the secret motivations of individual judges. *See generally* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). The constituency-relations argument explains the Court's commandeering and coercion decisions in the sense that it is a coherent principle that fits—i.e., is consistent with—their results. My intuition is that at least some of the justices who decided these cases had something like the constituency-relations argument consciously or semi-consciously in mind. But no part of my argument turns on this claim.

<sup>22</sup> 521 U.S. 898 (1997).

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The integrity of these representative relationships is basic to the operation of American federalism. Indeed, the responsiveness of state governments to their own electoral constituencies is what defines their distinctive existence and sets them apart from the local bureaucratic departments of a consolidated national government. An exercise of federal power that renders state governments legally responsible to the national government and its national constituency therefore alters the operation of American federalism in a fundamental way. This is true whether federal control takes the form of commandeering or coercive conditional spending legislation. This also explains why the Court remains unconcerned about run-of-the-mill—i.e., non-coercive—conditional spending legislation, despite its much greater potential to confuse the lines of political accountability. Whatever its other merits, such legislation leaves state governments in the control of their constitutionally appointed electoral constituencies.

Or so the argument might go. Ultimately, as Part III makes clear, I do not believe that the constituency-relations argument is sufficient to justify *NFIB* or the Court's commandeering decisions. But either way, the argument provides a more compelling explanation and justification for those decisions than the Court or its defenders have done. Critics should not assume that they have vanquished the intellectual case for the anti-commandeering and anti-coercion principles until they have grappled with the constituency-relations argument. And if the Court sticks with any or all of these decisions notwithstanding their problems, that argument offers a better guide to their interpretation and application than political accountability.

#### I. THE INADEQUACY OF POLITICAL ACCOUNTABILITY

This Part provides a critical review of the Supreme Court's commandeering and conditional spending decisions. Its principal purpose is to establish the deficiency of political accountability as an explanation and justification for the anti-commandeering principle established in *New York v. United States* and the anti-coercion principle established in *NFIB*. Along the way, it provides some necessary historical background and explains the current practical significance of the two doctrines.<sup>23</sup>

##### A. *The Anti-Commandeering Principle*

###### 1. *New York v. United States*

The story of the anti-commandeering doctrine begins with *New York v. United States*.<sup>24</sup> *New York* involved a complex set of interlocking provisions of

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<sup>23</sup> The doctrinal summary in this Part incorporates text adapted from Coan, *supra* note 15, at 345-56.

<sup>24</sup> Of course, one could always go back further—in this case, to the Supreme Court's earlier, subsequently abandoned attempts to limit direct federal regulation of states in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (invalidating the Fair Labor

the Low-Level Radioactive Waste Policy Amendments Act of 1985.<sup>25</sup> The Court upheld two of the challenged provisions, which gave states a choice between regulating or providing for the disposal of waste within their borders and losing federal funds or having their own regulations preempted by direct federal regulation of waste producers in their states.<sup>26</sup> But it struck down a third provision on the grounds that it directed states to legislate in accordance with federal policy, either by establishing a waste disposal plan or by subsidizing waste generators within their states.<sup>27</sup> The fact that New York had initially agreed to this provision—as part of a comprehensive plan for addressing the problem of radioactive waste—made no difference.<sup>28</sup>

The principal practical rationale the Court offered for this result was the need to preserve the political accountability of both federal and state officials.<sup>29</sup> If Congress were permitted to commandeer state legislatures into enacting federal policy, voters might inaccurately and unfairly hold state officials responsible for a decision imposed upon them by the federal government.<sup>30</sup> Conversely, if the federal government were permitted to take credit for national legislation addressing a serious problem like low-level radioactive waste, while foisting the difficult and unpopular decisions entailed by that solution onto state legislatures, it might avoid political responsibility for its policy choices.<sup>31</sup>

## 2. *Printz v. United States*

Five years later, the Court decided *Printz v. United States*, extending *New York*'s anti-commandeering principle to federal commandeering of state

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Standards Act to the extent it burdened “traditional governmental functions” of states).

<sup>25</sup> Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified at 42 U.S.C. § 2021b-2021j (2012)), *invalidated in part by* *New York v. United States*, 505 U.S. 144 (1992); *New York*, 505 U.S. at 149.

<sup>26</sup> *New York*, 505 U.S. at 173 (“The Act’s first set of incentives, in which Congress has conditioned grants to the States upon the States’ attainment of a series of milestones, is . . . well within the authority of Congress under the Commerce and Spending Clauses.”); *id.* at 174 (“The Act’s second set of incentives thus represents a conditional exercise of Congress’ commerce power, along the lines of those we have held to be within Congress’ authority.”).

<sup>27</sup> *Id.* at 176 (“Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two.”).

<sup>28</sup> *Id.* at 182 (“State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.”).

<sup>29</sup> *Id.* at 182-83.

<sup>30</sup> *Id.* at 168.

<sup>31</sup> *Id.* at 169 (“[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”).

executive officials.<sup>32</sup> *Printz* involved a challenge to interim provisions of the Brady Handgun Violence Prevention Act,<sup>33</sup> which required state law enforcement officers to perform background checks on would-be gun purchasers until a comprehensive national database could be created.<sup>34</sup> Despite its interim nature, despite strong practical arguments that the national government lacked the capacity to perform such background checks itself in the short term, and despite the dissent's vigorous argument that commandeering state executive officials was less offensive to state sovereignty than commandeering state legislatures, the Court rejected this policy as unconstitutional.<sup>35</sup>

Much of the Court's discussion was historical, but to the extent that it offered a practical or structural rationale for its decisions, it was the same as that offered in *New York*.<sup>36</sup> Like state legislatures, state executive officials make discretionary policy decisions in the course of carrying out their responsibilities.<sup>37</sup> To permit those officials to be commandeered by the federal government would risk confusing the lines of accountability carefully separated by the Constitution.<sup>38</sup>

### 3. Practical Significance

Until recently, the impact of the anti-commandeering principle has been mostly confined to the statutes struck down in *New York* and *Printz* and the swelling of American law reviews.<sup>39</sup> Congress has seldom found it necessary to commandeer state officials or state legislatures, and the Court has never

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<sup>32</sup> *Printz v. United States*, 521 U.S. 898, 933 (1997) ("We adhere to that principle today, and conclude categorically, as we concluded categorically in *New York*: 'The Federal Government may not compel the States to enact or administer a federal regulatory program.'" (quoting *New York*, 505 U.S. at 188)).

<sup>33</sup> Pub. L. No. 103-159, 107 Stat. 1536, *invalidated in part by Printz*, 521 U.S. 898.

<sup>34</sup> *Id.* at 902-03 (describing the Act's provisions).

<sup>35</sup> *Id.* at 926-33 (rejecting each of these grounds for upholding the Act).

<sup>36</sup> *Compare id.* at 930 (stating that Congress can both "take credit for 'solving' problems" without raising federal taxes and pass the blame stemming from unpopular federal policy to the states by forcing the states to implement said policy), *with New York*, 505 U.S. at 169 (arguing that when the federal government forces the states to regulate, state officials will bear most of the responsibility for the program, while federal officials will insulate themselves from political consequences).

<sup>37</sup> *Printz*, 521 U.S. at 930 ("Under the present law . . . it will be the [state official] and not some federal official who stands between the gun purchaser and immediate possession of his gun.").

<sup>38</sup> *Id.* ("[E]ven when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.").

<sup>39</sup> *See supra* note 3.



struck down another statute on this ground. Indeed, it has decided only one other case that turned directly on the anti-commandeering principle.<sup>40</sup>

This quiet obscurity is unlikely to last much longer. The reason is the twenty-three states and the District of Columbia that have legalized marijuana for some or all purposes.<sup>41</sup> As David Schwartz and Robert Mikos have shown, this state of affairs has placed federal drug policy on a collision course with the anti-commandeering principle.<sup>42</sup> Despite state legalization efforts, the possession, use, and distribution of marijuana remain federal crimes, but federal law enforcement lacks sufficient resources to investigate and prosecute the vast majority of offenses.<sup>43</sup> Historically, state officials have stepped in to fill the breach, working in close cooperation with their federal counterparts.<sup>44</sup> In legalization states, however, such cooperation is inconsistent with state law.<sup>45</sup>

For now, Congress and the President are treading cautiously in this area.<sup>46</sup> This caution may or may not last. But even if it does—and does so for political rather than legal reasons—the anti-commandeering principle has very important implications for federal drug enforcement efforts. In particular, that principle seems likely to lead courts to construe the Controlled Substances Act<sup>47</sup> narrowly, in order to avoid difficult constitutional questions at the boundary of commandeering and preemption. Already such questions are creating substantial uncertainty.<sup>48</sup>

If this uncertainty is resolved in favor of state marijuana policies, that will give states substantial room to obstruct federal drug enforcement. Among other things, state officials might issue licenses and permits to sell marijuana, return inadvertently or unlawfully seized marijuana to users and distributors, and

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<sup>40</sup> See *Reno v. Condon*, 528 U.S. 141, 151 (2000) (“[T]he [Driver’s Privacy Protection Act] is consistent with the constitutional principles enunciated in *New York* and *Printz*.”).

<sup>41</sup> See *State Medical Marijuana Laws*, *supra* note 5.

