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**TROJAN HORSE: FEDERAL MANIPULATION OF
STATE GOVERNMENTS AND THE SUPREME COURT'S
EMERGING DOCTRINE OF FEDERALISM**

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I. INTRODUCTION	114
II. THE GREAT DEBATE OF AMERICAN POLITICS: NATIONAL COLLECTIVISM V. FEDERALIST INDIVIDUALISM.....	117
III. FROM FEDERALISM TO NATIONALISM AND BACK AGAIN	125
IV. CONDITIONAL FEDERAL GRANTS.....	134
V. CONDITIONAL PREEMPTION.....	142
VI. TOWARDS A SEPARATION OF FEDERAL AND STATE GOVERNMENTS	151

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I. INTRODUCTION

It is a common refrain that the federal government has been progressively expanding its scope and reach for at least a century, regardless of which party was in control. In recent years that expansion has triggered a marked reaction among grassroots and constitutional scholars alike. In Texas, the reaction has been particularly vehement, with the state government challenging the federal administration in open defiance of its policies.¹ The reaction has focused on two policies specifically: first, the Patient Protection and Affordable Care Act (PPACA or ACA)², and second, the Environmental Protection Agency's (EPA) move to regulate greenhouse gases as pollutants under the Clean Air Act (CAA), which led to the partial cancellation of EPA's eighteen-year-old approval of Texas's highly successful State Implementation Plan (SIP) under the CAA.³

The new mandate that individuals purchase health insurance or pay a tax penalty has received the most attention of any aspect of the ACA. Texas joined twenty-five other states in successfully challenging the provision before the Eleventh Circuit, which struck down the mandate as exceeding the federal commerce power.⁴ But in the Texas Legislature, another aspect of the ACA rose to the fore: namely, its provisions requiring that states expand their Medicaid rolls as a condition of continuing to receive federal Medicaid matching funds.⁵

1. See, e.g., Letter from Bryan Shaw, Chairman, Tex. Comm'n on Env'tl. Quality, and Greg Abbott, Att'y Gen., Texas, to Lisa Jackson, Adm'r, U.S. Env'tl. Prot. Agency, and Dr. Alfredo "Al" Armendariz, Reg'l Adm'r, U.S. Env't'l Prot. Agency Region 6 (Aug. 6, 2010), http://www.tceq.texas.gov/assets/public/comm_exec/epa.pdf.

2. Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010). This statute is often referred to as "Obamacare."

3. Clean Air Act, 42 U.S.C. §7401 (1963); Naureen S. Malik, *EPA Rejects Texas Flexible Air-Quality Permit Authority*, WALL ST. J., June 30, 2010, <http://online.wsj.com/article/SB10001424052748703426004575339140408652292.html>; *Texas: Court Allows E.P.A. to Issue Greenhouse Permits*, N.Y. TIMES, Jan. 13, 2011, http://www.nytimes.com/2011/01/13/us/13brfs-COURTALLOWSE_BRF.html.

4. *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), cert. granted sub nom. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 80 U.S.L.W. 3198 (Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400).

5. Patient Protection and Affordable Care Act, 42 U.S.C. §18001 (2010); Dave Montgomery, *Conservative Legislators in Texas Seek to Opt out of Medicaid*, FORT WORTH

Facing a significant budget shortfall, and an unsustainable fiscal outlook for the state's Medicaid program (an outlook that is significantly aggravated by the ACA over the long-term), reform-minded state legislators explored every conceivable avenue for "opting out" of Medicaid entirely and replacing it with a state-based system.⁶ But in the end, state legislators apparently concluded that the penalty of losing Medicaid matching funds was simply too great, and the plan went nowhere.

On the environmental front, the EPA's move to regulate greenhouse gases led to a "SIP Call" late last year.⁷ A "SIP Call" is an EPA rule that prescribed the elements that a State Implementation Plan under the CAA must include in order to secure EPA approval. When a state fails to submit a conforming plan, the EPA can exact a number of penalties, including FIPing the state—that is, imposing a Federal Implementation Plan upon the state under the CAA. The EPA allows states to regulate in a federally pre-emptible area, on condition that state regulations comply with federal guidance. This is known, somewhat confusingly, as "conditional preemption."⁸ The SIP Call provided that every approved SIP needs to have a provision that "automatically updates" to include any pollutant designated by the EPA.⁹ The state of Texas has taken the position that the EPA's entire scheme for regulation of greenhouse gases, and in particular the "automatic update" provision of the SIP Call, violates federal law and both the federal and state constitutions. The EPA noted Texas's response, partially cancelled its eighteen-year-old approval of the state's SIP, and moved to impose a Federal Implementation Plan.¹⁰

STAR-TELEGRAM, Nov. 13, 2010, <http://www.star-telegram.com/2010/11/13/2629628/conservative-legislators-in-texas.html>.

6. Dave Montgomery, *Conservative Legislators in Texas Seek to Opt out of Medicaid*, FORT WORTH STAR-TELEGRAM, Nov. 13, 2010, <http://www.star-telegram.com/2010/11/13/2629628/conservative-legislators-in-texas.html>.

7. Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77,698 (Dec. 13, 2010) (to be codified at 40 C.F.R. pt. 52) [hereinafter "Final SIP Call"].

8. It would be more accurate to call this practice "conditional non-preemption" or "conditional permission," but in this article I will stick with the common usage among legal scholars.

9. Final SIP Call, *supra* note 7.

10. Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program, 75 Fed. Reg. 82,430 (Dec. 30, 2010) (to be codified at 40 C.F.R. pt. 52) [hereinafter "Interim Partial SIP Disapproval and Interim FIP"].

Both conditional federal grants and conditional preemption insinuate the federal government deeply into the legislative and regulatory processes of state governments. Both are examples of “cooperative federalism.”¹¹ This article argues that both practices are incompatible with “the structural framework of dual sovereignty,” the standard of federalism enshrined by the Supreme Court in *Printz v. United States*.¹²

According to Dr. Michael Greve, *Printz* and related precedents have “elevate[d] the Tenth Amendment into an extra-textual, judge-made principle of intergovernmental immunity.”¹³ Protecting the Constitution’s “structural framework of dual sovereignty” has thus emerged as a doctrine with potentially far-reaching consequences.

Because the “intergovernmental immunity” now understood to be enshrined in the Tenth Amendment is just as vulnerable to federal power indirectly applied in the guise of cooperative federalism as when such power is directly applied, there is ultimately a conflict between that “intergovernmental immunity” and the precedents that sustain conditional federal grants and conditional preemption. This article argues that as the Supreme Court examines and reexamines both practices, it should conclude (following the logic of *New York*, *Printz*, and *Bond*¹⁴) that neither practice can be squared with the federal structure of our Constitution, and that, in the long run, there may be no alternative to a judicially enforceable separation of federal and state government functions. Wherever federal programs confront states with a choice between subordinating local preferences to federal ones, on the one hand, and giving up either revenue or regulatory autonomy on the other, there is

11. See, e.g., Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 465 (2002) (discussing federal conditional grants as an example of cooperative federalism), and *New York v. United States*, 505 U.S. 144, 145 (1992) (describing conditional preemption as a program of cooperative federalism).

12. *Printz v. United States*, 521 U.S. 898, 918, 932 (1997).

13. MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 48 (1999).

14. Cf. *New York v. United States*, 505 U.S. 144 (1992) (holding that forcing states to either accept ownership of waste or regulate according to instructions of Congress is outside Congress’s enumerated powers); *Printz v. United States*, 521 U.S. 898 (1997) (stating that obligation to conduct background checks on prospective handgun purchasers imposed unconstitutional obligation on state officers to execute federal laws); *Bond v. United States*, 131 S. Ct. 2355 (2011) (holding that enforcement of the Chemical Weapons Convention intruded upon police power reserved to the states).

coercion. The logic of *New York*, *Printz*, and *Bond* would not need stretching very far to reach that conclusion.

The deeper implication is the tension between individualist competition and collectivist uniformity. The tension between federalism and national majority rule is one manifestation of the great debate at the heart of modern American politics: the tension between individualism and collectivism; between those who think interstate competition is something to be protected, and those who think it is something to be protected *against*; in short, between competitive federalism and cooperative federalism.

Part II shows how the tension between competitive federalism and cooperative federalism was distilled in the law and politics of the first half of the twentieth century, as a function of the tension between federalism and nationalism. Part III traces the Supreme Court's journey away from competitive federalism to cooperative or "process" federalism and back again. Parts IV and V examine the Supreme Court jurisprudence of conditional federal grants and conditional preemption, respectively, to show in each case how the logic of those opinions is contradictory, unsustainable, and ultimately incompatible with the federal structure of our Constitution. Part VI attempts to elaborate a judicially enforceable doctrine of separation of federal and state government functions, as applied to conditional federal grants and conditional federal preemption, to serve the Supreme Court's renewed interest in defending the "structural framework of dual sovereignty."¹⁵

II. THE GREAT DEBATE OF AMERICAN POLITICS: NATIONAL COLLECTIVISM V. FEDERAL INDIVIDUALISM

Though nationalist sentiment had deep cultural roots in modern Europe, the idea of national self-determination¹⁶ as the criterion of legitimacy for a system of government can trace its birth to the Revolutions of 1848 in Europe.¹⁷ Although that was

15. *Printz*, 521 U.S. at 932.

16. "National self-determination" is the idea that the nation should be the basic unit of sovereign political organization, and that in order to have sovereign legitimacy, a regime must be ordered so as to give expression to the will of the nation, usually as some function of national majority rule.

