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## Federalism and the Right to Decide Who Decides

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# VILLANOVA LAW REVIEW

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## Articles

### FEDERALISM AND THE RIGHT TO DECIDE WHO DECIDES

ANDREW B. AYERS\*

#### I. INTRODUCTION

IMAGINE that a state amends its constitution to create a new state officer who is empowered to choose, for any given issue, which other state officer will make decisions on that issue. This new officer, in other words, will choose which other state officer will exercise the power of the sovereign in a given field. Mimicking names like Attorney General, Inspector General, and Solicitor General, the amendment calls this officer the Delegator General. The Delegator General has no power to order any citizen to do anything, or to issue a ruling on any particular issue. This officer's power is exclusively procedural; the Delegator General decides who decides.

Now imagine that the United States Congress passes a statute which requires that the state's Delegator General assign certain decisions—say, about immigration or guns—to one branch of the state government, rather than another. Would this statute violate the state's sovereignty?

Federal statutes already in existence accomplish essentially what this fictional statute would: they compel state governments to assign decisions on specific issues to one branch or entity within state government, rather than any other. This paper explores the argument that commandeering the state's delegation function violates state sovereignty, just as commandeering the state legislature or executive-branch officials does.

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\* Assistant Professor of Law and Director of the Government Law Center, Albany Law School. I am grateful to Ted de Barbieri, Joe Buffington, Rob Heverly, Patricia Reyhan, Sarah Rogerson, and Christian Sundquist for their comments. Special thanks to the Hon. Denise Hartman; the ideas in this article are greatly indebted to her, and to the work we did together before her appointment to the bench. I'm deeply indebted, too, to Cesar Vargas, and very grateful to Janet Calvo and Jose Perez. Special thanks, too, to Alla Lefkowitz for reaching out to let me know about the Commerce-in-Arms Act and the litigation challenging it, and to Allison Gabrielli for helpful research assistance. As always, I'm grateful to James Ayers for diligent proofreading and comments, and endless support. Barbara Mitchell and Tom Mitchell provided many hours of childcare that helped me find time to write this article. Emily Mitchell Ayers did that too, and so much more.

Although there is no such thing as a Delegator General, all states do have ways of deciding who gets to exercise the power of the sovereign on which issue. Rather than allowing an individual to make such decisions, the power to delegate is distributed. Sometimes the state constitution delegates power; courts interpret constitutions in ways that result in further specification of power; statutes make further assignments; governors and their designees delegate power down their chains of command; and so on. The delegation function may never be consolidated in a single office (perhaps for good reason), but it is a real function.

And in several controversial areas of law, including immigration and gun-seller liability, the federal government has created statutes that effectively commandeer states' Delegators General. Instead of saying states can or cannot take action, these federal statutes allow states to act, but only if they do it by legislative enactment—not through executive order, agency regulation, judicial decision, or any other form of state action. The theory I want to evaluate here is that state sovereignty precludes the federal government from conditioning states' authority on the states' use of one particular branch of their government.

The first section of the article explains how these statutes work, and gives enough examples to show that the problem (if indeed it is a problem) is widespread. The second section explains how these federal statutes co-opt the states' delegation function: they preempt action by any state entity other than the legislature. This is a form of conditional preemption, in that the states are preempted unless their legislature acts.

As the third section of the article explains, the Supreme Court has upheld conditional preemption in a variety of contexts. But there should be an exception to that principle for statutes that leave only one component of the state government with the power to act. The third section of the article makes the case for a rule against conditioning preemption on the state's choice to act through a specified branch of its government. Conditional preemption of this kind is analogous to commandeering one of the state's officials.

## II. USING PREEMPTION TO PUSH DECISIONS INTO STATE LEGISLATURES

Several federal statutes use preemption to push specific policy choices into state legislatures. This section analyzes two of those statutes, explaining how they use preemption to control states' choices about which branch of state government (or entity within state government) is empowered to exercise the state's sovereign power on a given issue. It then gives examples of other statutes that do the same thing, to show that the problem (if indeed it is a problem) is widespread. Finally, it shows that many other federal statutes give states decision-making power in federally-dominated areas of law without limiting the states' ability to choose their own decision-makers.

A. *The Commerce-in-Arms Act*

The Protection of Lawful Commerce in Arms Act preempts any civil action for damages “resulting from the criminal or unlawful misuse” of a firearm.<sup>1</sup> But it exempts from preemption a civil action that alleges knowing violations of a federal or state *statute*.<sup>2</sup> So there is no preemption if the state authorizes a civil action against gun sellers by statute; but preemption will apply if the state authorizes the civil action through its judicial common law.

The Commerce-in-Arms Act has been applied to preempt actions by the victims of gun violence against stores that negligently sell firearms to dangerous people. For example, in 2012, the manager of the Odessa Pawn & Gun Shop in Odessa, Missouri, sold a gun to Colby Weathers, even though Colby’s mother had called two days earlier to warn the manager that Colby was severely mentally ill and had tried to kill herself with a gun he had sold her the previous month.<sup>3</sup> After he sold Colby the gun, she went directly home and used it to kill her father.<sup>4</sup> Colby’s now-widowed mother, Janet Delana, who had begged the manager not to sell Colby the gun, filed a negligence action against Odessa Gun & Pawn. But the Missouri Supreme Court found that her lawsuit was—in most respects—preempted by the Commerce-in-Arms Act.<sup>5</sup> The Act “expressly preempts all civil actions seeking damages against sellers resulting from the criminal or unlawful misuse of a firearm,” and Janet Delana was suing for damages

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1. Here’s how the Commerce-in-Arms Act works. First, it says that “[a] qualified civil liability action may not be brought in any Federal or State court.” 15 U.S.C. § 7902(a) (2018). Then, the Act defines a “qualified civil liability action” as “a civil action . . . brought by any person against a . . . seller of a qualified product . . . for damages . . . resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.” 15 U.S.C. § 7903(5)(A). A “qualified product” includes firearms and ammunition. 15 U.S.C. § 7903(4).