<sup>42</sup> See Mikos, *supra* note 8, at 1427-45 (asserting that “[s]omething’s [g]otta [g]ive” in the conflict between current state and federal marijuana law); Schwartz, *supra* note 8, at 575-81 (juxtaposing state marijuana legalization with federal marijuana criminalization and exploring the anti-commandeering implications thereof).

<sup>43</sup> See Mikos, *supra* note 8, at 1464-65 (reporting that the federal government employs only 4400 DEA agents while more than 14.4 million people regularly use marijuana in the United States every year); Schwartz, *supra* note 8, at 633 (observing that federal authorities only handle one percent of the roughly 800,000 marijuana cases every year).

<sup>44</sup> See Schwartz, *supra* note 8, at 582-84 (discussing cooperation between state and federal law enforcement).

<sup>45</sup> See Mikos, *supra* note 8, at 1427-32 (describing state law in states that have legalized marijuana); Schwartz, *supra* note 8, at 575-77 (same).

<sup>46</sup> Schwartz, *supra* note 8, at 584 (observing that the Obama administration has been “reducing enforcement [of the Controlled Substances Act] against individuals acting in compliance with state marijuana laws”).

<sup>47</sup> 21 U.S.C. §§ 801-904 (2012).

<sup>48</sup> See Schwartz, *supra* note 8, at 578-81 (collecting cases).

withhold state tax records of marijuana distributors from federal authorities.<sup>49</sup> Needless to say, such results would have important implications for federal law enforcement in other areas.<sup>50</sup>

On the other hand, if the uncertainty is resolved in favor of federal preemption, that is likely to narrow the anti-commandeering principle in important ways.<sup>51</sup> States might be required to refrain from various forms of arguably passive resistance on the grounds that such noncooperation affirmatively thwarts federal objectives and is therefore preempted by the Controlled Substances Act.<sup>52</sup> Either way, courts will be required to grapple with the reach and underlying justifications for the anti-commandeering principle.

## B. *The Anti-Coercion Principle*

### 1. *South Dakota v. Dole*

Prior to *NFIB*, the Court's most important conditional spending power decision was *South Dakota v. Dole*, decided in 1987.<sup>53</sup> *Dole* rejected a challenge to the National Minimum Drinking Age Act of 1984,<sup>54</sup> which withheld five percent of federal highway funds from states that did not adopt a legal drinking age of at least twenty-one.<sup>55</sup> In a decision most commentators understood as extremely deferential to Congress's conditional spending power, the Court emphasized that exercises of this power must satisfy five requirements.<sup>56</sup> Among these, "the financial inducement offered by Congress"

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<sup>49</sup> *Id.* at 584-85, 587; see also Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 160-61 (2012) (arguing that the anti-commandeering principle should protect state departments of revenue against compelled disclosure of state tax records to the federal government).

<sup>50</sup> Immigration enforcement is one obvious example. See, e.g., Mikos, *supra* note 49, at 142-43 (discussing a New York City policy barring city employees from sharing immigration information with the federal government); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382-84 (2006) (discussing state and local "sanctuary laws," which bar information sharing or other cooperation with federal immigration authorities).

<sup>51</sup> *Cf.* *City of New York v. United States*, 179 F.3d 29, 34-35 (2d Cir. 1999) (adopting narrow reading of the anti-commandeering principle based on the federal government's strong interest in obtaining immigration information in the possession of state agencies).

<sup>52</sup> See Schwartz, *supra* note 8, at 580-82 (collecting actual and hypothetical examples).

<sup>53</sup> *South Dakota v. Dole*, 483 U.S. 203 (1987). I bracket *United States v. Butler*, which invalidated a conditional federal spending program aimed at individuals. *United States v. Butler*, 297 U.S. 1, 68 (1936).

<sup>54</sup> 23 U.S.C. § 158 (2012).

<sup>55</sup> *Id.*

<sup>56</sup> *Dole*, 483 U.S. at 207-08, 210-11 (listing five conditions for the exercise of the spending power, including pursuit of "the general welfare," stating the conditions on the receipt of federal funds unambiguously, relating the grant to a national interest, not barred

must not be “so coercive as to pass the point at which ‘pressure turns into compulsion,’” though nothing in *Dole* suggested an inclination to apply this requirement stringently.<sup>57</sup> Indeed, the consensus view of commentators, supported by twenty-five years of decisions following *Dole*, was that the decision represented a virtual blank check to Congress.<sup>58</sup>

## 2. *NFIB v. Sebelius*

This changed with the Court’s surprising recent decision that the Affordable Care Act’s Medicaid expansion was unconstitutionally coercive of state governments that wished not to participate.<sup>59</sup> Both the *NFIB* decision and the Affordable Care Act are quite complex. But to understand the spending power aspect of the decision, it is necessary only to appreciate one key point: the Act requires states to participate in a substantial expansion of Medicaid in order to remain eligible to receive any federal Medicaid funds. “A State that opts out of the Affordable Care Act’s expansion in health care coverage thus stands to lose not merely ‘a relatively small percentage’ of its existing Medicaid funding, but *all* of it.”<sup>60</sup>

In holding this portion of the Act unconstitutional, Chief Justice Roberts’s controlling opinion relied on three principal factors: (1) the dramatic size of the Act’s Medicaid expansion, almost forty percent of the preexisting federal

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by other provisions of the Constitution, and not so coercive as to become compulsion).

<sup>57</sup> *Id.* at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

<sup>58</sup> See, e.g., Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 355 (2008) (“None of [*Dole*’s] direct limitations on the spending power has had any real bite in the cases.”); Lynn A. Baker, *Conditional Federal Spending and States’ Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 116, 117 n.18 (2001) (repeatedly describing *Dole* as “toothless”); Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 467-69 (2003) (stating that courts have treated *Dole*’s anti-coercion principle as “essentially nonjusticiable” even in cases where “the absolute amount or percentage of federal money at stake is so large that [a state] has ‘no choice but to accept the [federal legislation’s] many requirements’” (quoting *Kansas v. United States*, 214 F.3d 1196, 1201 (10th Cir. 2000))).

<sup>59</sup> *NFIB*, 132 S. Ct. 2566, 2603-04 (2012); see, e.g., Marty Lederman, *The States’ Extraordinary Medicaid Challenge: Claiming a Right Not to Take the Savory with the Sweet (or, . . . All Carrots; No Stick)* BALKINIZATION (Mar. 27, 2012), <http://balkin.blogspot.com/2012/03/states-extraordinary-medicaid-challenge.html>, archived at <http://perma.cc/DCT5-ZTMA> (writing before the decision that “many believe . . . it is highly unlikely a majority of Justices will be sympathetic to that challenge”).

<sup>60</sup> *NFIB*, 132 S. Ct. at 2604. Technically, a state’s non-participation merely gives the Secretary of Health and Human Services discretion to cut off all of the state’s Medicaid funding. 42 U.S.C. § 1396c (2012). She is not required by the Act to cut off all such funding, and, had the Court not struck down this provision, it would be difficult to imagine a Secretary taking this discretionary authority to its most punitive possible extreme. See *id.* (including the language “in [her] discretion”).

Medicaid budget;<sup>61</sup> (2) states' long-term reliance on federal funds they had been receiving under the preexisting Medicaid program;<sup>62</sup> and (3) the enormous size of the grants the Act threatened to withdraw from nonparticipating states.<sup>63</sup> The basic logic of the decision is that Congress cannot use the leverage afforded by its conditional spending power to coerce states into actions that Congress could not command them to take directly. Whether *NFIB* represents a major shift or a minor aberration, of course, remains to be seen.

### 3. Practical Significance

In stark contrast to commandeering, conditional spending is a ubiquitous, longstanding, and hugely important facet of the modern American constitutional order. As of 2006, there were 814 different federal programs distributing funds to the states.<sup>64</sup> In 2010, the federal government distributed \$608 billion to state and local governments,<sup>65</sup> making federal aid to the states the third-largest budget item after Social Security and defense spending.<sup>66</sup> Much conditional spending legislation is authorized under the spending power alone (as opposed to the commerce or other regulatory powers), including such political and historically significant legislation as Social Security,<sup>67</sup> the American Recovery and Reinvestment Act of 2009,<sup>68</sup> the No Child Left Behind Act of 2001,<sup>69</sup> and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>70</sup>

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<sup>61</sup> *NFIB*, 132 S. Ct. at 2601 (“In light of the expansion in coverage mandated by the Act, the Federal Government estimates that its Medicaid spending will increase by approximately \$100 billion per year, nearly 40 percent above current levels.”).

<sup>62</sup> *Id.* at 2604 (“[T]he States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid.”).

<sup>63</sup> *Id.* (“Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs.”).

<sup>64</sup> CHRIS EDWARDS, FEDERAL AID TO THE STATES: HISTORICAL CAUSE OF GOVERNMENT GROWTH AND BUREAUCRACY 1 (CATO Inst., Policy Analysis No. 593, 2007), available at <http://www.cato.org/pubs/pas/pa593.pdf>, archived at <http://perma.cc/B4DY-CBQ7>.

<sup>65</sup> Office of Mgmt. and Budget, Historical Tables, Table 12.1: Summary Comparison of Outlays for Grants to State and Local Governments: 1940-2019 (2013), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/hist12z1.xls>, archived at <http://perma.cc/S5GW-ZALL>.

<sup>66</sup> EDWARDS, *supra* note 64, at 1.

<sup>67</sup> 42 U.S.C. §§ 301-1397 (2012) (granting the Secretary discretion to terminate or limit federal aid payments to States that the Secretary finds have failed to comply with the Act).