17. PHILIPP BOBBITT, *THE SHIELD OF ACHILLES* 178 (2002) ("The turning point occurred in the late 1840s, when, for similar but unrelated domestic political purposes,

when the idea took root in European political thought, it would be another seventy years before it was put fully into practice there—in the aftermath of World War I.

In the United States, national self-determination took root more gradually. Given its colonial origins, self-government in America had little use for the notion of national self-determination. At the start of the Revolution, even radicals such as John Adams claimed only that the legislatures of the various colonies were co-equal with Parliament within the Kingdom of King George III, and that Parliament therefore could not rule over the colonies.¹⁸ The animus later turned against the King personally, during the very process of conceiving the Declaration of Independence, but even then the colonies advanced an argument of representative government that had nothing to do with national self-determination.¹⁹ Indeed, the Declaration of Independence created thirteen “Free and Independent States” with the explicit attributes of sovereignty.²⁰

Wary of the tendencies which had led other democratic experiments to end in failure, the Framers designed a constitution that went a step beyond purely national majority rule by guaranteeing majority rule at multiple levels of society, diffusing power in order to enhance both self-government and

European politicians seized on the idea of national self-determination as the key element underpinning a program of political reform.”).

18. SAMUEL ELIOT MORISON, HENRY STEELE COMMAGER & WILLIAM E. LEUCHTENBURG, 2 *THE GROWTH OF THE AMERICAN REPUBLIC* 163 (7th ed. 1980) (“Independently of one another, James Wilson[,] Thomas Jefferson, and John Adams ha[d] reached the conclusion that Parliament had no rightful jurisdiction over the colonies. ‘All the different members of the British Empire,’ said Wilson, ‘are distinct States, independent of each other, but connected together under the same sovereign in right of the same Crown.’ Wilson’s *Considerations on the Authority of Parliament*, Jefferson’s *Summary View*, and Adams’s *Novanglus* papers published this startling theory between August 1774 and February 1775. Historically they found no ground for Parliament’s authority, although they admitted that the colonies had weakly accepted it; logically there was no need for it, since the colonial legislatures were competent. The colonists should honor and obey the king, follow his lead in war, observe the treaties he concluded with other princes; but otherwise govern themselves. Thus a federal solution for the problem of liberty versus authority, which John Dickinson found to be implicit in the old empire, was now made explicit by these hard-thinking Americans in 1774–75. They demanded for the Thirteen Colonies the same dominion status which Canada, Australia, New Zealand, India, Pakistan, the West Indies, and other former colonies now enjoy in the British Empire, and which is now the official basis of the British Commonwealth of Nations.”)

19. *Id.* at 172–73.

20. THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).

individual liberty.²¹ The basic idea of the Constitution was partly based on national self-determination, but contemplated a far greater degree of state and local self-rule. In fact, to the extent that national self-determination boils down to the rule of national majorities, the Constitution was designed to protect *against* any such consolidation of power, as Federalist No. 10 makes clear.²² That is the most essential meaning of the Tenth Amendment to the Constitution, which reserves “to the States, or to the People” those powers not expressly granted to the federal government.²³

The Tenth Amendment has been called a “truism” that adds nothing new to the constitutional scheme of limited and enumerated powers for the national government, but there is reason to doubt this view. The Tenth Amendment enshrines the concept of “reserved” powers for the states, and well into the twentieth century it was often by reference to those reserved powers that the practical limits on federal power were defined. Once the Courts began defining federal power—particularly the spending and commerce powers—by reference only to their terms in Article I, Section 8 of the Constitution, the practical limits on federal power vanished.

The nationalist projects of the Progressive Movement and Franklin Roosevelt's New Deal found one obstacle after another in the Supreme Court's interpretation of the Constitution.²⁴ Abetted by the political branches, popular animus against the Court increased until finally, in the 1930s, the Constitution's federalism constraints collapsed before the irredentist principle of unrestrained national majority rule. The crisis came in 1937, when, after several years in which major New Deal initiatives were struck down by the Supreme Court, FDR threatened to pack the Court with five extra justices who would vote in his

21. THE FEDERALIST NO. 10, at 47 (James Madison) (Ian Shapiro ed., 2009). *See also*, *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (“Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.”).

22. *Id.*

23. U.S. CONST. amend. X.

24. GREVE, *supra* note 13, 14–17.

favor.²⁵ The Supreme Court promptly abdicated its role as guardian of constitutional limits on federal power.²⁶

That same year, Walter Lippmann published *The Good Society*, in which he argued that there are two kinds of political system, the collectivist and the individualist.²⁷ Among the collectivist systems he grouped Communism and Nazism, being among the first major Western intellectuals to realize that there was little difference between the two.²⁸ But the most striking aspect of the book was that he also grouped, among the collectivists, what he termed “gradual collectivists” or “democratic collectivists.”²⁹

Lippmann had been an early supporter of Woodrow Wilson and of the Roosevelts. It was Lippmann who, as an aide to Wilson, had drafted the original version of the Fourteen Points, a secular encyclical for the new faith of national self-determination.³⁰ But by 1937, Lippmann had soured on these nationalist excesses. He became a prominent critic of FDR’s New Deal, particularly its heavy-handed disregard for the Constitution’s constraints on federal power:

The gradual collectivist believes in the absolutism of the majority, having by a fiction identified the mandates of transient majorities with the enduring and diverse purposes of the members of a community. He thinks it absurd that a few oligarchs in the Kremlin or demagogic dictators in Berlin or Rome should pretend that their personal decisions are the comprehensive purposes of great nations. Yet the gradual collectivist, under the banner of popular sovereignty, believes in the dictatorship of random aggregations of voters. In this theory the individual has no rights as against the majority, for constitutional checks and bills of rights exist only by consent of the majority.³¹

25. *Id.*

26. In the Warren and Burger eras, the Supreme Court embraced “legislating from the bench,” overturning long-standing precedents in order to impose federal preferences in electoral apportionment, abortion rights, civil rights, and the like. In this sense, the Court went from being a guardian against unlimited federal power to a willing accomplice in its expansion.

27. WALTER LIPPMANN, *THE GOOD SOCIETY* 106–11 (1937).

28. *Id.*

29. *Id.*

30. John L. Snell, *Wilson on Germany and the Fourteen Points*, 26 J. MOD. HIST. 364, 365 (1954).

31. LIPPMANN, *supra* note 27, at 107.

Nearly twenty years earlier, in the case of *Hammer v. Dagenhart* (1918), the Supreme Court struck down an act of Congress prohibiting the interstate transport of goods produced in factories that had employed child labor.³² The law did not seek to outlaw intrastate child labor directly, a subject that at the time was understood to lie entirely outside the federal power to regulate commerce “among the several States.”³³ The law forbade only the *interstate transport* of goods produced in factories where child labor had been employed.³⁴ The majority reasoned that regardless of the actual thing regulated, the purpose and effect of the act was clearly to outlaw child labor, something Congress had no power to do, and hence, the law was unconstitutional.³⁵

In a famous dissent, Justice Oliver Wendell Holmes, Jr., thought the majority’s reasoning flawed because the purpose and consequences of the law were should be irrelevant if its subject matter lay within the federal government’s enumerated powers. If Congress had the power to regulate interstate commerce, it had the power to forbid it, or any part of it, and courts had no business inquiring into Congress’s purposes.³⁶

Holmes ignored the danger that, through such conditions, Congress might use its interstate commerce power to coerce the states to adopt policies that had nothing to do with interstate commerce. As Prof. Richard Epstein notes, the majority “understood the statute for what it was; it was not an effort to control the goods themselves, but to prescribe the internal rules governing their manufacture within the state.”³⁷

Attaching conditions to the application of federal power raised obvious dangers of subverting the independence and proper functioning of state governments. Nevertheless, *Dagenhart* was eventually overruled by *United States v. Darby*.³⁸ Sustaining the Fair Labor Standards Act, which prohibited the interstate transport of goods produced in contravention of certain labor standards, *Darby* still maintained a formal

32. *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918).

33. U.S. CONST. art. I, § 8, cl. 3.

34. *Dagenhart*, 247 U.S. at 276–77.

35. *Id.* at 276.

36. *Id.* at 277–78 (Holmes, J., dissenting).

37. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1427 (1987).

38. *United States v. Darby*, 312 U.S. 100, 116–17 (1941).

distinction between intrastate manufacturing and interstate commerce.³⁹ Yet the Court went further, noting that Congress's power "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."⁴⁰

So *Darby's* repudiation of *Dagenhart* served to vindicate Holmes's insouciance over the danger that conditions attached to federal power might coerce state governments into adopting policies they didn't want and thereby subverting their representative role. ⁴¹ *Darby's* repudiation of *Dagenhart* also served to vindicate another argument advanced in favor of the child labor law, by the Solicitor General of the United States in that case:

As the conviction grew that the employment of child labor was morally repugnant and socially unwise, it came to be regarded also in the light of unfair competition in trade among the States Thus, if one State desired to limit the employment of children, it was met with the objection that its manufacturers could not compete with manufacturers of a neighboring State which imposed no such limitation.⁴²

Thus the "race to the bottom" argument was born into the annals of modern American political discourse, perhaps the most common justification for every new expansion of federal power. Political economists have debated whether state competition for industry and population creates more social costs than federally imposed uniformity, or whether it reduces such costs.⁴³ But state governments do not only, or even primarily, compete for industry; elected state officials are, of necessity, chiefly concerned with being responsive to those who put them in office. This is why many states impose even greater regulations than those called for in federal rules,⁴⁴ regardless of

39. *Id.* at 117–18.