All qualified civil liability actions “shall be immediately dismissed by the court in which the action was brought or is currently pending.” 15 U.S.C. § 7902(b). Courts have divided on whether the Commerce-in-Arms Act preempts specific causes of action—potentially allowing other causes of action in a specific case to go forward—or whether it applies to entire cases. *See Ramos v. Wal-Mart Stores, Inc.*, 202 F. Supp. 3d 457, 465–66 (E.D. Pa. 2016) (listing cases).

2. Excluded from the definition of a “qualified civil liability action” are actions for knowing violations of state or federal statutes related to firearms. 15 U.S.C. § 7903(5)(A)(iii). Also exempted from preemption are actions for negligence per se and negligent entrustment. 15 U.S.C. § 7903(5)(A)(ii).

3. *Delana v. CED Sales*, 486 S.W.3d 316, 319 (Mo. 2016) (en banc); *see also* Ann E. Marimow, *A Warning, a Gun Sale and Tragic Consequences*, WASH. POST (Mar. 6, 2017), [http://www.washingtonpost.com/sf/local/2017/03/06/despite-a-mothers-plea-her-mentally-ill-daughter-was-sold-a-gun-with-tragic-results/?utm\\_term=.846b57db9f39](http://www.washingtonpost.com/sf/local/2017/03/06/despite-a-mothers-plea-her-mentally-ill-daughter-was-sold-a-gun-with-tragic-results/?utm_term=.846b57db9f39) [<https://perma.cc/FD2Q-CSX8>]. The business’s name is listed in the case caption as “Odessa Pawn & Gun,” but “Odessa Gun & Pawn” appears to be the name under which it does business. *See* <https://www.facebook.com/Odessagunandpawn/> [<https://perma.cc/GBT5-UM59>] (last visited June 20, 2017).

4. *See Delana*, 486 S.W. at 319; *Marimow*, *supra* note 3.

5. *See Delana*, 486 S.W.3d at 321–22.

that resulted from Colby's unlawful misuse of the firearms that Odessa Gun & Pawn had sold.<sup>6</sup>

Delana argued that the Commerce-in-Arms Act violated Missouri's sovereignty by "dictating to Missouri how it must delegate its lawmaking function among its governmental branches."<sup>7</sup> Congress had used preemption to wipe away judicially made law on gun-shop liability, leaving the state legislature as the only state body capable of making law on such issues. But the Missouri Supreme Court rejected her state-sovereignty argument, explaining briefly that the Act "does not commandeer the executive or legislative branch of Missouri government."<sup>8</sup>

That wasn't the end of Delana's lawsuit; under a separate exception to the Act, the court allowed Delana to proceed with a negligent-entrustment claim,<sup>9</sup> and the gun shop settled the case for \$2.2 million.<sup>10</sup> But the court's decision stands for the principle that Congress can use preemption to push decisions into states' legislatures.

The Second Circuit endorsed the same principle when the City of New York filed a public-nuisance action against gun manufacturers and sellers in an effort to curb gun violence.<sup>11</sup> The plaintiffs argued that the Commerce-in-Arms Act "violates the Tenth Amendment by dictating which branch of states' governments may authoritatively pronounce state law."<sup>12</sup> The problem was that the federal law exempts from preemption lawsuits brought under state *statutes*, but not lawsuits brought under state common law: The Act recognizes "predicate exceptions defined by statute, i.e. by a state's legislative branch, but not by common law as interpreted by state courts."<sup>13</sup>

The Second Circuit rejected the argument succinctly, holding that the Act "does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them."<sup>14</sup> Judges Miner and Cabranes evidently believed that commandeering challenges can succeed only if a specific branch of the state government is commandeered.

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6. *Id.* at 321. Delana's lawsuit was preempted because it was "a civil action . . . brought by any person against a . . . seller of a [firearm] . . . for damages . . . resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." 15 U.S.C. § 7903(5)(A). Weathers's plea—not guilty by reason of mental disease or defect—established that her conduct was criminal (she was committed to a secure treatment institution, even though she couldn't be punished). *Delana*, 486 S.W.3d at 321.

7. *Delana*, 486 S.W.3d at 323 (quoting brief).

8. *Id.* at 323–24.

9. The Missouri Court allowed Delana's claim for negligent entrustment to go forward under a separate exception to the federal statute. *Id.* at 326.

10. See Marimow, *supra* note 3.

11. See *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008).

12. *Id.* at 392.

13. *Id.*

14. *Id.* at 397. Judge Katzmman, in dissent, would have avoided the constitutional question. *Id.* at 405 (Katzmann, J., dissenting).

Like the Missouri Supreme Court, the Second Circuit allows Congress to push decisions into state legislatures.