<sup>68</sup> Pub. L. No. 111-5, 123 Stat. 115.

<sup>69</sup> 20 U.S.C. § 6311(a)(1) (2012).

<sup>70</sup> Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C., 21 U.S.C., 42 U.S.C.).

*NFIB*'s murky anti-coercion principle casts a constitutional pall over much of this legislation.<sup>71</sup> This fact both enhances the principle's significance and provides some reason to believe that it will lack staying power.<sup>72</sup> Unless and until the Court retreats, however, a sound justification is urgently needed to inform the application of its anti-coercion principle. As the next sub-Part explains, the Court's political accountability argument cannot provide that justification. Indeed, it cannot even explain the Court's focus on coercion.

### C. *Accountability Confusion*

#### 1. Criticisms of Political Accountability

The anti-commandeering principle announced in *New York* and *Printz* has come in for a great deal of criticism. That criticism falls into two essential categories: (1) criticism of the Court's historical rationale for these decisions<sup>73</sup> and (2) criticism of the Court's structural arguments.<sup>74</sup> For present purposes, I set the historical questions to one side. My interest here is exclusively in the structural questions raised by the anti-commandeering principle, in particular, the widespread academic criticism of the Court's political accountability argument.

That criticism has several strands. To begin with, some critics have noted that the preservation of clear lines of accountability and the protection of voters against the confusion associated with cooperative federalism in its various guises has little support in the text of the Constitution or in the precedents of the Supreme Court.<sup>75</sup> These critics have therefore questioned whether political accountability should be understood as a constitutional value at all.<sup>76</sup>

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<sup>71</sup> See Coan, *supra* note 15, at 371 (“*NFIB*'s anti-coercion principle is neither deferential nor cast in the form of a hard-edged categorical rule. If the Court adheres to this rule in its current form, it will cast a pall of uncertainty over a great deal of federal legislation and an avalanche of litigation seems likely to follow.”).

<sup>72</sup> *Id.* (discussing the likelihood that the Court will “retreat and retrench from *NFIB*'s anti-coercion principle in relatively short order”).

<sup>73</sup> See, e.g., Caminker, *supra* note 3; Powell, *supra* note 3.

<sup>74</sup> See, e.g., Jackson, *supra* note 3; Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1627 (2006).

<sup>75</sup> See, e.g., Siegel, *supra* note 74, at 1632 (pointing to the absence of commandeering in the Constitution's text, lack of support in originalist sources such as *The Federalist*, and modest historical and precedential support).

<sup>76</sup> See, e.g., *id.* (“[I]t is not clear that political accountability is a Tenth Amendment value, let alone one that the Court is charged with vindicating broadly and aggressively through a categorical rule.”); see also Hills, *supra* note 3, at 828 (“The difficulty with such political accountability arguments is that they overlook the complexity inherent in any system of federalism that always has the potential to confuse voters and thereby undermine political accountability.”).

In addition, and more damningly, other critics have pointed out that the Court's political accountability argument turns on a dubious empirical claim for which the Court has supplied no empirical evidence.<sup>77</sup> It is possible, these critics acknowledge, that some instances of federal commandeering may result in voter confusion and improper assignment of responsibility, positive or negative, to government officials who were not in fact responsible for a particular policy decision.<sup>78</sup> This is by no means certain, however. States subject to commandeering, especially to unpopular commandeering, have a strong incentive to alert voters to the compulsory character of the legislation they adopt (or the enforcement actions they undertake) in response to federal commandeering. And of course, to the extent commandeering produces popular results, the responsible level of government has a strong incentive to claim credit for these aspects of the law.<sup>79</sup>

At a minimum, it seems likely that different instances of commandeering will create different risks of political confusion. Some statutes will be drafted in ways that cloud the question of responsibility, while others will clarify it. And some statutes will afford greater practical opportunities than others for commandeered state officials to disavow responsibility for actions taken pursuant to federal commands.<sup>80</sup> In *Printz*, for example, it would have been almost trivially easy for state law enforcement officials performing background checks to inform gun purchasers that the checks were done pursuant to federally imposed obligations.<sup>81</sup>

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<sup>77</sup> See, e.g., Caminker, *supra* note 3, at 1062.

<sup>78</sup> See, e.g., Jackson, *supra* note 3, at 2205.

<sup>79</sup> Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 213, 231 (Kalypso Nicolaidis & Robert Howse eds., 2001) (“[P]roper lines of accountability can be preserved when component States are vigilant in publicizing the respective roles of the federal and State policy-makers on any given issue. Given proper information, citizens should find the lines of accountability reasonably clear.”); Siegel, *supra* note 74, at 1632-33 (“Government officials also have an abiding interest in informing voters when they are responsible for popular actions. And when these actions prove unpopular, such that politicians have an incentive to engage in blame shifting, the popular press often serves to advance political accountability.”).

<sup>80</sup> See, e.g., Jackson, *supra* note 3, at 2205 (“[T]he extent to which [accountability confusion] is likely (or more likely than in other forms of federal-state action) depends on the substance and substantiality of the burden.”); *id.* at 2204 (“[I]t is considerably easier for a state officer to identify to state voters the federal government’s responsibility when decisionmaking involves less rather than more discretion.”); Siegel, *supra* note 74, at 1655 (criticizing Court’s anti-commandeering principle for being “so broad, so context insensitive, that it applies not just in the face of a compelling government interest [but also] when accountability concerns are minimal . . .”).

<sup>81</sup> *Printz v. United States*, 521 U.S. 898, 958 n.18 (1997) (Stevens, J., dissenting) (“[W]e can be sure that CLEO’s will inform disgruntled constituents who have been denied permission to purchase a handgun about the origins of the Brady Act requirements.”).

Finally, commentators have pointed out that the Court's political accountability argument turns on unrealistic assumptions about voter competence. In particular, the argument assumes that voters in general pay close enough attention to the source of government policies to correctly assign responsibility to each level of government.<sup>82</sup> It is only commandeering that stands in their way of doing so. This heroic assumption is belied by the empirical literature on voter competence, which suggests that voters as a group are pervasively ignorant about much more basic questions.<sup>83</sup> Of course, not all voters are so ignorant. But as Neil Siegel points out,

it seems likely that citizens who pay attention to public affairs and who care to inquire will be able to discern which level of government is responsible for a government regulation, and citizens who do not care to inquire may be largely beyond judicial or political help on the accountability front.<sup>84</sup>

## 2. The Conditional-Spending Paradox

The most persistent criticism leveled against *New York* and *Printz* is that the Court failed to offer a principled distinction between commandeering and the conditional spending power, which seems to permit Congress to achieve the objective of federal commandeering by alternate means. This criticism rang especially true before *NFIB*, when most observers assumed that the federal spending power was essentially unlimited.<sup>85</sup> At the time, it was widely agreed, in fact taken as obvious, that a great deal of federal spending legislation gave states little option but to comply with the conditions imposed.<sup>86</sup> Even

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<sup>82</sup> See Hills, *supra* note 3, at 826 n.32 (“[I]f voters are so adept at apportioning responsibility, it is hard to see why they could not properly assign blame for unconditional mandates on nonfederal officials. Why is imprudent coercion easier to detect than imprudent expenditures?”).

<sup>83</sup> See generally MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* 62 (1996); JOHN ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* (1992).

<sup>84</sup> Siegel, *supra* note 74, at 1632.

<sup>85</sup> Coan, *supra* note 15, at 361 n.117 (“[T]he pre-*NFIB* understanding was that the spending power was a blank check.”).

<sup>86</sup> Ronald J. Krotoszynski, Jr., *Listening to the “Sounds of Sovereignty” But Missing the Beat: Does the New Federalism Really Matter?*, 32 *IND. L. REV.* 11, 17 (1998) (“[E]ven in this brave new world of post-post New Deal federalism, there really is no doubt that *South Dakota v. Dole* permits Congress to use the spending power to accomplish indirectly that which it may not accomplish directly.”); Robert A. Shapiro, *From Dualist Federalism to Interactive Federalism*, 56 *EMORY L.J.* 1, 14 (2006) (“[C]onditional funding remains an effectively unbridled source of federal power.”); Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 *NOTRE DAME L. REV.* 859, 864 n.23 (2000) (arguing that a virtually unlimited conditional spending power threatens to reduce all of the Court's federalism jurisprudence “to a matter of form rather than substance”). See generally Edward A. Zelinsky, *Accountability and Mandates: Redefining the Problem of Federal Spending*

legislation like that challenged in *Dole*, where the federal government threatened to withhold only five percent of states' highway funds from noncompliant states, produced universal compliance.<sup>87</sup> Countless conditional spending statutes put states to far less palatable choices.<sup>88</sup> The differential treatment of commandeering and conditional spending therefore seemed flatly inconsistent to many observers. To the extent that commandeering created a serious problem of political accountability, the conditional spending power seemed to create at least as serious a problem, perhaps an even greater problem, given the plausible deniability that such statutes actually compel state action.<sup>89</sup>

### 3. A New Puzzle

The Court's recent *NFIB* decision appears to resolve this tension against the conditional spending power. To the extent that conditional spending is the practical equivalent of commandeering, *NFIB* holds that it is unconstitutional.<sup>90</sup> The Court treats this result as a straightforward application of its familiar political accountability argument: "[W]hen the State has no choice" but to accept a federal offer, "the Federal Government can achieve its

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*Conditions*, 4 CORNELL J.L. & PUB. POL'Y 482 (1994).