40. *Id.* at 118.

41. *Dagenhart*, 247 U.S. at 278 (Holmes, J., dissenting).

42. *Id.* (LEXIS, found in the Syllabus before the opinion).

43. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 408 (1997).

44. See, e.g., Regional Greenhouse Gas Initiative, <http://www.rggi.org> (last visited Oct. 28, 2011). The Regional Greenhouse Initiative is a regional cap-and-trade system formed by ten northeastern states.

competitive consequences, and often with little discernable effect on industry and population flows.

Even more important, interstate regulatory competition is often the best way to establish the “right” level of regulation, by giving effect to local cost-benefit preferences. Even conceding that a lower level of federal uniformity creates net social costs, that is no reason to abandon the federal structure enshrined in our Constitution in favor of national majority rule unrestrained by constitutional limits. Ignoring local cost-benefit preferences, unrestrained national majority rule is bound to result in overregulation, and hence ultimately in greater social costs. Political economists have noted even more basic conceptual flaws in the “race to the bottom” argument.⁴⁵ Even in 1918, eliminating state choice was not necessary in order to eliminate child labor: *Dagenhart* did not pit child-labor states against a federal prohibition on child labor, but rather only North Carolina’s twelve-year-old child labor threshold against the federal fourteen-year-old threshold.⁴⁶ By the time the case was decided, all the states had child labor laws on the books,⁴⁷ all of them equal or close to the new federal standard, and the trend was clearly in favor of universally abolishing the practice altogether. The obvious reason is that state governments were responsive to local preferences, regardless of interstate competition. There was no race-to-the-bottom. The whole argument was a figment of political advocacy.

In the year after *Darby*, the doctrine of “substantial effects” on interstate commerce, which had been percolating through Supreme Court cases (mostly in minority opinions) for several decades,⁴⁸ led to the milestone case of *Wickard v. Filburn*.⁴⁹ *Wickard* held that any activity, however local, is within the federal power to regulate commerce “among the several States” if the activity has a substantial effect on interstate commerce when *all instances of it are aggregated across the nation*.⁵⁰ Thus, even the

45. See generally, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (arguing that there is no race to the bottom over environmental standards).

46. *Dagenhart*, 247 U.S. 251.

47. GREVE, *supra* note 13, at 15.

48. THE HERITAGE FOUNDATION, *THE HERITAGE GUIDE TO THE CONSTITUTION* 103 (2005).

49. *Wickard v. Filburn*, 317 U.S. 111 (1942).

50. *Id.* at 128–29.

wheat a farmer grew for his own consumption, never to enter the stream of even local commerce, was within the federal power to regulate commerce “among the several States.”⁵¹ The aggregation principle read the clause “among the several States” straight out of the Constitution because, as Justice Thomas noted in his concurring opinion in *United States v. Lopez*, “one always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce.”⁵² The aggregation principle had no stopping point: the federal government would now have the power to regulate all commerce. As a justification for unrestrained national majority rule, in the guise of federal uniformity, the “race-to-the-bottom” argument has remained firmly entrenched in our political discourse ever since. It imposes federal uniformity where the Framers intended to preserve diversity and justifies federal regulation of virtually everything the Framers assured the States’ ratification conventions that the federal government would never regulate.

There is at the heart of the “race-to-the-bottom” argument an article of faith that is arguably inimical to the founding principles of our Constitution. That article of faith holds that inequality of living standards—from state to state—is a social injustice, and that is the role of government to redress that injustice by seeking federal uniformity. In this view, state regulatory competition is a force to be protected *against*, and so too the diffusion of power among multiple levels of government. Even the enhanced self-governance and individual liberty that federalism was meant to protect become drivers of social injustice in the view of the national-collectivists. The individualist emphasis on self-reliance and individual liberty, rooted in an originalist conception of the Constitution, has found itself locked in a dialectic with the national-collectivist impulse towards the largely unrestrained rule of transient national majorities. This dialectic has arguably come to define the two main approaches to federalism at the Supreme Court—and seems increasingly to define the two political parties.⁵³

51. *Id.*

52. *United States v. Lopez*, 514 U.S. 549, 600 (1995) (Thomas, J., dissenting).

53. See generally ALFRED S. REGNERY, UPSTREAM 211–326 (2008). Among the national political parties, the breakdown has not been uniform. Though the Democratic party has been thoroughly collectivist and nationalist in its orientation since the administration of FDR, it was not so in the south until the 1990s. The Progressive Movement of the early

Indeed, for more than seventy years, collectivists in Congress, the White House, and the Supreme Court have worked in tandem to expand federal power dramatically in each generation.

By the 1980s, the Supreme Court had moved so far from the Constitution's constraints on federal power, that it could point to no protection for federalism save the "national political process" itself.⁵⁴ Only then did the Court begin to realize that, far from protecting federalism, the national political process is the gravest danger to it. That journey is the subject of the next section.

III. FROM FEDERALISM TO NATIONALISM AND BACK AGAIN

In Federalist No. 45, James Madison articulated a formalistic vision of the separation of federal and state power under the proposed Constitution:

The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.⁵⁵

Of course, Madison himself looked to the federal structure of the Constitution for the solution to a major internal problem, namely the need for "a safeguard against domestic faction and insurrection."⁵⁶ In Federalist No. 10, he fretted that purely national majority rule would render the people's representatives insensitive to local concerns, while purely local majority rule

twentieth century, for its part, grew out of the Republican party, which in its Northeast and Midwest "establishments" has retained a rather collectivist and nationalist orientation to this day, achieving its most expansive exponent in the ultra-nationalist administration of Richard Nixon, which expanded the scope of the federal government more than any administration before or since. The national-collectivist accumulation of power since the administration of FDR has led to a counter-reaction in the "conservative movement" identified with *National Review*, Barry Goldwater, Ronald Reagan, and, today, the Tea Party.

54. *García v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985).

55. THE FEDERALIST NO. 45 (James Madison), *supra* note 21, at 237.

56. THE FEDERALIST NO. 10 (James Madison), *supra* note 21, at 47.

would render them insensitive to national ones, creating, in each case, a tendency toward divisive faction and even insurrection.⁵⁷ “The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.”⁵⁸

Thus, the federal structure of the Constitution—its diffusion of power among multiple levels of government—was meant to protect against majoritarian tyrannies at every level. Integral to this conception was a formal distinction between the categories of powers granted to the federal government and those reserved for the states—the distinction enshrined in the Tenth Amendment.⁵⁹

This conception lasted throughout the nineteenth century and well into the twentieth. In 1824, the Supreme Court held in *Gibbons v. Ogden* that navigation and commerce across state lines fall within the federal commerce power.⁶⁰ *Gibbons* rests on two pillars of the Constitution: the formal separation of federal and state functions, and the Supremacy Clause: “[T]he sovereignty of Congress, though limited to specified objects, is plenary as to those objects.”⁶¹ This was not the resounding affirmation of federal supremacy that some might suppose nowadays. Chief Justice John Marshall shared James Madison’s foundational assumption that federal powers would be few and strictly defined, and that States would remain the major agents of regulation and self-government:⁶²

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

57. *Id.*

58. *Id.* at 52.

59. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

60. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

61. *Id.* at 197.

62. *See id.* at 205 (discussing Congress’s limited power).

Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description.⁶³

The Court observed that “inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State” were but a few examples “of that immense mass of legislation” not surrendered to the federal government.⁶⁴ “No direct general power over these objects is granted to Congress,” Marshall observed, “and, consequently, they remain subject to State legislation.”⁶⁵ Only because it was so sure of the stringent limitations on the scope of federal power, and the preeminence of States with respect to most categories of legislation, did the Court feel so confident asserting the supremacy of federal law within its domain.⁶⁶ Hence, an expansive view of the powers reserved to the states was a necessary predicate of Marshall’s expansive view of the Supremacy Clause. Otherwise, it was obvious that there would be no way to prevent that “great consolidation of Government” that Patrick Henry warned of in the Virginia ratification debates.⁶⁷

Formal categories were indispensable to the Court’s federalism jurisprudence until the New Deal, because the boundary between federal and state authority was made clearer and more stable by definition on both sides of the divide. If knowing exactly which powers had been delegated to the federal government helped us understand which powers had been reserved to the states—the idea captured in the Tenth Amendment—the reverse was also true.

Hence, when the nationalist program of FDR destroyed any tangible limit on the federal commerce power, it also destroyed the formal walls protecting the powers reserved to the States. For many decades, the Supreme Court abandoned all pretense of

63. *Id.* at 194–95.

64. *Id.* at 203.

65. *Id.*

66. *Id.*

67. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 162 (1996).

protecting the “very extensive portion of active sovereignty”⁶⁸ retained by the states, and quickly discovered, especially under the Warren and Burger Courts, that the Justices often enjoyed legislating more than judging.⁶⁹

During this time, federal power continued to grow along with the increasing legitimacy of national majority rule. But growing friction with core state functions was inevitable. When federalism cases once again began making their way to the Supreme Court, the justices found themselves caught in an irresolvable dilemma: How could they now defend the federal structure of the Constitution, when they themselves has long since eviscerated it?