### B. *The Immigration-Benefits Bar*

In 1996, Congress passed a public-benefits statute known as the Personal Responsibility and Work Opportunity Reconciliation Act, often called the Welfare Reform Act or, tongue-tanglingly, “PRWORA.”<sup>15</sup> It contained a provision which I’ll call “the Immigration-Benefits Bar,” codified at 8 U.S.C. § 1621, which prohibits state governments from giving public benefits to certain noncitizens.

The Benefits Bar says that states can give public benefits only to enumerated categories of noncitizens.<sup>16</sup> The enumerated categories include all “qualified aliens,”<sup>17</sup> i.e., those eligible for federal public benefits: lawful permanent residents, asylees, refugees, and noncitizens in several humanitarian statuses.<sup>18</sup> The Benefits Bar also allows state public benefits for nonimmigrants,<sup>19</sup> a group that includes people on student visas, temporary workers, and many other categories of temporarily present noncitizens.<sup>20</sup>

But the Benefits Bar does not exempt, and thus bars benefits for, some significant categories of noncitizens, among them people in Temporary Protected Status.<sup>21</sup> It also doesn’t exempt people with no authorization to be present (“undocumented immigrants”<sup>22</sup>), or those who are present because immigration authorities have exercised prosecutorial discretion and granted them “deferred action”<sup>23</sup> (including beneficiaries of the Deferred Action for Childhood Arrivals (DACA) program<sup>24</sup>). So un-

15. See Pub. L. No. 104-93, 110 Stat. 2105 (Aug. 22, 1996).

16. See 8 U.S.C. § 1621(a) (2018).

17. 8 U.S.C. § 1621(a)(1), referring to the definition of “qualified alien” in 8 U.S.C. § 1641.

18. See 8 U.S.C. § 1641. Section 1621(a) adds another humanitarian category, aliens paroled under 8 U.S.C. § 1182(d)(5) for less than one year.

19. *Id.* § 1621(a).

20. See 8 U.S.C. § 1101(a)(15).

21. On temporary protected status, see 8 U.S.C. 1254a(b)(1)(B).

22. See generally Kari Hong, *The Ten Parts of “Illegal” in “Illegal Immigration” That I Do Not Understand*, 50 UC DAVIS L. REV. ONLINE 43 (2017).

23. See generally SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* (2015).

24. On DACA, see Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58 (2015); on DACA’s rescission, see <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/ZB7A-WGBS>]. Currently, the DACA program continues in effect because of two nationwide preliminary injunctions that compel the federal government to continue it. See *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1049 (N.D. Cal. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 438 (E.D.N.Y. 2018). As of March 25, 2018 (the date of finalizing this article), litigation in both cases is ongoing.

documented people and beneficiaries of deferred action cannot receive state public benefits unless some other exception to the Benefits Bar applies.

The Benefits Bar has an important exception under which a state can offer public benefits if it does so “through the enactment of a State law after August 22, 1996 which affirmatively provides for such eligibility.”<sup>25</sup> In other words, states can offer public benefits to otherwise-ineligible noncitizens if they do so by passing legislation.<sup>26</sup> The most straightforward reading of § 1621(d)’s state-law override provision is that only a statute passed by the legislature can trigger the override.<sup>27</sup>

The Benefits Bar and the state-law override together function to give states a choice whether to offer public benefits to significant categories of noncitizens. There are serious constitutional questions about the permissibility of this arrangement, because state choices affecting noncitizens are constitutionally suspect. In general, state decisions that deny public benefits on the basis of immigration status are subject to strict scrutiny.<sup>28</sup> To be sure, Equal Protection jurisprudence allows the *federal* government to treat noncitizens differently, subjecting its decisions only to rational-basis scrutiny; but, as Michael Wishnie observes, there are powerful reasons to believe that the federal government cannot share its power to discriminate with the states.<sup>29</sup> This article maps out a state-sovereignty challenge to the Welfare Reform Act, but it is important to be aware of the Act’s other vulnerabilities.

The Benefits Bar became the subject of litigation in several states when state courts received applications for bar admission from otherwise-qualified noncitizens who were either undocumented or beneficiaries of the DACA program.<sup>30</sup> On its face, § 1621(d) appeared not to help the

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25. “A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under [the benefits bar] only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.” 8 U.S.C. § 1621(d).

26. For an example of a state taking advantage of the override provision, see *Kaider v. Hamos*, 975 N.E.2d 667, 669–70; 679–80 (Ill. App. Ct. 1st Dist. 2012), which discusses a state law that allows health-care benefits for undocumented pregnant women and children, and rejects a preemption challenge to that aspect of the “Moms & Babies” program.

27. The legislative history of § 1621(d) supports this reading: “Only the affirmative enactment of a law *by a State legislature and signed by the Governor* after the date of enactment of this Act, that references this provision, will meet the requirements of this section.” H.R. Rep. No. 104-725, at 383 (1996) (emphasis added). *But see* *Martinez v. Regents of U. of Cal.*, 50 Cal. 4th 1277, 1293 (2010) (noting that a similar statement in the legislative history of 8 U.S.C. § 1623 is merely a “general summary [that] oversimplifies more nuanced statutory language”).

28. *See* *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

29. Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 530 (2001).