<sup>87</sup> See *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

<sup>88</sup> See, e.g., No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2012) (requiring state-run schools to meet challenging yearly progress standards, or risk losing \$24 billion in funding annually); Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), 42 U.S.C. §§ 601 et seq. (2012) (conditioning \$16 billion in Temporary Assistance to Needy Families grants on states conforming welfare programs to federal requirements, including a work requirement, a five-year limit on assistance, data reporting requirements to the federal government, and participation in the Income and Employment Verification System).

<sup>89</sup> See, e.g., Hills, *supra* note 3, at 828 ("[W]henever the federal government induces states to act, whether with block grants or categorical grants, there is a considerable risk that voters will be confused about which level of government imposed the regulatory burdens of the program."); Jackson, *supra* note 3, at 2202 ("Conditional spending regulatory requirements, though nominally involving a state's choice to accept federal funds, can result in a very confusing picture of responsibility for voters. Why, then, would commandeering be different?"); Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 190 (2002) ("The reason for the anti-commandeering rule was the Court's fear that commandeering state officials would cause a lack of accountability and confuse state voters . . . . Yet conditional funding arguably creates the same concern about accountability since states agree to comply with conditions beyond their control in order to receive federal funds."); cf. PAUL PETERSON, *THE PRICE OF FEDERALISM* 63 (1995) ("Would not local officials be more accountable to their own citizens and taxpayers if they were not so dependent on federal assistance?").

<sup>90</sup> *NFIB*, 132 S. Ct. 2566, 2602 (2012) ("The Constitution simply does not give Congress the authority to require states to regulate. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." (quoting *New York v. United States*, 505 U.S. 144, 178 (1999))).



objectives without accountability, just as in *New York* and *Printz*.<sup>91</sup> Voluntary conditional spending programs, by contrast, permit states to be held accountable for their choice to accept federal funds and the conditions that come with them.<sup>92</sup> For this reason, *NFIB* does not question their constitutionality.

This reasoning is deeply unsatisfying. The political accountability problem that *New York* and *Printz* identify is not that states' freedom of choice will be limited by federal coercion. It is that voters will be unable to appreciate the degree of coercion and apportion responsibility accordingly.<sup>93</sup> If voters cannot figure out that the federal government is responsible for commandeering or coercive exercises of the conditional spending power—and the Court assumes they cannot—it is unclear why they will be able to figure out that states are responsible for their choice to accept federal funds in the absence of coercion.<sup>94</sup> Indeed, commandeering seems the easiest case for the public to sort out. When a federal statute commandeers state governments, officials at both levels of government can point to a federal mandate as the source of a particular policy.<sup>95</sup> Conditional spending, by contrast, forces voters to sort out the far murkier question of a state's practical ability to refuse a sizeable federal grant. Whatever their capacity to do this, it seems unlikely to be systematically greater in cases of federal coercion.

*NFIB* thus creates a new puzzle. The old puzzle was how to square *Printz* and *New York* with the Court's historically deferential spending power decisions, which appeared to permit the equivalent of commandeering by another name. The new puzzle is how to square *New York* and *Printz*'s emphasis on political accountability with *NFIB*'s narrow focus on coercion. By

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<sup>91</sup> *Id.* at 2603.

<sup>92</sup> *Id.* at 2602-03 (“Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer.”).

<sup>93</sup> See *supra* notes 29-31 and accompanying text (summarizing the Court's accountability argument).

<sup>94</sup> See Hills, *supra* note 3, at 827 n.32 (“Of course, voters might be astute enough to blame Congress for imprudently giving unrestricted funds to nonfederal governments and blame nonfederal governments for the waste of such funds. But, if voters are so adept at apportioning responsibility, it is hard to see why they could not also properly assign blame for unconditional mandates on nonfederal officials. Why is imprudent coercion easier to detect than imprudent expenditures?”).

<sup>95</sup> Cf. Jackson, *supra* note 3, at 2204 (“[I]t is considerably easier for a state officer to identify to state voters the federal government's responsibility when decisionmaking involves less rather than more discretion.”). It is possible to imagine conditional-spending grants that afford states less discretion than instances of commandeering and vice versa. But as a general matter, conditional spending—especially non-coercive conditional spending—seems almost certain to delegate more discretion than commandeering and therefore to create more serious political accountability problems.

the logic of the Court's political accountability argument, all conditional spending legislation—or at least the large fraction of it that might conceivably have a meaningful impact on states' regulatory choices—would seem to create serious accountability problems. Yet in *NFIB*, the Court seems curiously indifferent.

To be sure, *NFIB* did not create this puzzle *ex nihilo*. The Court's political accountability argument has always implicated cooperative federalism arrangements that the Court has shown no inclination to disturb. But before *NFIB*, this puzzle was overshadowed by the Court's divergent treatment of commandeering and its practical equivalent under the conditional spending power. By resolving this apparent tension, at least for the moment, *NFIB* has brought the anomaly of the Court's exclusive focus on coercion into stark relief.

## II. AN ALTERNATIVE TO POLITICAL ACCOUNTABILITY

The Supreme Court's political accountability argument fails to explain or justify the Court's commandeering and conditional-spending decisions. This does not, however, settle the case against the anti-commandeering and anti-coercion principles. It merely deprives those principles of their most prominent functional justification. As it happens, another, more compelling rationale is available—one that has been only hinted at in the Court's decisions and has received very little attention in the academic literature. I call this rationale the "constituency-relations argument." The goal of this Part is to elaborate this argument as sympathetically and systematically as possible.

The central claim is straightforward. Both commandeering and conditional spending threaten the independent relation of state governments to their local electoral constituencies. The felt imperative to protect this relation explains why *New York*, *Printz*, and *NFIB* are largely indifferent to the political confusion that any cooperative federalism program, coercive or otherwise, is bound to generate. Political accountability, as the Court defines it, is simply not the issue. The real issue is the risk of Congress and its national constituency wresting control of state governments away from their local constituencies.

This risk may or may not be sufficient to deny Congress the tools it believes necessary to address serious national problems. Ultimately, I believe it is not, for reasons developed in Part III, but I put that issue to one side here. For now, the key point is that our thinking about commandeering and conditional spending—and the Court's—will be clearer if it focuses on constituency relations rather than political accountability.

### A. *The Constituency-Relations Model*

Most legal discussions of American federalism focus on the constitutional text enumerating Congress's powers, the Tenth Amendment, and rather abstract notions of separate spheres, state sovereignty, and state autonomy. These discussions are not unimportant, but they have distracted attention from

the real, working political system that the Constitution originally created and now sustains. This system, grounded in portions of the constitutional text that receive scant attention in most discussions of federalism, consists of a carefully calibrated set of political relations between different popular constituencies and the governing bodies responsible to them.<sup>96</sup>

The set of constituency relations the Constitution establishes for the federal government is quite elaborate. Each House of Congress and the President has a separate and differently defined popular constituency.<sup>97</sup> All three are national in character but were arrived at through political compromise intended to represent various competing conceptions of the national polity. The political relations between state governments and their constituencies are less clearly spelled out in the constitutional text. In fact, most of the particulars are left by the Tenth Amendment for states themselves to decide.<sup>98</sup> Nevertheless, the existence of an independent set of political relations between states and their constituencies is clearly presupposed by the Constitution's many references to the states as going political concerns.<sup>99</sup> This presupposition is reinforced more explicitly in Article IV's guarantee to each state of a republican form of government.<sup>100</sup>

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<sup>96</sup> Cf. V. F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 851-52 (2003) [hereinafter Nourse, *Constitutional Anatomy*] ("The vertical relations created by the Constitution . . . invite us to ask—not how power is described in the Constitution (as, for example, 'judicial,' 'executive,' or 'state') but, instead—how changing power shifts constitutional relations between the governed and the governing.").

<sup>97</sup> U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII. The federal judiciary is deliberately defined by its relative *insulation* from any popular constituency. *Id.* art. III, § 1. Of course, "relative" is an important qualifier. The presidential appointment power, the horizontal Necessary and Proper Clause, and many other provisions give the judiciary a meaningful but attenuated relation to the national constituencies of Congress and the President. *See id.* art. I, § 8, cl. 18; *id.* art. II, § 2, cl. 2; *see generally* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (2001) (reviewing empirical evidence of the Court's connections to popular constituencies).

<sup>98</sup> U.S. CONST. amend. X.

<sup>99</sup> *See, e.g., id.* art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*, and the Electors in each State shall have the Qualifications requisite for Electors of *the most numerous Branch of the State Legislature*." (emphasis added)); *id.* art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, *the Executive Authority thereof* shall issue Writs of Election to fill such Vacancies." (emphasis added)); *id.* art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of *two Senators from each State . . .*" (emphasis added)); *id.* art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed *in each State by the Legislature thereof . . .*" (emphasis added)). None of the italicized text makes sense without functioning state governments. And that is just the first four sections of Article I.