The Court went back and forth in an embarrassing series of reversals. When the Court once again took up the Fair Labor Standards Act in *Maryland v. Wirtz*, it ruled that the Act could indeed regulate the employees of state-run schools and hospitals.⁷⁰ The Court relied heavily on this passage from another New Deal case, *United States v. California*:

[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.⁷¹

Just eight years later, in *National League of Cities v. Usery*, the Court again took up the application of the Fair Labor Standards Act to state and local employees and overruled *Wirtz*:

Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power, if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow “the National Government [to] devour the essentials of state sovereignty,” [citations omitted] and would therefore transgress the bounds of the authority

68. THE FEDERALIST NO. 45 (James Madison), *supra* note 21, at 235.

69. REGNERY, *supra* note 53, at 211–55.

70. 392 U.S. 183, 201 (1968).

71. 297 U.S. 175, 185 (1936).

granted Congress under the Commerce Clause We are therefore persuaded that *Wirtz* must be overruled.⁷²

The commerce power did not permit Congress to infringe on state sovereignty:

If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence." Thus, even if appellants may have overestimated the effect which the Act will have upon their current levels and patterns of governmental activity, the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system."⁷³

A subsequent case, *Hodel v. Virginia Surface and Mining Reclamation Association*, elaborated the rule of *National League of Cities* into a three part-test.⁷⁴ In order for a federal law to infringe impermissibly on state sovereignty it had to: (1) regulate the "States as States"; (2) address matters that are "attributes of State sovereignty"; and (3) impair state operations in their "traditional governmental functions."⁷⁵

The three-part balancing test articulated in *Hodel* was already arguably removed from *National League of Cities*'s bright-line defense of those aspects of state sovereignty deemed essential "to the States' separate and independent existence" and their "ability to function effectively in a federal system."⁷⁶ But the focus now shifted to the third *Hodel* requirement, namely whether the congressional exercise of the commerce power infringed on "traditional governmental functions."

72. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 855 (1976).

73. *Id.* at 851–52 (internal citations omitted).

74. 452 U.S. 264 (1981). This was later elaborated into a four-part test that included the added requirement that it could not be a case in which the federal interest "justifies state submission." See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537 (1985).

75. *Hodel*, 452 U.S. at 287–88, n.29.

76. *Nat'l League of Cities*, 426 U.S. at 843, 845.

The Supreme Court soon reversed itself again.⁷⁷ In 1984, the Court again took up the Fair Labor Standards Act in *Garcia v. San Antonio Metropolitan Transit Authority*, this time as applied to employees of the local transit authority.⁷⁸ The Court surveyed the landscape of federal court decisions trying to apply the “traditional governmental functions” test and found an incomprehensible cacophony of rulings. “We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side.”⁷⁹ The Court essentially revived the ruling in *Wirtz*: “We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional.’”⁸⁰

Brazenly rewriting constitutional history, the Court now decided that:

In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.⁸¹

Justice O’Connor’s dissent noted the ominous implications in the majority’s embrace of national majority rule as the sole guarantor of constitutional federalism: “With the abandonment of *National League of Cities*, all that stands between the remaining essentials of state sovereignty and Congress is the latter’s underdeveloped capacity for self-restraint.”⁸² Joining her in dissent, Justice Rehnquist was simply exasperated: “I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.”⁸³

77. *Garcia*, 469 U.S. 528.

78. *Id.* at 531.

79. *Id.* at 539.

80. *Id.* at 546–47.

81. *Id.* at 552.

82. *Id.* at 588 (O’Connor, J., dissenting).

83. *Id.* at 580 (Rehnquist, J., dissenting).

He was right: *Garcia* would prove the low point in the Court's prostration before national majority rule and was soon overruled tacitly if not yet expressly. In 1992, there emerged *New York v. United States*,⁸⁴ the first of a line of cases that would establish a new bright-line rule: the federal government cannot compel a state government to do anything.⁸⁵

This time, Justice O'Connor wrote for the majority: "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."⁸⁶ The Court struck down the "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act because it required states either to take title to low-level radioactive waste generated within their borders, or regulate its disposal according to Congress's instruction.⁸⁷ "In this provision," reasoned the majority, "Congress has crossed the line distinguishing encouragement from coercion."⁸⁸ Congress could not force states to choose between two alternatives neither of which Congress had the power to impose "as a free standing requirement."⁸⁹

The decision was justly well-received in federalism circles, but it was not without its problems. The Court reaffirmed the legitimacy of both conditional federal grants and conditional preemption as forms of "encouragement" not rising to the level of "coercion."⁹⁰ The Court noted, "[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."⁹¹ On the other hand, "[a]ccountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance

84. 505 U.S. 144 (1992).

85. See generally *Printz v. United States*, 521 U.S. 898 (1997) (striking down a federal statute directing the operations of state officials); *New York v. United States*, 505 U.S. 144 (1992) (striking down a federal mandate on state nuclear waste disposal).

86. *New York*, 505 U.S. at 162.

87. *Id.* at 174–75.

88. *Id.*

89. *Id.*

90. *Id.* at 173–74 (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) and *FERC v. Mississippi*, 456 U.S. 742, 764–65 (1982)).

91. *Id.* at 168.

with the views of the local electorate in matters not pre-empted by federal regulation.”⁹²

The weakness in the Court’s reasoning was that, given the broad sweep of the federal tax-and-spend power (in the case of conditional federal grants) and of federal commerce power (in the case of conditional preemption), it does not take much “encouragement” to diminish a state government’s responsiveness to local preferences. By definition any such “encouragement” diminishes a state government’s responsiveness to local preferences in favor of national ones, the only variable being a matter of degree, that is the whole purpose of such “encouragement.” If we reverse the logic of O’Connor’s distinction between encouragement and coercion, and start by asking whether a federal law leaves elected state officials free to regulate “in accordance with the views of the local electorate,”⁹³ it becomes obvious that virtually all cases of federal “encouragement” boil down to some degree of coercion. That is the subject of the next two sections of this article.

Before pursuing the Court’s reasoning into the realm of conditional federal grants and conditional coercion, two more cases bear mentioning, including the most important and far-reaching of the Court’s commandeering cases, *Printz v. United States*.⁹⁴

In *Printz*, the Court struck down a part of the Brady Act that required states to conduct background checks on prospective gun purchasers.⁹⁵ The Court ruled that because the federal government cannot compel state governments to regulate, neither can it compel state officials to perform any particular function.⁹⁶ The ruling was a welcome relief from the modern plague of indeterminate multi-prong balancing tests. Such tests, wrote Justice Scalia for the majority,

might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments. [Citations omitted] But where, as here, it is the whole *object* of the law to direct the functioning of the state

92. *Id.* at 170.

93. *Id.* at 169.

94. 521 U.S. 898 (1997).

95. *Id.* at 935.

96. *Id.*

executive, and hence to compromise the structural framework of dual sovereignty, such a “balancing” analysis is inappropriate. It is the *very principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.⁹⁷

The ruling in *Printz* was categorical. The federal government could not use the commerce power to compel state officials to perform any function,⁹⁸ period. It did not matter if the function was minor or the federal interest overwhelming. It did not matter if it was a traditional state function or not. It did not matter if the state incurred no costs at all. If a federal law offended “the structural framework of dual sovereignty”⁹⁹ it was now categorically unconstitutional.

The most potentially consequential feature of the opinion in *Printz* was the revival of the notion that the federal and state governments occupy separate spheres in a “structural framework of dual sovereignty” and that the States must remain “independent and autonomous within their proper sphere of authority.”¹⁰⁰ The protection for this federal structure was further reinforced by Scalia’s invocation of the Necessary and Proper Clause.¹⁰¹ A law which violates the federal structure of the Constitution is not a law that is “proper” for carrying into execution any enumerated power, “and is thus, in the words of the Federalist, ‘merely [an] ac[t] of usurpation’ which ‘deserves to be treated as such.’”¹⁰²

The Court’s reasoning in *Printz* could have enormous implications. If states must remain “independent and autonomous within their proper sphere of authority,”¹⁰³ and any law which crosses into the sphere is not “proper” within the Necessary and Proper Clause, then it may once again be possible to trace the outer boundaries of the federal government’s delegated powers by tracing the outer boundaries of the states’ reserved powers.

97. *Id.* at 932 (citations omitted).

98. *Id.* at 935.

99. *Id.* at 932.

100. *Id.* at 928.

101. *Id.* at 923–24.

102. *Id.* (alteration in original) (quoting THE FEDERALIST NO. 33, at 204 (Alexander Hamilton)).

103. *Id.* at 924.

This view of the federal structure of the Constitution was reaffirmed last summer in *United States v. Bond*.¹⁰⁴ Holding that citizens have standing to challenge federal violations of state sovereignty, Justice Kennedy, for the majority, reiterated that “federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”¹⁰⁵ Those laws issued by the separate spheres of authority “in excess of delegated governmental power cannot direct or control”¹⁰⁶ the actions of the individual. Where the federal government encroaches upon the political territory of the States, the “individual has a direct interest in objecting to laws that upset the constitutional balance” because holding true to “federalism is not for the States alone to vindicate.”¹⁰⁷ In short, the separation of government authority into two bodies of government “protects the liberty of the individual from arbitrary power.”¹⁰⁸ For the first time since the New Deal, the Court had finally, however unwittingly, equated unbridled national majority rule with “arbitrary power.”