30. *See* Florida Bd. of Bar Exam’rs Re: Question As To Whether Undocumented Immigrants Are Eligible For Admission To The Florida Bar, 134 So. 3d

applicants in California, Florida and New York, because those states had no statute affirmatively providing for the benefits at issue.<sup>31</sup>

The litigation gave rise to various complex questions of statutory interpretation. Some litigants argued, unsuccessfully, that DACA beneficiaries are “qualified aliens” exempt from the Benefits Bar.<sup>32</sup> Some argued, again unsuccessfully, that attorney licensure is not among the kinds of “public benefit” prohibited by the Benefits Bar.<sup>33</sup> And an impor-

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432 (Fla. Mar. 6, 2014); *In re Garcia*, 58 Cal. 4th 440 (2014); *Matter of Vargas*, 131 A.D.3d 4, 27 (N.Y. App. Div. 2d Dep’t 2015).

31. New York State has Judiciary Law § 460, which precludes consideration of immigration status in decisions about bar admission, but section 460 was enacted before 1996, *see* 1982 Sess. Laws of NY ch. 133 § 29, so it doesn’t trigger the state-law override.

32. It’s hard to argue that DACA beneficiaries are “qualified aliens” exempt from the bar under § 1621(a)(1). Section 1621 refers to the definition of “qualified alien” in 8 U.S.C. § 1641, which in turn defines “qualified alien” to include several groups to which DACA beneficiaries plainly do not belong: legal permanent residents, asylees, and refugees.

Section 1641 also includes “an alien *whose deportation is being withheld under section 243(h)* of such Act [8 U.S.C. 1253] (as in effect immediately before the effective date of section 307 of division C of Public Law 104-208) *or* § 241(b)(3) of such Act [8 USC § 1251(b)(3)] (as amended by section 305(a) of division C of Public Law 104-208).” 8 U.S.C. § 1641(b)(5) (emphasis added). But neither of these apply to DACA beneficiaries. Relief under § 243(h) became unavailable in 1997, when § 243(h) was removed from the law; the current § 243 contains no subsection (h). *See* P.L. 104-208, div. C § 307 (1997); INA § 243, codified at 8 U.S.C. § 1253. And relief under § 241(b)(3) is a special category of relief from removal for people who can show that their “life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 C.F.R. § 208.16.

Nor are DACA beneficiaries “nonimmigrants” exempt under § 1621(a)(2), or parolees exempt under § 1621(a)(3).

33. Section 1621(c) defines “state or local public benefit” to include “any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government. . . .” 8 U.S.C. § 1621(c)(1)(A). Licensure as an attorney, also known as bar admission, is a “professional license” under any reasonable interpretation of that phrase. Certificates of admission in New York, for example, have the word “license” in their text. *See, e.g.*, Certificate of Bar Admission for Andrew B. Ayers, on file with author.

Some litigants argued that the Bar does not apply to attorney licenses because § 1621’s text refers to public benefits that are “provided by *an agency* of a State or local government or by *appropriated funds* of a State or local government.” *Id.* (emphasis added). A state court is not an “agency of a State . . . government.” As DOJ’s California brief conceded, “the customary use of that term [agency] in federal statutes does not encompass the judicial branch.” US Br. to Cal. at 7. *See* *Hubbard v. United States*, 514 U.S. 695, 699 (1995) (“In ordinary parlance, federal courts are not described as ‘departments’ or ‘agencies’ of the Government. . . . [I]t would be strange indeed to refer to a court as an ‘agency.’”). DOJ also notes that other parts of PRWORA (the Act of which § 1621 is a part) make explicit that they cover state courts and state agencies, while § 1621 doesn’t do so. *See* DOJ Br. to Cal. at 8 n.2, citing 42 U.S.C. § 666(a)(5)(i)(ii) and other provisions.

But attorney licenses nonetheless appear to fall within § 1621(c)’s definition of public benefits, because they are “provided . . . by appropriated funds of a State.” 8 U.S.C. § 1621(c)(1)(A). DOJ argued in the California case that state



tant but puzzling question is presented by the language of § 1621(d), the override provision, which seems to allow states to extend public benefits only to *unlawfully* present aliens—not to those in lawful statuses like Temporary Protected Status who are otherwise excluded from benefits under the Benefits Bar.<sup>34</sup> Congress cannot have intended to allow states to give benefits to unlawfully present people, while excluding lawfully present beneficiaries of Temporary Protected Status, and indeed New York has concluded that the override provision allows benefits for both.<sup>35</sup> But we can skip over these questions here because they aren't relevant to state

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courts operate using funds appropriated by the state legislature (DOJ Br. to Cal. at 9), and the Florida Supreme Court reached the same conclusion: Florida courts operate with appropriated funds, so attorney licenses are covered by the benefits bar (Fl. S. Ct. slip op. at 5).

The California board of bar examiners, and Garcia, argued that attorney licensure is not “provided . . . by appropriated funds of a State” because the use of appropriated funds is *de minimis*, and because no funds were set aside specifically for bar admissions. Similarly, a LatinoJustice report argues that attorney licenses are not “provided . . . by appropriated funds,” because “bar admissions are entirely financed by private funds.” Funds for the bar committees that review applications are “paid by lawyer dues, not state appropriations.” See LatinoJustice, *Lifting the Bar: Undocumented Law Graduates & Access to Law Licenses* 15–17 (Feb. 21, 2014), available at <http://prbany.com/lifting-the-bar-undocumented-law-graduates-access-to-law-licenses/> [<https://perma.cc/WZ2T-MV76>]. Although judges' salaries are of course paid from appropriated funds, LatinoJustice argues that those salaries are “not specifically designated for any purpose,” and “the word ‘appropriated’ means to set apart for or assign to a particular purpose or use.” *Id.* These arguments are developed in a report by LatinoJustice and other groups. *Id.* For a similar argument, see Katherine Tianyue Qu, *Current Developments 2012-2013: Passing the Legal Bar: State Courts and the Licensure of Undocumented Immigrants*, 26 GEO. J. LEGAL ETHICS 959, 963–64 (2013).