<sup>100</sup> *Id.* art. IV, § 4; *see also* Merritt, *supra* note 20, at 23 ("Since at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their rulers. That control, moreover, is exerted principally—although not

Together, these relations between popular constituencies and governing institutions define, create, and sustain the actual working system of American federalism.<sup>101</sup> Indeed, the nature of these constituency relationships is far more fundamental to American federalism than the particular substantive powers assigned to each level of government. To see this, one need only imagine what would happen if an institution with a nationally defined constituency—say, the Presidency—were empowered to appoint and remove all state officials. Even if the current allocation of powers between the federal and state governments remained precisely the same, this change would clearly represent a major disruption to the functioning of American federalism.<sup>102</sup> State governments would be less responsive to diverse, local constituencies and more responsive to an agglomerated national constituency.<sup>103</sup> They would also be more susceptible to influence by well-organized special interests, since the obstacles to organizing effective majorities are greater at the national level.<sup>104</sup>

Needless to say, these disruptions would be far greater than would result from the overturning of the Court's much heralded commerce power decisions in *United States v. Lopez*<sup>105</sup> and *United States v. Morrison*.<sup>106</sup> Indeed, they would likely be more severe than granting the states exclusive authority to regulate manufacturing and agriculture as the Supreme Court attempted to do

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exclusively—through majoritarian processes.”).

<sup>101</sup> Cf. Nourse, *Constitutional Anatomy*, *supra* note 96, at 837-38 (“I reject the judiciocentric position that the separation of powers and federalism require recourse to descriptive texts or functions and argue, instead, that our government *is*, in important structural senses, a set of popular relations.”).

<sup>102</sup> The inspiration for this thought experiment is Nourse, *Constitutional Anatomy*, *supra* note 96, at 860 (“Just have the House elect the Senate and see what happens to the Presidency; the departments are still ‘doing’ the same things and performing the same ‘functions,’ but the ‘balance’ of power changes dramatically.”).

<sup>103</sup> In an important recent article, David Schleicher has argued that state governments *already* respond to the agendas of national political parties, more than the state-specific concerns of their local constituents. David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 HASTINGS L.J. 1043, 1048-49 (2014). If true, this may well diminish the distinctive benefits of state-level governance (while perhaps also diminishing the distinctive costs). But the essential question for federalism is relative: Are states more responsive to the concerns of their local constituencies than is the national government? Even Schleicher seems unlikely to answer this question in the negative.

<sup>104</sup> This is a fundamental postulate of political economy. See, e.g., NEIL K. KOMESAR, LAW'S LIMITS: RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 63 (2001) [hereinafter KOMESAR, LAW'S LIMITS] (“Smaller numbers of voters are easier to organize and it is easier to prevent free riding and therefore, the probability of majoritarian activity increases.”).

<sup>105</sup> 514 U.S. 549, 551 (1995) (limiting Congress's power to regulate noneconomic activities under the commerce power).

<sup>106</sup> 529 U.S. 598, 602 (2000) (applying *Lopez* to invalidate civil remedy provision of Violence Against Women Act).

in the early 1930s.<sup>107</sup> It is virtually impossible to imagine a shift in the understood substantive scope of state and federal powers that would exceed in its consolidative influence the impact of assigning the appointment and removal of state officers to the President.<sup>108</sup> Conversely, it is virtually impossible to imagine an expansion of the substantive scope of state authority that would compensate for this disruption of the relationship between state governments and their local constituencies.

Federalism, then, depends on the independent relations of state governments to their locally defined popular constituencies. It is those relations that make state governments more responsive to popular majorities.<sup>109</sup> It is those relations that better enable state governments collectively to respond to heterogeneous national preferences.<sup>110</sup> And it is those relations that give state governments the incentive to compete with other states for the affections of “a mobile citizenry.”<sup>111</sup> The literature on these and other purported benefits of federalism is vast, and it would be unnecessarily tedious to review it here. For present purposes, it is unimportant whether all the claims made on federalism’s behalf are true. The key point is that all, or virtually all, of those claims require that

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<sup>107</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 301-02 (1936) (invalidating Bituminous Coal Conservation Act on the ground that “mining is not interstate commerce”).

<sup>108</sup> In some sense, this is the inverse of Ernest Young’s observation that it doesn’t matter whether states exist if they have nothing to do. Young, *supra* note 19, at 62-63. It matters little—or at least much less—what states have to do if they do it at the behest of Congress rather than their own constituents.

<sup>109</sup> See, e.g., Nourse, *Constitutional Anatomy*, *supra* note 96, at 874-75 (“As a general rule, it is easier for a majority to be constructed in a town than a city, a state than in a nation (even if there may be exceptions to that rule)—a result arising “from the effect of numbers on the transaction costs of governing . . . .”); Gordon Tullock, *Federalism: Problems of Scale*, 6 *PUB. CHOICE* 19, 21 (1969) (“[T]he smaller the governmental unit the more influence any one of its citizens may expect to exert, consequently, the smaller the unit, the closer it will come to fitting the preference patterns of its citizens.”).

<sup>110</sup> For the classic statement, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416 (1956). See also Jenna Bednar et al., *A Political Theory of Federalism*, in *CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE* 223, 227 (John Ferejohn et al. eds., 2001) (“A decentralized polity will usually end up with fewer dissatisfied citizens. For example, where fifty citizens in the first province favor policy A while ten oppose it, and thirty citizens in a second province favor non-A with ten favoring A, each province can adopt different policies, leaving only twenty (rather than forty) dissatisfied citizens [as would be the case in a centralized polity].”).

<sup>111</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“This federalist structure of joint sovereigns . . . makes government more responsive by putting the States in competition for a mobile citizenry.”); see also ALBERT BRETON, *COMPETITIVE GOVERNMENTS: AN ECONOMIC THEORY OF POLITICS AND PUBLIC FINANCE* (1996); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 *J.L. ECON. & ORG.* 1 (1995).

state governments remain independently electorally responsible to their own local constituencies.<sup>112</sup>

I call this the “constituency-relations model” of federalism. It draws most directly on the work of legal scholars like Victoria Nourse and Neil Komesar, who emphasize the importance of bottom-up constituent participation in predicting the relative performance of social decision-making institutions.<sup>113</sup> More remotely, this model draws on political economy, public choice, and institutional economics, all of which emphasize variation in the costs and benefits of collective action for constituents as an important predictor of institutional performance.<sup>114</sup> Those costs and benefits, of course, vary with the number and heterogeneity of the constituents competing for control of a particular governing authority. For example, as noted above, the organizational hurdles to assembling an effective majority are typically lower at the state than the national level because it is easier to raise awareness and overcome free-rider problems in smaller groups.<sup>115</sup>

It is here that I diverge from past work in this vein. That work is chiefly concerned with shifts in substantive authority—over interstate commerce<sup>116</sup> or

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<sup>112</sup> Cf. Young, *supra* note 19, at 52-65 (tracing a similar list of federalism’s benefits to what he calls “state autonomy”). By autonomy, Young means that states “need to have meaningful things to do.” *Id.* at 52 (emphasis omitted). This is true, but the putative benefits of federalism follow only if they do those things at the behest of their own constituents rather than the direction of Congress.

<sup>113</sup> See generally NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 7 (1994) [hereinafter, KOMESAR, IMPERFECT ALTERNATIVES] (“The participation-centered approach identifies the actions of the mass of participants as the factor that in general best accounts for the variation in how institutions function.”); Nourse, *Constitutional Anatomy*, *supra* note 96, at 840 (“At the center of the idea of a constitutive position is the notion of an economy of vertical relations between the governed and the governing, relations that create what we conventionally call the separation of powers and federalism.”); see also Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1170 (2011) (“The representational approach ‘asks whether and how the shifting of tasks among government players affects ‘who’ will decide,’ where the ‘who’ is the people, represented by state, district, and nation.” (citations omitted)). Nourse calls her framework the “vertical relations model.” Nourse, *Constitutional Anatomy*, *supra* note 96, at 840 (describing “vertical relations between the governed and the governing”). Komesar calls his the “participation-centered approach.” KOMESAR, IMPERFECT ALTERNATIVES, *supra*, at 7 (describing the “participation-centered approach”). I have tweaked their nomenclature to put the emphasis on popular constituencies.

<sup>114</sup> See, e.g., JAMES M. BUCHANAN, LIBERTY, MARKET AND STATE: POLITICAL ECONOMY OF THE 1980S (1986); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); RUSSELL HARDIN, COLLECTIVE ACTION (1982); MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION (1965).

<sup>115</sup> See *supra* notes 104 & 109.

<sup>116</sup> See Nourse, *Constitutional Anatomy*, *supra* note 96, at 876-77 (analyzing Lopez in

impeachment<sup>117</sup> or land use,<sup>118</sup> for example—from one institutional decision-maker to another. What risks, it asks, do such shifts pose for political majorities and minorities?<sup>119</sup> For the most part, this question takes the relation between institutional decision-makers and their popular constituencies as stable or given. If power to regulate marijuana is shifted to the states, for example, that is assumed to empower local constituencies, with whatever risks and benefits that poses, because the relation between those constituencies and state governments is taken as given.

In reality, of course, such relations are just as contingent as the allocation of substantive authority, with significant implications for political risk. To return to a prior example, for the President to appoint and remove state legislators would greatly reduce their responsiveness to local constituencies (and thus the risks and benefits of state governance) across the board. Under this regime, it would matter far less if the authority to regulate marijuana were shifted to states because states, like Congress, would be responsible to a national constituency. This is exactly the sort of risk, I want to argue, that the Court is half-consciously—and half-persuasively—responding to in cases like *New York, Printz*, and *NFIB*.