IV. CONDITIONAL FEDERAL GRANTS

In *United States v. Butler*, the Supreme Court noted that through the device of conditional federal grants, “constitutional guarantees, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion.”¹⁰⁹ This indispensable observation has lied largely unnoticed in the chaff of Supreme Court dicta for decades, to virtually no effect. Nowadays, those seeking protection from the dictates of conditional federal funds must look to the woefully insufficient standard of *South Dakota v. Dole*.¹¹⁰

The ACA’s Medicaid expansion provisions show how illusory state “prerogative” really is in the conditional federal grants context. The federal grant constitutes forty percent of all federal funds paid to States.¹¹¹ It is nearly impossible to imagine that any

104. *Bond v. United States*, 131 S. Ct. 2355 (2011).

105. *Id.* at 2364 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

106. *Id.*

107. *Id.*

108. *Id.*

109. 297 U.S. 1, 72 (1936).

110. 483 U.S. 203 (1987).

111. U.S. CENSUS BUREAU, FEDERAL AID TO STATES FOR FISCAL YEAR 2009 vii (2010).

state government would find it politically feasible to forego such a large amount of its citizen's taxes paid to the federal government for any reason, and none ever has.¹¹²

Dole upheld a federal law that threatened states with the loss of five percent of federal highways funds if they did not raise their drinking age to twenty-one.¹¹³ The Court noted that the penalties attaching to such conditional federal programs could not be so onerous as to pass “the point at which pressure turns into compulsion.”¹¹⁴ *Dole* insists that state prerogative must be preserved, both in theory and in fact, but would have us believe that freedom of choice is preserved in the state's ability to refuse the funding and its conditions.

But any amount of money taxed away from the states and returned to them only on condition of compliance with federal preferences weakens the state's ability to choose. The only question is whether it weakens that freedom of choice a little or a lot— a question not of kind but of degree. *Dole* conflates the sliding scale of coercion with an imaginary spectrum along which pressure is supposed turn into compulsion at some point. But this is a logical fallacy. If the penalty involved is miniscule, there is pressure, and freedom of choice is lessened; if the penalty is enormous, there is still freedom of choice, notwithstanding the pressure. Either there is coercion in both cases or there is coercion in neither. *Dole's* attempt to articulate some way of distinguishing between compulsion and mere encouragement was doomed to be unworkable in practice, and so it has proved. The *Dole* standard has never triggered a ruling of coercion, no matter how great the penalty.¹¹⁵

The coercion problem is particularly acute where the federal government makes more onerous the conditions attaching to an existing program in which the States are already heavily invested. That, in a nutshell, is what the Medicaid expansion

112. JAGADEESH GOKHALE, CATO INSTITUTE, THE NEW HEALTH CARE LAW'S EFFECT ON STATE MEDICAID SPENDING 6 (2011), <http://www.cato.org/pubs/wtpapers/StateMedicaidSpendingWP.pdf>.

113. *Id.* at 205.

114. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

115. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1266–69 (N.D. Fla. 2011) (discussing *Dole*), *aff'd in part and rev'd in part*, 648 F.3d 1235, 1328 (11th Cir. 2011) (affirming the judgment regarding two provisions but reversing with regard to severability), *cert. granted sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 80 U.S.L.W. 3198 (Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400).

provisions of the ACA do. If *Dole* was ever going to be used to establish the coercive effect of a federal conditional grant program, *HHS v. Florida*—the main challenge to the ACA—was the textbook case.¹¹⁶ Both the district court and the Eleventh Circuit Court of Appeals struck down the individual mandate in ACA, on federalism grounds.¹¹⁷ But both refused to find coercion in the ACA’s Medicaid expansion provisions.¹¹⁸

In attempting to trace the limits on the federal conditional spending power, the Supreme Court in *Dole* observed, “[t]he spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases.”¹¹⁹ The Court listed four: (1) the exercise of the spending power must be in pursuit of “the general welfare”; (2) the conditions must be unambiguously stated; (3) the conditions must be related to the federal interest in particular national projects or programs; and (4) the conditions cannot require the States to do something that is otherwise unconstitutional.¹²⁰

Each of these limits either by its own terms offers no logical protection for state sovereignty, or has been applied by federal courts in a way that offers no protection. First, in applying the “general welfare” prong, federal courts must “defer substantially” to the judgment of Congress,¹²¹ and the Court has even speculated that the standard is not judicially enforceable at all.¹²² The second restriction, that conditions be unambiguously stated, is an issue of statutory drafting with no bearing on the nature or scope of the condition, or whether it constitutes coercion. The third restriction, that the condition bear a reasonable relation to the federal interest in a national project or program, has the promise implied in Justice Sandra Day O’Connor’s dissent in *Dole*, namely that of drawing a distinction between conditions on how the federal grant is to be spent (which O’Connor thought permissible) and conditions based on state adoption of a regulatory scheme not specifically related to how the grant is to be spent (which O’Connor thought

116. See generally *Florida ex rel. Bondi*, 780 F. Supp. 2d 1256.

117. *Florida ex rel. Att’y Gen.*, 648 F.3d at 1302–07; *Florida ex rel. Bondi*, 780 F. Supp. at 1298.

118. *Id.*

119. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

120. *Id.* at 207–08.

121. *Id.*

122. *Id.* at 207 & n.2.

impermissible).¹²³ But the Court's holding in *Dole* forecloses that promise as a useful distinction, because the drinking-age requirement at issue in *Dole* was not a condition on how the federal highway funds were to be spent, but rather only a loosely related regulation.¹²⁴ And in any case *Dole* implicitly recognized that the conditions attaching to federal conditional funds may "pass the point at which pressure turns into compulsion" even if the conditions are focused purely on how the funds are to be spent.¹²⁵ The fourth restriction, the bar against requiring states to do anything that is otherwise unconstitutional, is logically of no help because we are questioning the imposition of federal conditions on state regulatory powers that we presuppose to be constitutional.

The supposed "coercion doctrine" lies in *Dole's* observation that the penalty of losing federal funds "might be so coercive as to pass the point at which pressure turns into compulsion,"¹²⁶ which is unconstitutional. The Court insisted that compliance with federal conditions must remain "the prerogative of the States not merely in theory but in fact."¹²⁷

Dole focused on the fact that unwilling states stood to lose "a relatively small percentage of certain federal highway funds":¹²⁸

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact.¹²⁹

This mere "temptation" in the form of "relatively mild encouragement" was not enough to rise to the level of coercion.¹³⁰ According to the Court, regulatory authority over the State's drinking age "remains the prerogative of the States not merely in theory but in fact."¹³¹

123. *Id.* at 216.

124. *Id.* at 211.

125. *Id.* (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

126. *Dole*, 483 U.S. at 211.

127. *Id.* at 211–12.

128. *Id.* at 211.

129. *Id.*

130. *Id.*

131. *Id.*

This has to be read together with preceding quotation from *Steward Machine Company*, in which the Court observed, “[b]ut to hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible.”¹³² Temptation, then, is not the same as coercion; when the States can “theoretically” opt out of a federal program, doing so remains their prerogative. But *Dole* also noted that the States must be able to retain their prerogatives “in fact.”¹³³

This standard raises impossible conceptual problems, which is why no federal conditional grant program has ever been found to be coercive. The incoherence of the Eleventh Circuit’s ruling on the Medicaid expansion provisions of the ACA, in *Florida ex rel. Attorney General v. United States Department of Health and Human Services* shows why.¹³⁴ In the trial court below, Judge Roger Vinson ruled that the law’s Medicaid provisions are constitutional.¹³⁵ He observed that federal courts routinely pay lip service to *Dole*’s coercion doctrine but have never in practice found coercion in any case, no matter how onerous the conditions.¹³⁶ He ruled in effect that there is no doctrine of coercion, and concluded that because the plaintiffs’ coercion claim could not succeed no matter how large the penalty in fact, “the defendants are entitled to judgment as a matter of law.”¹³⁷

The twenty-six states challenging the ACA argued that they simply could not afford the loss of Medicaid funds, so compliance is in no sense voluntary.¹³⁸ If true, that would violate *Dole*. Even if opting out remained a state prerogative in theory,

132. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937).

133. *Dole*, 483 U.S. at 212.

134. *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted sub nom. Nat’l Fed’n of Indep. Business v. Sebelius*, 80 U.S.L.W. 3198 (Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400).

135. *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *aff’d in part and rev’d in part*, 648 F.3d 1235, 1328 (11th Cir. 2011) (affirming the judgment regarding two provisions but reversing with regard to severability), *cert. granted sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 80 U.S.L.W. 3198 (Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400).

136. *See id.* at 1268 (“[E]very single federal Court of Appeals called upon to consider the issue has rejected the coercion theory as a viable claim.”).

137. *Id.* at 1269.

138. *See id.* at 1269 (discussing that because Medicaid is the single largest federal grant-in-aid program to the states, the states effectively have no choice other than to participate in the program).

the political process itself virtually guaranteed that it could not remain so in fact: the penalty was simply too large,¹³⁹ and the federal matching funds were paid for by state residents to begin with. The government countered with evidence that in fact the penalty is less onerous than claimed.¹⁴⁰

Vinson noted: “In short, there are numerous genuine disputed issues of material fact with respect to this claim that cannot be resolved on summary judgment.”¹⁴¹ But he nevertheless ruled that given the failure of federal courts to develop any applicable coercion standard, there really was no issue of material fact, and the government was entitled to judgment as a matter of law.¹⁴² This was tantamount to holding that the *Dole* standard doesn’t even exist. At the very least, the Medicaid count should have proceeded to a trial on the facts. *Dole* seems to require a factual inquiry into whether federal conditions “pass the point at which pressure turns into compulsion[;]”¹⁴³ compliance must remain a state prerogative “not merely in theory but in fact.”¹⁴⁴ There was at least an issue of material fact as to whether the Medicaid expansion provisions are so onerous that states can’t afford to opt out.