These arguments are unlikely to prevail. The text of § 1621 contains no *de minimis* exception, and courts are likely to embrace—or defer to—DOJ's position that attorney licenses are provided with appropriated funds. Also, New York State law considers funds to be “appropriated” even if they are fees collected from applicants to pay for the costs of processing applications (that is, even if a program pays for itself and the legislature doesn't need to set aside specific funds for it). Thus, it's likely that attorney licensure is the kind of “public benefit” to which the benefits bar applies.

34. The text of the statute is quite clear on this point. The title of § 1621(d) is “State Authority to Provide for Eligibility of *Illegal Aliens* for State and Local Public Benefits.” 8 U.S.C. § 1621(d) (emphasis added). And its text says “[a] State may provide that an alien who is *not lawfully present* in the United States is eligible for any State or local public benefit” by legislative enactment. *Id.* (emphasis added).

35. The New York Court of Appeals held that the statute “obviously” authorizes benefits for lawfully present noncitizens. *Aliessa v. Novello*, 96 N.Y.2d 418, 426 (2001). The court noted that [s]ection 1621(d) refers to “[s]tate authority to provide for eligibility of *illegal aliens*” (emphasis added), but held that “the statute obviously authorizes the State to provide State Medicaid to PRUCOLs.” *Id.* at 429 n.9. The term “PRUCOLs” here refers to people “permanently residing in the United States under color of law”—a term which the Court of Appeals had defined to include “aliens of whom the INS is aware, but has no plans to deport.” *Id.* at 422 n.2. Because the plaintiffs in that case included “PRUCOLs,” this portion of the opinion was holding, not dicta.

sovereignty; suffice to say that courts have found no statutory argument under which unauthorized aliens or DACA beneficiaries may receive state public benefits without a state legislative enactment.

The Florida Supreme Court held that unauthorized aliens and DACA beneficiaries are ineligible for bar admission because of the Benefits Bar.<sup>36</sup> But Florida then enacted a statute allowing undocumented aliens to be licensed as lawyers,<sup>37</sup> which triggers the override provision and eliminates any need to rule on its lawfulness. In California, before the Supreme Court could rule on the question of an undocumented lawyer's eligibility for licensure, the state legislature passed a special statute which triggered the state-law override, and so the candidate was licensed without any judicial ruling on the applicability of the Benefits Bar.<sup>38</sup> And in Missouri, a DACA beneficiary was denied licensure as a nurse because although Missouri had taken up the override provision's invitation to offer public benefits to otherwise-ineligible noncitizens, the Missouri statute chose not to offer them professional licenses.<sup>39</sup> In none of these cases did any party discuss the kind of state-sovereignty argument that is the subject of this article.<sup>40</sup>

When a state-sovereignty argument was raised on behalf of Cesar Vargas, a DACA beneficiary seeking bar admission in New York, the Second Department of the state's Appellate Division adopted the theory rejected in the Commerce-in-Arms cases discussed above: that Congress violates state sovereignty when it uses preemption to push states to act through their legislatures.<sup>41</sup>

Vargas, and the New York Attorney General's office in an amicus brief, urged the Appellate Division to invoke the doctrine of constitutional avoidance and construe section 1621's term "enactment of a state law" to

36. Fla. Bd. of Bar Exam'rs, 134 So. 3d 432 (Fla. Mar. 6, 2014).

37. H.R. 755, § 454.021, 2014 Leg., Reg. Sess. (Fla. 2014); see Wendi Adelson, *Lawfully Present Lawyers*, 18 CHAP. L. REV. 387, 399 (2015).

38. *In re Garcia*, 58 Cal. 4th 440 (2014). All of the submissions to the California Supreme Court in *Garcia* can be found at <http://www.courts.ca.gov/18822.htm> [<https://perma.cc/R79F-6SRA>].

39. MO. REV. STAT. § 208.009. Because the state law did not make professional licenses available to those noncitizens, a case in Missouri involving a nurse's application for licensure was resolved without discussion of the Benefits Bar's lawfulness. The Missouri Administrative Hearing Commission, evaluating a nurse's application for licensure, held that a Missouri law that listed specific benefits available for noncitizens did not mention professional licensure. See *Zamarron v. State Bd. of Nursing*, 2017 Mo. Admin. Hearings LEXIS 1530 (May 2, 2017) (discussing MO. REV. STAT. § 208.009).

40. The applicant in *Garcia* did argue that the Benefits Bar violated state sovereignty by compelling the states to participate in the enforcement of immigration law. *Garcia*, Applicant's Opening Brief at 15–18, available at <http://www.courts.ca.gov/documents/2-s202512-pet-opening-brief-merits-061812.pdf> [<https://perma.cc/U3DF-XESC>]. But this argument seems wrong as stated—simply not issuing a license for someone is very different from enforcing federal immigration law.