#### B. *Constituency Relations and Commandeering*

The connection between the constituency-relations model and the Court's anti-commandeering doctrine is fairly straightforward. As explained above, the risks and benefits of state-level governance—and therefore virtually all of the purported benefits of federalism—flow from the independent relation of state governments to their locally defined popular constituencies. It is this electoral relation that enables popular principals to control their governmental agents.<sup>120</sup>

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terms of the shift in power between local and national constituencies).

<sup>117</sup> See Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 768-772 (1999) (analyzing *Clinton v. Jones* in terms of the shift in power from national constituency of Congress to nonconstituency of courts).

<sup>118</sup> See KOMESAR, *LAW'S LIMITS*, *supra* note 104, at 74-75 (identifying local decisionmaking with majoritarian bias and national decisionmaking with minoritarian bias).

<sup>119</sup> See KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 113, at 82 (“[T]he important question is not the frequency or severity of a [majoritarian or minoritarian] bias, but rather the extent to which a bias in a given context can be corrected by substituting other institutions such as the courts or the market or by reforming the political process.”); Nourse, *Constitutional Anatomy*, *supra* note 96, at 854 (“[F]or any particular structural innovation, we must identify the baseline relations that govern, how those relations change with the proposal, and what the new relations and incentives mean for risks to majorities and minorities.”).

<sup>120</sup> Needless to say, such responsiveness is highly imperfect. Agency slack is pervasive in government, as in other spheres. Out-of-state influences on state politics are also numerous and powerful. National political parties and out-of-state campaign contributions are probably the two most important examples. See generally Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1078 (2014). But as a relative matter, it seems incontestable

But appointment and removal through periodic elections are not the only mechanisms for controlling the behavior of government officials. Nor is the assignment of appointment and removal authority to another constituency the only way in which such an electoral relation might be disrupted.

If the federal government has (and exercises) the power to direct the policymaking choices of state governmental institutions and to back up its directions with coercive sanctions, the principal-agent relation between states and their popular constituencies will be seriously disrupted. A state government that acts pursuant to congressional or other federal commandeering is one that is not responsive, or at least less responsive, to its own constituency and more responsive to the national constituency of the government whose directives it is following. If the commandeering power were widely exercised, it would go far toward converting state governments into mere bureaucratic departments of a consolidated national government, seriously undermining many if not all the purported benefits of federalism.

The connection between this risk and federal commandeering is much stronger than the connection between federal commandeering and political accountability as the Court has defined it in *New York* and *Printz*. Depending on a variety of contingent circumstances, commandeering might generate confusion among state voters about the level of government responsible for various policy choices. This is the risk the Court has in mind when it talks about “political accountability.” But as already emphasized, such confusion is unlikely to be the result always or even often, given the strong incentive of state governments to alert voters to the fact that they are acting under federal directive rather than pursuant to their own free will.<sup>121</sup> By contrast, every instance of commandeering interferes with the political relation between state governments and their local constituencies, rendering state governments responsible to the federal government instead.<sup>122</sup>

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that the electoral relations established by the Constitution tend to make state governments relatively more responsive to local constituencies and the national government relatively more responsive to national constituencies. Cf. Nourse, *Constitutional Anatomy*, *supra* note 96, at 868 (“I am aiming to capture, not all of the incentives of any particular actor in the system, but a simple and thus predictive take on relative incentives, with emphasis on the term ‘relative.’”).

<sup>121</sup> See *supra* notes 78-79 and accompanying text.

<sup>122</sup> This is not to suggest that accountability—or political confusion—is unimportant. Indeed, some form of accountability is essential to the operation of the constituency relationships established by the Constitution. But this is not a good justification for the anti-commandeering and anti-coercion principles, for two reasons developed more fully above. First, there is little theoretical or empirical basis to believe that commandeering and coercion threatens accountability. See *supra* notes 82-84 and accompanying text. Second, even if they do threaten accountability, this does not distinguish them from other, clearly permissible exercises of federal power. See *supra* note 89 and accompanying text. Indeed, noncoercive conditional spending seems likely to pose a far greater threat. See *supra* Part I.C. What does distinguish commandeering and coercion is the way in which they transfer



This alternative rationale for the anti-commandeering principle helps to explain the Court's puzzling indifference to the actual risks of confusion associated with particular instances of federal commandeering.<sup>123</sup> It also helps to explain Justice Scalia's insistence in *Printz* that federal directives requiring state executive officials to undertake nondiscretionary ministerial tasks represent a more egregious offense to federalism than commands that afford states greater policy discretion.<sup>124</sup> This view makes little sense if the Court's concern is the potential for commandeering to generate political confusion. It is far easier for state officials, especially state executive officials, to make clear that their hands are tied with respect to a clearly defined ministerial task than with respect to a federal directive that requires them to exercise discretion in its implementation.<sup>125</sup> However, if the real problem is disruption to states' independent relations to their popular constituencies, Justice Scalia's view makes much more sense. A federal directive that gives state officials no discretion is one that cleanly severs their ability to respond to state voters, whereas a directive that reserves significant discretion to state officials leaves room to exercise that discretion in response to the interests and preferences of their local constituencies.

There are isolated passages in the commandeering decisions and others in which the Court seems to gesture toward this view. The most notable is a frequently quoted passage from Justice Kennedy's concurrence in *U.S. Term Limits, Inc. v. Thornton*,<sup>126</sup> in which he emphasizes the separate relations—which he refers to as “privit[ies]”—between the federal government and its national constituency and state governments and their local constituencies.<sup>127</sup> With little explanation and little apparent awareness that this explanation

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control of state officials and institutions from their local constituency to the federal government.

<sup>123</sup> See *supra* note 113 and accompanying text.

<sup>124</sup> *Printz v. United States*, 521 U.S. 898, 928 (1997) (“Even assuming, moreover, that the Brady Act leaves no ‘policymaking’ discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty. Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than . . . by reducing them to puppets of a ventriloquist Congress.”).

<sup>125</sup> See *supra* notes 78-79 and accompanying text.

<sup>126</sup> 514 U.S. 779 (1995).

<sup>127</sup> *Id.* at 838 (Kennedy, J., concurring) (“The resulting Constitution 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.”); see also *Printz*, 521 U.S. at 920 (“The Constitution thus contemplates that a State’s government will represent and remain accountable to its own citizens.”); *New York v. United States*, 505 U.S. 144, 169 (1992) (“Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.”).

represents something distinct from its familiar political accountability argument, the Court quotes this passage as justification for the anti-commandeering principle in *Printz*.<sup>128</sup> This portion of the decision has received little academic attention, but it is the most persuasive passage in these opinions. If federalism is understood based on the constituency-relations model, commandeering represents a direct threat to the independent electoral relation between state governments and their local constituencies and thereby threatens to undermine the benefits widely associated with the federal system. A commandeering doctrine built on this idea would be much sounder and more consistent with the Court's decisions than one built on political accountability.

### C. *Constituency Relations and Conditional Spending*

The connection between the constituency-relations model and *NFIB*'s anti-coercion principle is nearly as straightforward. Commandeering interferes with the constituency relation between states and their electorates by imposing federal obligations backed up by coercive sanctions. At least some exercises of the conditional spending power effect an equivalent disruption by imposing federal obligations backed up by a different set of unpalatable consequences—the withholding of federal funds that states can ill afford to pass up. In both cases, federal action interposes Congress and its national constituency between states and their local constituencies. The result is to sever the link between the policies states enact and their local constituencies.

The constituency-relations model provides a cleaner and more satisfying explanation for the anti-coercion principle than does the Court's political accountability argument. In particular, the constituency-relations model explains in a way that accountability cannot why the Court is concerned to limit only coercive exercises of the conditional spending power. *NFIB* is a helpful illustration. The Court is certainly correct that exercises of the conditional spending power have the potential to generate confusion about the proper apportionment of responsibility between federal and state governments.<sup>129</sup> But for reasons discussed at length in Part I.C, the risk of such confusion does not seem likely to correlate in any systematic way with the degree of coercion involved. Indeed, conditional spending statutes lying in the murky middle ground between coercion and encouragement seem likely to generate the greatest amount of confusion.<sup>130</sup>

The Court says that voluntary conditional spending programs are constitutional because they permit voters to hold state officials responsible for the decision to accept federal funds and the conditions that come with them.<sup>131</sup>

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<sup>128</sup> *Printz*, 521 U.S. at 920-21.

<sup>129</sup> See *NFIB*, 132 S. Ct. 2566, 2602-03 (2012).

<sup>130</sup> See *supra* notes 93-95 and accompanying text.

<sup>131</sup> *NFIB*, 132 S. Ct. at 2602-03 (“Spending Clause programs do not pose [a] danger [to political accountability] when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held

But this misses the essential point of the political accountability argument. That point is not the ability or inability of voters to hold state officials responsible for decisions; it is the risk that voters will improperly hold states responsible for decisions that were actually made by the federal government and vice versa.<sup>132</sup> It is not at all clear that this risk is greater in cases of federal coercion. Indeed, like instances of federal commandeering that direct state officials to undertake discrete and well-defined ministerial tasks, federal grants that states truly have no practical option to refuse seem likely to afford a relatively clear opportunity for states to point out that the federal government had a gun to their heads.<sup>133</sup>

The anti-coercion principle makes much more sense in light of the constituency-relations model, whose focus is not confusion but the disruption of the political relations that ensure state governments' responsiveness to their own popular constituencies. If this is the real risk to federalism, the Court's focus on coercion makes perfect sense. The extent to which a conditional spending statute deprives states of the practical option to refuse federal funds and the conditions attached thereto is the precise extent to which that statute interferes with the ability of state governments to respond to the interests and preferences of their local constituencies and requires them to respond instead to the national constituency of Congress.<sup>134</sup>

Of course, from the standpoint of the constituency-relations model, there is something misleading about the Court's dichotomous division of conditional spending programs into the discrete categories of "coercive" and "voluntary." The effects of such programs on the practical choices available to state governments fall along a continuum. All conditional spending presumably influences the states' decision calculus to some degree. But given the centrality of conditional spending statutes to the modern welfare state, it seems reasonable for the Court to focus on the most extreme examples. At any rate, the Court's focus on coercion as the constitutionally relevant variable tracks the constituency-relations model in a way that it does not track political accountability.