Hence the Eleventh Circuit should have reversed that summary judgment and returned the case to Judge Vinson for a trial on the facts. Instead it affirmed his judgment, but virtually ignored what he actually said:

If anything can be said of the coercion doctrine in the Spending Clause context, however, it is that it is an amorphous one, honest in theory but complicated in application. But this does not mean that we can cast aside our duty to apply it;

139. See TEX. HEALTH AND HUMAN SERVS. COMM’N & TEX. DEP’T OF INS., IMPACT ON TEXAS IF MEDICAID IS ELIMINATED, H. 81 (2009).

140. *Id.* at 1267 (“In their voluminous materials filed in support of their motion for summary judgment, the state plaintiffs have identified some serious financial and practical problems that they are facing under the Act, especially its costs. They present a bleak fiscal picture. At the same time, much of those facts have been disputed by the defendants in their equally voluminous filings; and also by some of the states appearing in the case as *amici curiae*, who have asserted that the Act will in the long run save money for the states. It is simply impossible to resolve this factual dispute now as both sides’ financial data are based on economic assumptions, estimates, and projections many years out. In short, there are numerous genuine disputed issues of material fact with respect to this claim that cannot be resolved on summary judgment.”).

141. *Id.*

142. *Id.* at 1269.

143. *Id.* at 1266 (internal citations omitted).

144. *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987).

indeed, it is a mystery to us why so many of our sister circuits have done so. To say that the coercion doctrine is not viable or does not exist is to ignore Supreme Court precedent, an exercise this Court will not do If the government is correct that Congress *should* be able to place any and all conditions it wants on the money it gives to the states, then the Supreme Court must be the one to say it.¹⁴⁵

But by affirming Judge Vinson's summary judgment, the Eleventh Circuit in effect said that Congress should be able to place any and all conditions it wants on the money it gives to the states. It should be no mystery why so many "sister circuits" have tossed *Dole's* coercion doctrine aside. Coercion is coercion, whether it's a single dollar or a million. A conditional federal grant is categorically coercive "because it necessarily conditions the exercise of one right upon the conscious surrender of a second."¹⁴⁶

The right a state surrenders when accepting federal conditions is, of course, the right to be responsive to local preferences. The right it surrenders when refusing the federal conditions is the right to share in the benefits of a program its citizens are paying for. In essence every federal conditional grant boils down to this: Accept national majority rule within the sphere of traditional state authority, or suffer the massive transfer of funds from your state to states that do accept national preferences. This certainly qualifies as "encouragement." It is also coercion.

The *Dole* test is worse than a mirage. It does nothing tangible to protect states' regulatory autonomy, while allowing the federal courts to pretend that the states are protected. In fact, only budgetary constraints prevent the federal government from using conditional grants for the total subversion of state governments. *Garcia* stood for the proposition that the national political process is enough to protect federalism. But if, after *New York* and *Printz*, *Garcia* is no longer good law, where does that leave *Dole*?¹⁴⁷

145. Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1266–67 (11th Cir. 2011) (emphasis in original), *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 80 U.S.L.W. 3198 (Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400).

146. Richard A. Epstein and Mario Loyola, *ObamaCare's Next Constitutional Challenge*, WALL ST. J. (June 7, 2011), <http://online.wsj.com/article/SB10001424052702304474804576367690213892556.html>.

147. See Section III for discussion of *Garcia*, *New York*, and *Printz*.

In *Printz* the Court held that where a federal action threatens the “dual sovereignty” guaranteed to the states, it offends the federal structure of the Constitution, and must be struck down.¹⁴⁸ Judge Vinson acknowledged this, and all but invited the Supreme Court to overrule *Dole* and extend the logic of *Printz* to the arena of conditional federal grants:

Some have suggested that, in the interest of federalism, the Supreme Court should revisit and reconsider its Spending Clause cases [e.g., *Dole*]. See Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 Chap. L. Rev. 195–96 (2001) (maintaining the “greatest threat to state autonomy is, and has long been, Congress’s spending power” and “the states will be at the mercy of Congress so long as there are no meaningful limits on its spending power”). However, unless and until that happens, the states have little recourse to remaining the very junior partner in this partnership.¹⁴⁹

Judge Vinson reasoned that the *Dole* coercion standard doesn’t really exist, and in effect, all federal conditional grant programs are permissible, no matter how great the penalty. With glaring incoherence, the Eleventh Circuit affirmed his ruling while flatly contradicting his basis for it. The federal courts have indeed applied the *Dole* standard in a way that permits all conditional grants. Nothing except *Garcia*’s national political process stands in the way of the total absorption of state budgets by the federal government.

Though the Commerce Clause portion of *United States v. Butler* is no longer valid law,¹⁵⁰ there is presumably no argument with *Butler*’s observation on the inherent conflict between a too-expansive reading of the Spending Clause, and the federal structure of the Constitution:

Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-

148. 521 U.S. 898 (1997).

149. Florida *ex rel.* Bondi v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256, 1269 (N.D. Fla. 2011), *aff’d in part and rev’d in part*, 648 F.3d 1235, 1328 (11th Cir. 2011) (affirming the judgment regarding two provisions but reversing with regard to severability), *cert. granted sub nom.* Nat’l Fed’n of Indep. Bus. v. Sebelius, 80 U.S.L.W. 3198 (Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400).

150. Wickard v. Filburn, 317 U.S. 111 (1942) (overruling *U.S. v. Butler* as to Commerce Clause standard).

government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States (which has aptly been termed 'an indestructible Union, composed of indestructible States,') might be served by obliterating the constituent members of the Union. But to this fatal conclusion the doctrine contended for would inevitably lead. And its sole premise is that, though the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers, so as to reserve to the states and the people sovereign power, to be wielded by the states and their citizens and not to be invaded by the United States, they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed. The argument, when seen in its true character and in the light of its inevitable results, must be rejected.¹⁵¹

If conditional federal grants have no limit in a doctrine of coercion, then the exercise of the power to make them has no limit, save such as may be self-imposed by the federal government. The failure of the federal courts to fashion the *Dole* coercion doctrine into any meaningful limit on the federal government's ability to subvert state governments through conditional grants should sooner or later tempt the Court to see the same danger in conditional grants that it has found in commandeering. The federal uniformity such grants are designed to achieve have consistently come at the expense of state governments' responsiveness to local preferences and accountability for government policies at all levels.

V. CONDITIONAL PREEMPTION

At first blush the practice of giving states permission to regulate in a pre-emptible field, on condition that they meet federal guidelines, seems to present an entirely different problem than conditional federal grants. Conditional federal grants allow the federal government to get indirectly something it cannot get directly, namely specific state legislation.¹⁵²

151. *United States v. Butler*, 297 U.S. 1, 77–78 (1936).

152. Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975, 983 (2011) (discussing Congressional authority to use conditional grants to induce state legislatures to enact certain legislation).

Conditional preemption, by contrast, allows the federal government to get indirectly something that it *can* get directly, namely the regulation of individuals subject to overlapping state and federal authority.¹⁵³ The greater power of wholesale preemption, we are told, includes the lesser power of conditional preemption, and so there is not even a theoretical possibility of coercion.¹⁵⁴

But, because conditional preemption accomplishes federal ends through the instruments of state government, the same danger is raised as in the conditional federal grant cases, namely, that the “inducement offered by Congress might . . . pass the point at which pressure [on state governments] turns into compulsion.”¹⁵⁵ As with the ACA’s Medicaid expansion provisions, instances of conditional preemption demonstrate the lack of meaningful difference in *New York’s* supposed distinction between “encouragement” and “coercion,” and raise every bit as much concern for the “separate and independent existence” of the states.¹⁵⁶ Conditional preemption presents state governments with a “choice” that is really no choice at all: Either regulate this or that area according to federal preferences, or the federal government will preempt your ability to regulate it at all.

EPA’s fantastical voyage into the realm of planetary climate control is a good example of how little choice in fact conditional preemption programs leave to the states. The Clean Air Act (CAA) was designed to regulate emissions of pollutants that cause direct harm to human health.¹⁵⁷ As Justice Scalia noted in his dissent in *Massachusetts v. EPA*, “regulating the buildup of CO₂ and other greenhouse gases in the upper reaches of the atmosphere, which is alleged to be causing global climate change, is not akin to regulating the concentration of some substance that is *polluting the air*.”¹⁵⁸ In order to bring greenhouse gases within the CAA, the EPA had to devise a

153. See Somin, *supra* note 11 and accompanying text.

154. Ronald D. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289, 324 n.250 (1984) (using the example of Congress’s power to preempt all highway operations as justification for Congress’s power to require states to pay their highway commissioners and toll-takers a federal minimum wage).

155. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

156. See *New York v. United States*, 505 U.S. 144, 175 (1992).

157. 42 U.S.C. § 7401(b)(1).