41. *Matter of Vargas*, 131 A.D.3d 4, 27 (N.Y. App. Div. 2d Dep't 2015).

include a court order admitting someone to the bar.<sup>42</sup> But the Second Department went further, simply holding that § 1621 was unconstitutional because it limited states to legislative action. It held that states could simply reject the requirement of legislative action and admit noncitizens to the bar via an order of their courts. The decision was called “a monumental one due to the state’s status as a center for the legal profession and its influence on other state courts regarding bar admission policy.”<sup>43</sup> Although the applicant in *Vargas* was a DACA recipient, the *Vargas* holding (that the Benefits Bar can be overridden by courts, not just legislatures) gives courts the power to admit any noncitizen to the bar, including undocumented immigrants, if the courts so choose.

Other cases followed the precedent set by *Vargas*. The Third Department of the New York’s Appellate Division adopted *Vargas* in 2017, admitting an anonymous DACA recipient to the bar.<sup>44</sup> Pennsylvania admitted a DACA recipient to the bar after the applicant’s briefs invoked *Vargas*.<sup>45</sup> And New Jersey admitted the same attorney, Parthiv Patel, despite the Benefits Bar.<sup>46</sup>

*Vargas* made a point of saying that its holding was limited to judicial orders; it did not hold that state sovereignty allows *any* state officer to trigger the State-Law Override and authorize public benefits for noncitizens.<sup>47</sup> But the New York State Education Department later issued regulations admitting noncitizens to professional licensure, invoking the authority embraced by *Vargas*.<sup>48</sup>

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42. I co-authored and signed the brief for the Attorney General’s office. Nothing in this article represents the views of the New York Attorney General’s office or any of the other people whose names appear on the brief. But I’m deeply grateful to each of those people for everything I learned from them about the issues discussed there.

43. Christopher Connell, *Undocumented Attorneys and the State of the Bar*, 26 S. CAL. INTERDISC. L.J. 569, 583 (2017).

44. *See* Matter of Anonymous, 152 A.D.3d 1046 (2017).

45. *See* Pennsylvania Admits DACA Recipient to the Bar, ACLU Pennsylvania (Dec. 19, 2017), <https://www.aclupa.org/news/2017/12/19/pennsylvania-admits-daca-recipient-bar-1> [<https://perma.cc/8BZX-L2P3>]; *see also* Memorandum of Law in Support of Application of Parthiv Patel (Letter to Pa. Bd. of Law Examiners, Feb. 21, 2017), available at [https://www.aclupa.org/download\\_file/view\\_inline/3179/1106/](https://www.aclupa.org/download_file/view_inline/3179/1106/) [<https://perma.cc/M7F3-RWEW>].

46. *See* *DACA Recipient Sworn In As Lawyer By NJ AG*, ACLU (Jan. 24, 2018), <https://www.aclu.org/news/daca-recipient-sworn-lawyer-nj-ag> [<https://perma.cc/V46A-V5FU>].

47. Matter of Vargas, 131 A.D.3d 4, 27 (N.Y. App. Div. 2d Dep’t 2015) (“We emphasize, however, that the Tenth Amendment concerns implicated here by the issuance of law licenses do not exist in regard to the issuance of other types of professional licenses by other arms of our state’s government. Our focus here is solely upon the infringement of the judiciary’s authority, as an independent and freestanding constitutional branch of state government, to issue law licenses.”).

48. *See* N.Y. COMP. CODES C.R. & R. 8 § 80-1.3 (2018) (for teacher licensure “pursuant to 8 U.S.C. § 1621(d), no otherwise qualified alien shall be precluded from obtaining a professional license under this Title if any individual is not unlawfully present in the United States, including but not limited to applicants granted

It remains to be seen whether other courts or state agencies will similarly find that entities other than state legislatures can invoke the State-Law Override, and whether other courts will find unconstitutional § 1621(d)'s attempt to push decisions about public benefits for noncitizens into state legislatures.

### C. A Widespread Practice

The Commerce-in-Arms Act and the Immigration-Benefits Bar are only two examples of statutes that use preemption to push states to make decisions through their legislatures. There are many other statutes that likewise exempt states from preemption only if they “enact” a “law”—language that implies a legislative action.

One example is the Gun Free School Zones Act of 1990, which prohibits discharge of a firearm in a school zone—a statute famously struck down as exceeding Congress’s power under the Commerce Clause in *United States v. Lopez*, but later amended to cure the defect.<sup>49</sup> That Act has a preemption clause that allows states to create their own gun-free school zones, but only if they do so by “enacting a statute.”<sup>50</sup> Similarly, the Secretary of Health and Human Services can exempt states from federal requirements for clinical laboratories if the state enacts a statute that is more stringent than federal requirements—but apparently not if the state imposes more stringent requirements via another part of its government.<sup>51</sup>

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deferred Action for Childhood Arrivals relief or similar relief from deportation.”); *see also id.* § 59.4 (applying same language to other professions); 38 N.Y. St. Reg. 19 (March 9, 2016) (proposed regulation); *id.* 23, 25 (June 1, 2016) (“While the Vargas decision is based on an intrusion on the role of the judiciary over bar admissions in violation of the Supremacy Clause, we believe that the Court’s reasoning applies equally to the adoption of regulations having the force and effect of law by an administrative agency that is part of the executive branch of New York government, another one of the three coequal branches of government under the New York Constitution.”); *Board of Regents Permanently Adopts Regulations to Allow DACA Recipients to Apply for Teacher Certification and Professional Licenses*, N.Y. EDUC. DEP’T, (May 17, 2016), <http://www.nysed.gov/news/2016/board-regents-permanently-adopts-regulations-allow-daca-recipients-apply-teacher> [<https://perma.cc/UH7L-NHCD>]. For more on the process leading to these changes, see Janet M. Calvo, *Professional Licensing and Teacher Certification for Non-Citizens: Federalism, Equal Protection and a State’s Socioeconomic Interests*, 8 COL. J. RACE & LAW 33 (2017).