### III. OBJECTIONS AND CAVEATS

The last Part attempted to formulate the constituency-relations argument as sympathetically and systematically as possible. This Part subjects that argument to critical analysis. A number of objections merit consideration. Part

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accountable for choosing to accept or refuse the federal offer.").

<sup>132</sup> See *New York*, 505 U.S. at 169 ("[W]here the Federal Government directs a State to regulate, it may be the state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.").

<sup>133</sup> Cf. *NFIB*, 132 S. Ct. at 2604 ("In this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head.").

<sup>134</sup> See *supra* note 112 and accompanying text.

III.A considers the most fundamental of these: that the constituency-relations argument cannot distinguish between commandeering and coercive conditional spending, on the one hand, and preemption on the other. If the latter is constitutionally permitted, and uncontroversially so, why should the former be constitutionally prohibited? Part III.B considers a range of other objections. Most important is the possibility that commandeering and conditional spending might be justified by countervailing national interests. Indeed, they might be justified by the very same interests that justify federal regulatory or spending authority in the first instance. Each of these objections is answerable, but in the end, I doubt that the constituency-relations argument can overcome them.

A. *The Preemption Objection*

The most fundamental objection to the constituency-relations argument is that it proves too much. Like commandeering and conditional spending, federal preemption of state regulations interferes with the ability of states to respond to the interests and preferences of their constituents. Indeed, the argument would go, preemption constrains this ability in exactly the same way as conditional spending and commandeering. It forces states to choose a policy option—in the case of preemption, inaction—at the behest of a national constituency that it would not choose if it were only responsive to a local constituency.<sup>135</sup> Yet neither the Court nor any commentator has been willing to question or suggest serious limitation on Congress's authority to preempt state regulations, at least not when Congress is acting within the scope of its acknowledged constitutional authority. Of course, it would be very difficult to argue for such limitation, given the clear import of the Supremacy Clause, which makes federal law superior to any conflicting state law.<sup>136</sup>

This objection has significant force. Commandeering and conditional spending may or may not be distinguishable from preemption, in terms of the form of disruption each creates in the relation between states and their electorates.<sup>137</sup> But the Constitution clearly authorizes preemption and to that extent limits the responsiveness of state governments to their local constituencies.<sup>138</sup> It does not, however, clearly authorize commandeering or coercive conditional spending programs. If Congress possesses both of these powers in addition to its explicit power to preempt state regulation, there would seem to be no constitutional limit on its ability to convert states into

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<sup>135</sup> See, e.g., Caminker, *supra* note 3, at 1054-55 (“Commandeering precludes state officials from being directly and exclusively responsive to their constituency’s desires, but so does conventional preemption.”).

<sup>136</sup> U.S. CONST. art. VI, cl. 2.

<sup>137</sup> Cf. Adler & Kreimer, *supra* note 3, 94-95 (proposing an action/inaction distinction between commandeering and preemption but expressing doubt that this distinction is “truly justified by the values of constitutional federalism”).

<sup>138</sup> Some such limits are obviously necessary to enable the federal government to perform its constitutionally prescribed role.

mere bureaucratic departments. There is at least a respectable argument, therefore, that denying Congress these powers is necessary to preserve the states as the going and independent political concerns the constitutional text presupposes them to be.<sup>139</sup>

The practical effect of such a prohibition is well illustrated by the case of marijuana legalization. Congress clearly possesses the authority to preempt state regulations affirmatively permitting the use of marijuana for medical or other purposes. Indeed, the Supreme Court has read the Controlled Substances Act as doing just this.<sup>140</sup> But without the power to conscript state law enforcement officers in the enforcement of the Act or to employ the conditional spending power to similar effect, the federal government's ability to preempt these laws in a practical sense is starkly limited.<sup>141</sup> In states that have legalized it, marijuana remains widely available, despite occasional federal crackdowns under Presidents Bush and Obama.<sup>142</sup>

If this result is a boon to federalism, as many have suggested,<sup>143</sup> the reasons for celebration have nothing to do with political accountability and a great deal to do with constituency relations. The states that have legalized marijuana in one fashion or another have done so in response to the preferences of their own voters, arguably increasing the responsiveness of national drug policy to heterogeneous preferences, permitting mobile citizens (and tourists) to vote with their feet, and so on. These states have not, in any meaningful sense, cleared up voter confusion about the level of government responsible for marijuana regulation. More important, a new federal law requiring these states to enforce federal law would do little to create such confusion. What it would do is render state officials responsive to a national constituency rather than their respective state constituencies.

The harder question is whether state legalization efforts should be understood as a boon to federalism. Sensibly conceived, federalism does not simply entail the maximization of state power. Rather, it entails a distribution

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<sup>139</sup> See *supra* note 97 and accompanying text.

<sup>140</sup> *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (“[L]imiting the activity to marijuana possession and cultivation ‘in accordance with state law’ cannot serve to place respondents’ activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”). *But see* Mikos, *supra* note 8, at 1422-26 (arguing that the anti-commandeering principle prohibits preemption of state laws that merely permit, rather than affirmatively authorize or aid in, the medical use of marijuana).

<sup>141</sup> Mikos, *supra* note 8, at 1423 (“[S]tates retain both de jure and de facto power to exempt medical marijuana from criminal sanctions, in spite of Congress’s uncompromising—and clearly constitutional—ban on the drug.”).

<sup>142</sup> See, e.g., *id.* at 1479 (“In short, though Congress’s categorical ban on marijuana is constitutional, state exemptions have become the de facto governing law of the land.”).

<sup>143</sup> See, e.g., *id.* at 1481-82 (suggesting that states’ choices to legalize marijuana for medical purposes and the federal government’s inability to preempt such legislation is a victory for American federalism).

of power between the state and federal governments according to their relative competence. If regulating the national market for marijuana is a power best exercised by Congress, it is unclear why we should celebrate—or seek to enhance—the power of state constituencies to subvert national policy.<sup>144</sup> This question receives fuller treatment in the next sub-Part.

### B. *Other Objections*

Even if the preemption objection could be overcome, the constituency-relations argument would face significant hurdles. At best, the argument demonstrates that commandeering and coercive exercises of the conditional spending power pose a real risk to the effective operation of federalism. It does not demonstrate that this risk outweighs the potential benefits of commandeering and conditional spending in any or all cases. Nor does it show that judicial intervention is necessary or effective to protect against this risk. In fact, there are a number of reasons to doubt the wisdom of the anti-commandeering principle endorsed in *Printz* and *New York* and the anti-coercion principle endorsed in *NFIB*.

#### 1. Political Safeguards

First, judicial intervention may be unnecessary to protect against the risk posed by commandeering and conditional spending. Certainly, as to commandeering, the amount of questionable federal legislation was negligible even before the Court stepped in.<sup>145</sup> Indeed, the unprecedented character of the legislation struck down in *New York* and *Printz*, emphasized by the Court as a strong reason for doubting its constitutional validity,<sup>146</sup> may be better

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<sup>144</sup> Another possible rejoinder to the preemption objection is that only commandeering, rather than preemption, permits Congress to externalize the costs of federal policy onto the states. *See Hills, supra* note 3, at 872; *Young, supra* note 19, at 38. This argument fails for three reasons. First, it cannot account for the anti-coercion principle, which prohibits Congress from achieving state compliance even when it is willing to internalize the costs of its policies. Second, preemption—no less than commandeering—frequently imposes financial costs on states that Congress does not internalize. Think of Title VII, the Fair Labor Standards Act, or the Drivers' Privacy Protection Act upheld in *Reno v. Condon*, 528 U.S. 141, 143 (2000); all directly or indirectly require states to bear substantial expense. Third, from the standpoint of constituency relations, there is nothing special about financial costs. Both commandeering and preemption clearly preclude state governments from pursuing the policies that their constituents prefer. In that sense, both interfere with constituency relations. A fuller treatment of the cost-internalization argument will have to await future work.

<sup>145</sup> *Cf. New York v. United States*, 505 U.S. 144, 177 (1992) (“No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress.”).

<sup>146</sup> *Printz v. United States*, 521 U.S. 898, 905 (1997) (“[I]f, as petitioners contend, earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.”); *New York*, 505 U.S. at 177 (“The take title

understood as a demonstration that the political process provides significant protection against extensive use or abuse of commandeering.<sup>147</sup> There are many possible explanations for this. Historically, states have exerted substantial influence on federal policy by virtue of the state-based organization of the major political parties,<sup>148</sup> though the nature of this influence is changing as parties grow more cohesive and centralized.<sup>149</sup> States are also aggressively and effectively represented by a substantial cadre of lobbying organizations dedicated to representing their institutional interests as states.<sup>150</sup> Finally, there is some evidence that the voting public cares about federalism for its own sake.<sup>151</sup> Together, these protections may be sufficient to guard against most abuses of the commandeering and conditional spending powers, whose greatest risk lies in the potential they create for across the board subordination of state governments to federal power.