158. 549 U.S. 497, 559 (2007).

fiendishly convoluted series of rule-makings.¹⁵⁹ Texas has joined other states in fighting all of these new rules in federal court.¹⁶⁰

On June 3, 2010, the EPA gave the states until August 2, 2010 to report whether their SIPs would include greenhouse gases as pollutants “subject to regulation” under the CAA.¹⁶¹ The government of Texas replied that it had “neither the authority nor the intention” of complying with the EPA’s new greenhouse gas rules, which it considered to be illegal and unconstitutional.¹⁶² On December 13, 2010, the EPA issued a SIP Call for thirteen states, including Texas, indicating that to secure or maintain EPA approval, SIPs would henceforth need to “automatically update” to cover all substances designated as pollutants by the EPA now or in the future.¹⁶³ In comments to the SIP Call, the Texas Commission on Environmental Quality (TCEQ) reiterated its position that the EPA’s demand for a revision to the Texas SIP was illegal.¹⁶⁴ In response, the EPA subsequently issued a partial disapproval of the Texas SIP.¹⁶⁵ It explained that its original approval of the Texas SIP, eighteen

159. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I) [hereinafter “Endangerment Finding”]; Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71) [hereinafter “Timing Rule”]; Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600) [hereinafter “Tailpipe Rule”]; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) [hereinafter “Tailoring Rule”].

160. Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program, 75 Fed. Reg. 82,430 (Dec. 30, 2010) (to be codified at 40 C.F.R. pt. 52).

161. See Tailoring Rule, *supra* note 159.

162. See Letter, *supra* note 1.

163. Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77,698 (Dec. 13, 2010) (to be codified at 40 C.F.R. pt. 52) [hereinafter “Final SIP Call”].

164. Texas Commission on Environmental Quality Comments on Actions to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions; Finding of Substantial Inadequacy and SIP Call, Docket ID No. EPA-HQ-OAR-2010-0107, FRL-9190-7 Federal Implementation Plan (FIP), Docket ID. No. EPA-HQ-OAR-2010-0107, FRL-9190-8 (Oct. 4, 2010) [hereinafter TCEQ comments].

165. Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program, 75 Fed. Reg. 82,430 (Dec. 30, 2010) (to be codified at 40 C.F.R. pt. 52) [hereinafter “Interim Partial SIP Disapproval and Interim FIP”].

years earlier, had been an error because the SIP did not automatically update for newly designated pollutants.¹⁶⁶ In the same rulemaking, it immediately imposed a FIP as an interim final rule¹⁶⁷ and thereby took over permitting authority in Texas for greenhouse gas emissions under the CAA's provisions on Prevention of Significant Deterioration (PSD). As a consequence, Texas companies wishing to build new facilities or expand existing ones may now have to file for two separate permits, one covering greenhouse gas emissions, to be issued directly by the EPA, and the other covering emissions of "conventional" (i.e., actual) pollutants, to be issued as before by the TCEQ.¹⁶⁸ If Texas does not submit a revised SIP by December 1, 2011, the EPA could move towards a full takeover of PSD permitting authority.¹⁶⁹

Texas's court challenges focus on the host of statutory questions raised by the EPA's actions, but it has not argued that the SIP Call and subsequent FIP are unconstitutionally coercive or commandeering.¹⁷⁰ That is understandable, given standing precedents of the Supreme Court. Its two major conditional preemption cases—*Hodel* and *FERC v. Mississippi*—both appear to foreclose any constitutional challenge on federalism grounds.¹⁷¹ However, as has been noted, the Court's decisions in this area have been unstable and contradictory for decades; raising legitimate questions about how settled this area of the law really is, even after *Printz*.¹⁷²

Hodel and *FERC* both relied on *National League of Cities's* elevation of the Tenth Amendment to a principle of immunity for the "traditional governmental functions" of states.¹⁷³ Both

166. *Id.* at 82,432–33.

167. *Id.* at 82,448. The interim actions were finalized in Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program, 76 Fed. Reg. 25,178 (May 3, 2011) (to be codified at 40 C.F.R. pt. 52) [hereinafter "Final Partial SIP Disapproval and Final FIP"].

168. See Tailoring Rule, *supra* note 159.

169. See TCEQ Comments, *supra* note 164.

170. See Petitioners' Reply To Respondent United States Environmental Protection Agency's Response In Opposition To Petitioners' Emergency Motion For A Stay Pending Review, No. 10-1092 (D.C. Cir. Jan. 7, 2011).

171. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (upholding a scheme of conditional preemption); *FERC v. Mississippi*, 456 U.S. 742 (1982) (upholding a scheme of conditional preemption).

172. See *supra* text accompanying note 85.

173. *Hodel*, 452 U.S. at 265; *FERC*, 456 U.S. at 778.

were handed down in the 1980s before *Garcia*, which overruled *National League of Cities* and thereby undermined the doctrinal foundation of both cases.¹⁷⁴ Then, in due course, *Garcia* was all but overruled by *New York* and *Printz*, both of which nonetheless reaffirmed *Hodel* and *FERC*.¹⁷⁵ So what have all these decisions left settled, exactly?

Let's take a closer look. In *Hodel*, the Supreme Court upheld a new federal law that sought to regulate surface coal mining.¹⁷⁶ The law established environmental performance standards for surface coal mining operations, and provided for each state to establish a regulatory program in accordance with the standards and guidance provided in the law, subject to federal approval,¹⁷⁷ as with a SIP under the CAA.¹⁷⁸ For states that failed to secure approval of the state program, the law required the federal agency (Department of the Interior) to establish a federal regulatory program to implement the law,¹⁷⁹ as with a FIP under the CAA.¹⁸⁰

The case was on appeal to the Supreme Court directly from the federal district court¹⁸¹ which had struck down the law. The district court had relied heavily on the federalism doctrine of *National League of Cities*:

In *National League of Cities* the Court held that the minimum wage and overtime pay provisions of the Fair Labor Standards Act could not be applied to states and subdivisions of states. The fact that wages and hours of state employees were commerce or affected commerce was not questioned. The

174. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). In *Garcia*, the Court said, "The controversy in the present cases has focused on the third *Hodel* requirement—that the challenged federal statute trench on 'traditional governmental functions.' The District Court voiced a common concern: 'Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult.' Just how troublesome the task has been is revealed by the results reached in other federal cases We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side." *Id.* (internal citations omitted).

175. 505 U.S. at 167; 521 U.S. at 926.

176. 452 U.S. 264 (1981) (upholding the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 *et seq.*).

177. 30 U.S.C. § 1253 (1977).

178. 42 U.S.C. §7410(a) (1977).

179. 30 U.S.C. §1254 (1977).

180. 42 U.S.C. § 7410(c) (1977).

181. At the time, 28 U.S.C. § 1252 (1977) provided for direct appeals to the Supreme Court from any federal court decision striking down a federal law in any suit to which the U.S. was a party. Section 1252 was repealed in 1988.

Tenth Amendment, however, was found to preclude the exercise of commerce power “in a fashion that would impair the States’ ‘ability to function effectively in a federal system.’” In reaching that conclusion, the Court carefully distinguished the authority of Congress under the commerce clause to regulate “wholly private activity,” from the authority to enact regulations that were “directed, not to private citizens, but to the States as States.” According to the Court, the exercise of commerce power in the former is limited only by the requirement that “the means chosen by (Congress) must be reasonably adapted to the end permitted by the Constitution,” whereas its exercise in the latter is proscribed by the Tenth Amendment when matters “essential to (the States’) separate and independent existence” are involved. Applying the holding of *National League of Cities*, congressional action alleged to be in contravention of the Tenth Amendment must be scrutinized to determine whether the legislation is directed to the states as states and usurps an “integral governmental function.”¹⁸²

The district court arguably articulated the proper Tenth Amendment test, namely whether “legislation is directed to the states as states and usurps an ‘integral governmental function.’”¹⁸³ But it was on less firm ground when it set out to apply the standard. “The issue before the court, therefore, is whether the surface mining act is directed to the states as a sovereign entity, displacing its role as a decision-maker in areas of traditional governmental services, or whether the act is directed to private activity.”¹⁸⁴ The former, according to the court, was prohibited, but the latter was not.¹⁸⁵

A test focused on whether the federal law impinged on an area of “traditional governmental services” clearly was not the essential test of *National League of Cities*, which focused instead on the more essential question of whether the federal law “force[d] directly upon the States [Congress’s] choices as to how essential decisions regarding the conduct of integral

182. *Va. Surface Mining & Reclamation Ass’n v. Andrus*, 483 F. Supp. 425, 432 (W.D. Va. 1980) (internal citations omitted).

183. *Id.*

184. *Id.*

185. *Id.* Outside the context of “traditional governmental services,” the court noted, “[t]he induced-coerced distinction [of *Steward Machine Co. v. Davis*] can still be used to determine the validity of legislation affecting nontraditional governmental functions.” *Id.* at 432 n.6. This confusing twist was thankfully relegated to a footnote.

government functions are to be made.”¹⁸⁶ The district court’s analysis was on untenable ground from that point forward. In striking down the Surface Mining Act, the court cited a variety of ways it “[displaced the state’s] role as a decision-maker in areas of traditional governmental services.”¹⁸⁷ “The Commonwealth [of Virginia] is deprived of its right to dictate whether this land could be better used for some other purpose.”¹⁸⁸ “[T]he reclamation provisions adversely affect land values.”¹⁸⁹ The required remedial landscaping “is economically infeasible and physically impossible.” “[T]he state has been deprived of its choice as to how best to protect Virginia’s environment.”¹⁹⁰

But the problem with the Surface Coal Mining Act was not that it displaced state authority in areas of traditional governmental functions, which is entirely permissible on preemption grounds, but rather that it *subverted* the instrumentalities of state government to accomplish federal ends. That is how the law threatened the “States’ ability to function effectively in a federal system” and their “separate and independent existence.”¹⁹¹

The district court had distilled from *National League of Cities* a promising articulation of the protections offered to state governments by the Tenth Amendment. But it so misapplied that standard to the facts that the subsequent reversal by the Supreme Court was almost inevitable.