49. The original version of the Act was struck down as exceeding Congress’s authority under the Commerce Clause in *United States v. Lopez*, 514 U.S. 549, 567–68 (1995). But the Act was later amended to add a jurisdictional element that cured the constitutional defect; any violation of the Act must now involve “a firearm that has moved in or that otherwise affects interstate or foreign commerce.” 18 U.S.C. 922(q)(3)(A), *amended by* P.L. No. 104-208, 110 Stat. 3009-369, 3009-372 (Sept. 30, 1996).

50. 18 U.S.C. § 922(q)(4) (“Nothing in this subsection shall be construed as preempting or preventing a State or local government from *enacting a statute* establishing gun free school zones as provided in this subsection.”) (emphasis added).

51. 42 U.S.C. § 263a(p).

And states can enact restrictions on equipment that interferes with wireless communications—but only by statute.<sup>52</sup>

Another example is the Affordable Care Act, which allows states to opt out of providing abortion coverage through state insurance exchanges set up under the Act, but only if the state “enacts a law to provide for such prohibition.”<sup>53</sup> Other examples include the federal statute governing the selection of members of the electoral college;<sup>54</sup> the Age Discrimination in Employment Act;<sup>55</sup> the Interstate Agreement on Detainers Act, which creates procedures for states to request that other jurisdictions detain prisoners;<sup>56</sup> and laws governing the medical use of narcotic drugs,<sup>57</sup> asbestos-related liability,<sup>58</sup> and various other topics.<sup>59</sup>

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52. 47 U.S.C. § 605(e)(6).

53. 42 U.S.C. § 18023(a)(1). At least 21 states did so. *See Health Reform And Abortion Coverage In The Insurance Exchanges*, NAT’L CONF. OF ST. LEGIS., (Apr. 2014), <http://www.ncsl.org/research/health/health-reform-and-abortion-coverage.aspx> [<https://perma.cc/W9VN-MKYY>]. An analysis of whether this provision forces states to make decisions through their legislatures would be complicated by the fact that states are not required to operate their own exchanges.

54. 3 U.S.C. § 5 (“If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures . . . such determination . . . shall be conclusive. . . .”) (emphasis added).

55. 29 U.S.C. § 623(j)(1)(B)(i) (exempting firefighters who were denied employment if they were rejected because of “the age of hiring in effect on the date of such failure or refusal to hire under applicable *State or local law enacted after September 30, 1996*. . . .”) (emphasis added). *See generally* Drnek v. City of Chicago, 192 F. Supp. 2d 835, 838 (N.D. Ill. 2002).

56. 18 U.S.C. app. § 2, art. VIII (“This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same.”).

57. 21 U.S.C. § 823(g)(2)(I) (“[N]othing in this paragraph shall be construed to preempt any State law that . . . permits a qualifying practitioner to dispense narcotic drugs in schedule III, IV, or V, or combinations of such drugs, for maintenance or detoxification treatment in accordance with this paragraph to a total number of patients that is more than 30 or less than the total number applicable to the qualifying practitioner under subparagraph (B)(iii)(II) *if a State enacts a law modifying such total number and the Attorney General is notified by the State of such modification*. . . .”) (emphasis added).

58. 15 U.S.C. § 2650(b) (“[A] State *may enact or amend State law to establish or modify a standard of liability for local educational agencies or asbestos contractors with respect to actions required under this subchapter [15 U.S.C. §§ 2641-2656]*”) (emphasis added).

59. *See, e.g.*, 12 U.S.C. § 1701j-3(c)(1)(A) (“[A] State, by a State law enacted by the State legislature prior to the close of such 3-year period, with respect to real property loans originated in the State by lenders other than national banks, Federal savings and loan associations, Federal savings banks, and Federal credit unions, may otherwise regulate such contracts. . . .”); *see also id.* § 2279aa-12(b)(2) (“The provisions of paragraph (1) shall not be applicable to any State that, during the 8-year period beginning on January 6, 1988, *enacts a law that (A) specifically refers to this subsection; and (B) expressly provides that paragraph (1) shall not apply to the State.*”) (emphasis added); 15 U.S.C. § 78bb(e)(1) (“No person using

One of the statutes that shields state legislative action from preemption, the Alaska National Interest Lands Conservation Act, was cited with approval in the Supreme Court's landmark states'-rights case *New York v. United States*.<sup>60</sup> That statute provides that the State of Alaska retains certain authority "if the State enacts and implements laws of general applicability" that meet certain criteria.<sup>61</sup> The Supreme Court had no occasion to discuss this provision of the Act, so *New York* tells us nothing about the provision's constitutionality; nonetheless, it illustrates the number of places in which we can find examples of Congress using preemption to push decisions into state legislatures.