This argument is harder to make for conditional spending, which is extraordinarily common and often strongly constrains the practical ability of states to refuse federal funds and the conditions attached to them. Still, it is hard to deny that states represent a going political concern, responsible for large and important areas of public policy.<sup>152</sup> Nor is it possible to deny that they remain more responsive to local than national constituencies. This is strong evidence that the political process is capable of preventing the

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provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress.”).

<sup>147</sup> Siegel, *supra* note 74, at 1653 n.103 (“In *Printz*, Justice Scalia observed for the majority that historically Congress has not engaged in commandeering. . . . Ironically, his observation may suggest that anticommandeering doctrine does not advance federalism values to a significant extent because the doctrine does not appreciably lower the probability of federal regulation.”).

<sup>148</sup> See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 278 (2000) [hereinafter Kramer, *Political Safeguards*] (“For most of our history, the decentralized American party systems completely dominated the scene and protected the states by making national officials politically dependent upon state and local party organizations.”); Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1526-27 (1994).

<sup>149</sup> See Bulman-Pozen, *supra* note 120; cf. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 276-77 (2011) (describing these trends).

<sup>150</sup> See, e.g., Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 961-70; see also Jennifer M. Jensen, *State Representation in Washington and the Political Safeguards of Federalism* 13-17 (Am. Political Sci. Ass’n 2013 Annual Meeting Paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2300599](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300599).

<sup>151</sup> See, e.g., Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1711-17 (2007) (collecting studies to this effect).

<sup>152</sup> See, e.g., Kramer, *Political Safeguards*, *supra* note 148, at 233 (“[T]he states have more than held their own in American government—thoroughly dominating the first century and a half and remaining pivotal institutions with their hands in virtually every pie and program today.”).

nightmare of national consolidation that direct federal control of states seems to risk in the abstract. The key question, of course, is comparative—whether courts would do better than the political process. Surely, they would provide more protection for states, but at what cost? These are bigger questions than I can answer here. There is, however, reason to doubt the Court's power to improve matters with a standard as amorphous and malleable as the anti-coercion principle.<sup>153</sup>

## 2. Countervailing Federal Interests

Second, and more important, commandeering and conditional spending might serve countervailing national interests sufficient to justify whatever risk they pose to federalism. In *Printz*, for example, Congress had identified a pressing national problem, the solution to which seemed to require—not absolutely, but reasonably—the participation of state law enforcement officers during the five years it would take to bring a federal database online.<sup>154</sup> Given the relatively modest risk involved in requiring state officials to perform such a minor task on an interim basis, federal commandeering may well have been cost-justified in this circumstance.<sup>155</sup> Of course, the federal government might have purchased the states' compliance through a non-coercive exercise of the conditional spending power.<sup>156</sup> But given the deeply rooted gun culture in many states, both strategic and principled holdouts seem likely to have been a real problem. Of course, these are the problems that arguably justified a national legislative solution in the first instance.

*New York* is perhaps an even more compelling illustration of the point. The problem of low-level radioactive waste disposal was obviously a national one of substantial import that the states had tried and failed to resolve on their own.<sup>157</sup> The legislation New York was required to adopt—establishing a waste disposal site or taking title to all waste produced within its borders—involved far greater burdens than the Brady Act's background checks.<sup>158</sup> But the need for federal action was also greater and the risk to federalism substantially diminished by the fact that New York itself agreed to the federal scheme.<sup>159</sup>

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<sup>153</sup> See Baker & Berman, *supra* note 58, at 521 (describing the coercion standard as “just too amorphous to be judicially administrable”).

<sup>154</sup> See H.R. REP. NO. 103-344, at 19 (1993) (discussing the need for the participation of state law enforcement officers during the first five years following enactment to bring a complete federal database online).

<sup>155</sup> See Hills, *supra* note 3, at 896 (“[I]t is highly unlikely that a few minor demands of the Brady Act variety on nonfederal officers would [not be cost-justified].”).

<sup>156</sup> *Id.* at 872.

<sup>157</sup> See *New York v. United States*, 505 U.S. 144, 149-51 (1992) (discussing the history of the take-title provision and the fact that states had failed to resolve the issue of how to store low-level radioactive waste on their own).

<sup>158</sup> Hills, *supra* note 3, at 893-96.

<sup>159</sup> *New York*, 505 U.S. at 189-94, 196-97 (White, J., concurring in part and dissenting in



Moreover, as in *Printz*, commandeering was used to overcome the same problems of interstate coordination that arguably justified federal legislation in the first instance.<sup>160</sup>

The same basic analysis holds for Congress's use of the conditional spending power in *NFIB*. The Affordable Care Act's Medicaid expansion responds to a serious problem of interstate coordination in the provision of health insurance to low-income Americans.<sup>161</sup> Absent effective coercion of states, there was a real risk that the same coordination problems necessitating federal action would undermine the Act's effectiveness. The aftermath of the Court's decision bears this out. Freed from federal coercion, nearly half of the states have refused to participate in the Act's Medicaid expansion, with obvious spillover effects on other states and the nation as a whole.<sup>162</sup> This is strong evidence that constituency relations are important drivers of institutional decision-making but also strong evidence of the damage state constituencies can do in policy spheres better dealt with at the national level.

### 3. The Lesser of Evils

Finally, as Neil Siegel points out, placing federal commandeering and conditional spending off limits may force the federal government to resort to wholesale preemption of state regulations and the establishment of a new federal enforcement bureaucracy, whose operations would be entirely insulated from local control.<sup>163</sup> In cases where this represents a plausible alternative to commandeering, the anti-commandeering principle may actually diminish the influence of local constituencies on the formation and administration of regulatory policy. This point receives further support from the work of Heather Gerken and Jessica Bulman-Pozen, who argue that state governments implementing federal policy under conditional spending and commandeering statutes enjoy substantial flexibility to account for, accommodate, and respond

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part).

<sup>160</sup> See *id.* at 151-52 (majority opinion) (describing the lack of state coordination that induced Congress to pass the challenged legislation).

<sup>161</sup> See *NFIB*, 132 S. Ct. 2566, 2612 (2012) (Ginsburg, J., dissenting in part).

<sup>162</sup> See *Status of State Action on the Medicaid Expansion Decision as of August 28, 2014*, HENRY J. KAISER FAMILY FOUND., <http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/>, archived at <http://perma.cc/2DXL-4JJC> (last visited Oct. 17, 2014) (observing that twenty-eight states (including the District of Columbia) are implementing the expansion, two states are in open debate, and twenty-one states are not moving forward with the expansion at this time).

<sup>163</sup> Siegel, *supra* note 74, at 1646 (“Anticommandeering doctrine may increase the costs of federal regulation . . . because the unavailability of commandeering may result in more instances of federal preemption going forward.”). Justice Stevens stresses the same point in his *Printz* dissent. *Printz v. United States*, 521 U.S. 898, 959 (1997) (Stevens, J., dissenting) (“By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to . . . create vast national bureaucracies to implement its policies.”).

to local interests and preferences.<sup>164</sup> In other words, electoral incentives keep state officials surprisingly responsive to their popular constituency even when they are operating under federal direction. Federal administrators possess far fewer incentives to respond to local constituencies.<sup>165</sup> Thus, where preemption and federal administration are the likely alternative to commandeering and coercive conditional spending, the latter two would be preferable from the standpoint of the constituency-relations model.<sup>166</sup>

#### CONCLUSION

In combination, the objections discussed above seriously undermine the case for the anti-commandeering and anti-coercion principles. The current Supreme Court, however, clearly does not see it that way and probably won't for some time. Given this state of affairs, the constituency-relations model is superior to the Court's political accountability argument. It is more persuasively grounded in constitutional structure and better explains the Court's special concern for coercion. Whether or not that concern is wise or well-founded, our thinking about the anti-commandeering and anti-coercion principles will be clearer if it focuses on constituency relations rather than political accountability. More broadly, the representational relationships established by the Constitution are central to the deep structure of American federalism. If the constituency-relations argument refocuses attention on these political wellsprings of our constitutional order, it will not have been a total loss.

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<sup>164</sup> Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256 (2009).

<sup>165</sup> Fewer, not none. The presidential administration federal officials ultimately report to may wish to curry favor with local constituencies. Local congresspersons may also exert pressure on federal agencies to accommodate local preferences. The key point is that state officials have relatively stronger incentives to respond to local constituencies even when operating under federal compulsion.

<sup>166</sup> Gerken and Bulman-Pozen actually go so far as to argue that commandeering preserves greater responsiveness than conditional spending because the latter permits the federal government to buy state complicity, whereas the former often provokes active resistance. *See* Gerken & Bulman-Pozen, *supra* note 164, at 1297 (“Indeed there is reason to think that commandeering, were it permitted, would lead to more engaged and intense forms of contestation than conditional preemption and conditional spending.”); *id.* at 1302 (“[I]f you are strongly committed to uncooperative federalism, conditional spending is a worse option than commandeering but a better option than preemption . . .”).