Reversing the district court in *Hodel*, the Supreme Court observed that the Act simply did not require states to do anything.¹⁹² According to the majority, “[t]he most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.”¹⁹³ “Congress could constitutionally have enacted a statute prohibiting any state regulation of surface

186. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 855 (1976).

187. *Va. Surface Mining & Reclamation Ass’n v. Andrus*, 483 F. Supp. 425, 432 (W.D. Va. 1980)

188. *Id.* at 434.

189. *Id.*

190. *Id.*

191. *Nat’l League of Cities*, 426 U.S. at 851–52.

192. *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981).

193. *Id.* at 289.

coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role.”¹⁹⁴

But if *Hodel* was correct to reverse the district court, it also failed to apply the Tenth Amendment standard actually articulated in *National League of Cities*. Instead, it elaborated a highly permissive three-part test: In order to run afoul of the Tenth Amendment, the federal law must (1) “regulate[] the ‘States as States’”; (2) “address matters that are indisputably ‘attribute[s] of state sovereignty’”; and (3) “impair their ability ‘to structure integral operations in areas of traditional governmental functions.’”¹⁹⁵ It upheld the Act because the first of the three requirements was not satisfied.¹⁹⁶

Hodel’s gloss on *National League of Cities* had little to do with the latter’s most essential holding, namely that the Tenth Amendment protects “States’ ability to function effectively in a federal system” and their “separate and independent existence” within that system.¹⁹⁷

Hodel’s failure to apply the structural federalism argument articulated in *National League of Cities* carried forward into *FERC v. Mississippi*,¹⁹⁸ in which the Court upheld the Public Utility Regulatory Policies Act of 1978 (PURPA).¹⁹⁹ PURPA required States to consider federal regulatory standards while the states regulated public utilities within their jurisdictions.²⁰⁰ It required states to regulate pursuant to federal directives or face federal regulatory preemption.²⁰¹ *FERC* held that the requirement to consider the Act’s guidance did not run afoul of *National League of Cities* because “no state authority or nonregulated utility is required to adopt or implement the specified rate design or regulatory standards.”²⁰² The Court noted precedents that “in effect directed state decisionmakers to take or refrain from taking certain actions.”²⁰³

194. *Id.* at 290.

195. *Id.* at 287–88.

196. *Id.* at 288.

197. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 851–52 (1976).

198. *FERC v. Mississippi*, 456 U.S. 742 (1982).

199. Pub L. No. 95-617, 92 Stat. 3117 (1978).

200. *Id.*

201. *Id.*

202. *FERC*, 456 U.S. at 749–50.

203. *Id.* at 762.

By focusing on the simple question of whether state implementation of federal requirements remained a matter of state prerogative, *Hodel* and *FERC* made the same mistake as *Dole*. In all three cases, the Court failed to apply the Tenth Amendment standard of *National League of Cities* as a principle of protection for the “States’ ability to function effectively in a federal system” or their “separate and independent existence.”²⁰⁴

New York and *Printz*, the cases that arguably abandoned *Garcia*, each distinguished the congressional legislation in both *Hodel* and *FERC* as falling outside the categorical prohibition on federal commandeering, because states retained a theoretical choice to refuse obeisance to federal preferences.²⁰⁵ But neither *Hodel* nor *FERC* asked the questions later raised in *New York* and *Printz*, namely whether the congressional legislation left state legislators able to respond to local preferences, whether it kept the federal government accountable for federal policies, and whether the congressional scheme could be squared with the “structural framework of dual sovereignty” that created a need to protect “States’ ability to function effectively in a federal system” and their “separate and independent existence” in the first place.²⁰⁶

The tacit resurrection of *National League of Cities* implied in the tacit overruling of *Garcia* treated *Hodel* and *FERC* as proper applications of the former, apparently because when *Garcia* overruled *National League of Cities*, it took *Hodel* and *FERC* down too.²⁰⁷ But in fact, the approach taken in *Hodel* and *FERC* is far closer to that of *Garcia* than to that of *National League of Cities*. *Hodel* and *FERC* abandoned the most important aspect of the Tenth Amendment standard articulated in *National League of Cities*, and thereby marked decisive steps on the road to *Garcia*. A proper application of the structural federalism doctrine at the heart of *New York* and *Printz* would find that both the “traditional governmental function” standard applied by *Hodel* and *FERC*, and the process federalism standard applied by *Garcia*, stood on equally untenable reasoning and that all three cases should be overruled.

204. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 851–52 (1976).

205. *New York v. United States*, 505 U.S. 144, 167 (1992); *Printz v. United States*, 521 U.S. 898, 926 (1997).

206. *Nat’l League of Cities*, 426 U.S. at 851–52.

207. *See supra* note 175 and accompanying text.

A pure Tenth Amendment standard such as that articulated in *National League of Cities*, *New York*, and *Printz*, which asks whether federal legislation can be squared with the structural framework of dual sovereignty, would cast considerable doubt on the EPA's greenhouse gas SIP Call and similar cases of conditional preemption. Conditional preemption deprives state governments of the ability to represent the preferences of their constituents, not in areas of traditional governmental functions, but in actually crafting state policy. Where their "encouraged" (and invariably coerced) deference to federal preferences reduces the accountability of the federal government with respect to the costs and consequences of implementing its own policies, the "States' ability to function effectively in a federal system"²⁰⁸ is clearly impaired. The national political process offers only this protection to federalism: It directly constrains the choices the federal government can make, by forcing it to be accountable for the costs and consequences of its own policies. It is precisely this accountability that conditional preemption allows the federal government to escape—through a subversion of state governments. That is why conditional preemption is more than just a lesser-included part of wholesale preemption, and that is why conditional preemption should be carefully checked by the federal courts.

VI. TOWARDS A SEPARATION OF FEDERAL AND STATE GOVERNMENTS

The common aspect of *Dole*, *New York*, and *Printz* is that they distinguished between encouragement and coercion by looking to the effects on self-governance, accountability, and the individual rights protected by the diffusion of power. But if you reverse their logic, and start by looking at those effects, many of the supposedly permissible "encouragements" of cooperative federalism are clearly coercive.

In the case of conditional federal funds, searching for the point at which "pressure turns into compulsion" is a fool's errand.²⁰⁹ Given the federal taxing monopoly, the loss of even a small amount of revenue to state governments forces the states to raise revenue elsewhere. Whether it's a dollar or \$10 billion,

208. *Nat'l League of Cities*, 426 U.S. at 843.

209. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

the citizens of the state lose either money or self-governing autonomy. Forcing states to make that choice is coercion.

In the case of conditional preemption, the states are forced to choose between two alternatives both of which entail the loss of self-governance, and one of which (where the state chooses to comply with federal conditions) also entails the loss of accountable government. Forcing states to make *that* choice is coercion.

The Supreme Court's progressive turn away from unbridled national majority rule, and back to the "structural framework of dual sovereignty,"²¹⁰ has been predicated on the Court's insistence that states must remain "independent and autonomous within their proper sphere of authority."²¹¹ This marks a promising trend. But the Court's future federalism decisions will struggle with the contradictions and dilemmas of past precedents until it concludes that the pressure which the federal government puts on the states by indirection and "encouragement" is every bit as offensive to the structural framework of dual sovereignty as compulsion directly applied.

In the case of conditional federal grants, every dollar the federal government taxes away from a state's residents, only to transfer it back to the state government on condition of obeisance to the will of the national majority is a surrender of state sovereignty not merely purchased, but coerced. In the case of conditional preemption, every condition attached to federal "permission" for state regulation in an area the federal government could regulate itself is a shifting of the burden of regulation, taxation, and accountability from the federal government to the states. In the first case, the federal government would not be able to achieve its objective except through coercion, because it has no power to compel state regulation. In the second, the federal government could achieve its objectives by bearing the burden of regulation and taxation—and being accountable for the results, itself. But in neither case should the federal government be able to escape the burdens of implementing its own policies through the stratagem of dressing coercion of state governments up as encouragement.

210. *Printz v. United States*, 521 U.S. 898, 928, 932 (1997).

211. *Id.* at 929, n.14.

In future federalism cases, where the federal government “encourages” a state to forsake the preferences of its citizens by holding the hammer of the federal tax-and-spend power, or that of federal preemption, over the state government, the Court will hopefully recall its opinion in *Printz*:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for “solving” problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even 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.²¹²

Cooperation between federal and state governments has proven enormously beneficial to our society. Consider the response to a hurricane or a wildfire. In those situations, federal and state officials stand shoulder to shoulder, on an equal footing, pooling resources and reaching decisions by consensus. The federal structure of our Constitution is not threatened when the partnership between federal and state governments is based on equality. But all too often the unequal power of the federal government is brought to bear on state governments through encouragement in the form of tangible pressure that by definition undermines the states’ ability to remain “independent and autonomous within their proper sphere of authority.”

The Supreme Court is hopefully working its way towards a doctrine of federalism that will offer real protection for the dual sovereignty of the states. But until such a doctrine comes to fruition, the federal essence of our Constitution has woefully little to protect it against the “arbitrary power” of unbridled national majority rule.

212. *Id.* at 930.