Is it safe to assume that the phrase "enact a State law" and its variants refer to legislative action, as opposed to executive, judicial, or administrative actions? Dictionaries confirm that the verb "enact" generally refers to legislative action, rather than executive, judicial or administrative actions.<sup>62</sup> And when Congress wants to allow non-statutory state action, it does so explicitly, by using language like this:

Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to *adopt such policies and enact such laws* as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except

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the mails, or any means or instrumentality of interstate commerce, in the exercise of investment discretion with respect to an account shall be deemed to have acted unlawfully or to have breached a fiduciary duty under State or Federal law unless expressly provided to the contrary by a law enacted by the Congress or any State. . . .") (emphasis added); *id.* § 80a-3a(c) (dealing with registration of certain investment funds: "during the 3-year period beginning on December 8, 1995, a State may enact a statute that specifically refers to this section and provides prospectively that this section shall not preempt the laws of that State referred to in this section."); *id.* § 6731 ("This subchapter [15 U.S.C. §§ 6731 et seq.] shall only apply to a mutual insurance company in a State which has not enacted a law which expressly establishes reasonable terms and conditions for a mutual insurance company domiciled in such State to reorganize into a mutual holding company."); 18 U.S.C. § 2345(a) ("Nothing in this chapter [18 U.S.C. §§ 2341-2346] shall be construed to affect the concurrent jurisdiction of a State or local government to enact and enforce its own cigarette tax laws, to provide for the confiscation of cigarettes or smokeless tobacco and other property seized for violation of such laws, and to provide for penalties for the violation of such laws."); 47 U.S.C. § 553 ("Nothing in this subchapter [47 U.S.C. §§ 521-573] shall prevent any State or franchising authority from enacting or enforcing laws, consistent with this section, regarding the unauthorized interception or reception of any cable service or other communications service."); 49 U.S.C. § 5904 (allowing states to "enact a law" creating penalties for violation of state highway-weight laws).

60. See Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233; see also *New York v. United States*, 505 U.S. 144, 167 (1992). See generally *John v. United States*, 720 F.3d 1214, 1218 (9th Cir. 2013) (detailing how Act works); *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 314 (9th Cir. 1988).

61. 16 U.S.C. § 3115(d).

62. For example, the Oxford English Dictionary defines "enact" as "[o]f a legislative authority: To make into an act." *Enact*, Oxford English Dictionary, <http://www.oed.com/view/Entry/61514?rskey=8kxjq3&result=3&isAdvanced=false#eid> [Permalink unavailable] (last visited Apr. 10, 2018).

as modified by the Colorado River compact or other interstate agreement.<sup>63</sup>

When Congress wishes to do so, it is quite capable of using language that includes non-legislative actions. For example, when the federal Real Estate Settlement Procedures Act preempts inconsistent “State law,” it takes care to define “law” broadly: “‘Law’ as used in this section includes regulations and any enactment which has the force and effect of law and is issued by a State or any political subdivision of a State.”<sup>64</sup> Another statute likewise provides that “[n]o State or political subdivision thereof may enact, prescribe, issue, continue in effect, or enforce *any law (including any regulation, standard, or other provision having the force and effect of law)*” that transgresses on the relevant areas.<sup>65</sup> Similarly, the Airline Deregulation Act preempts “a law, regulation, or other provision having the force and effect of law” that applies to the relevant subject matter.<sup>66</sup>

Another example of congressional tolerance for non-legislative state action is the federal E-Sign Act, under which e-signatures cannot be denied legal effect in any transaction affecting interstate commerce.<sup>67</sup> That Act preempts any “State statute, regulation, or other rule of law”—note the care to include non-legislative action.<sup>68</sup> It then exempts from preemption not only state “enactments,” but any state action that “constitutes an enactment *or adoption* of the Uniform Electronic Transactions Act.”<sup>69</sup> Even though this statute is anticipating the possibility of states adopting model *statutes*, it uses the phrase “enactment *or adoption*,” taking care to allow for state action other than legislation. In other words, the law allows states to adopt a model statute through non-legislative means. At times, then, Congress is remarkably protective of states’ non-legislative lawmaking.

Against this backdrop of congressional care in using the word “enactment,” it seems reasonable to assume that statutes referring to the “enactment” of a state “law” do indeed refer to action by the legislature. The question is an important one, because (as noted above) there are many such statutes.

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63. 43 U.S.C. § 618m.

64. 12 C.F.R. § 1024.5(c)(3) (2018).

65. 49 U.S.C. § 44703(j)(2) (requirements for certification of airmen) (emphasis added).

66. *See id.* § 41713(b); *see also id.* § 14501(c)(1) (similar preemption language for motor carriers of property); *id.* § 47107(e)(5) (“This subsection does not preempt—(A) a State or local law, regulation, or policy enacted by the governing body of an airport owner or operator. . .”).

67. 15 U.S.C. § 7001(a).

68. 15 U.S.C. § 7002(a)(1).

69. 15 U.S.C. § 7002(a)(1) (emphasis added).

D. *Conditional Preemption Without Forced Delegation*

The reason for federal laws to save state legislative enactments from preemption, presumably, is to preserve some measure of state power in areas otherwise dominated by federal law. This kind of strategy is known as “cooperative federalism,” and it is generally looked on with favor by the courts.<sup>70</sup> But most of the statutes that deploy conditional preemption in the service of cooperative federalism do so without specifying which entity within state government can take the action that avoids preemption.

For example, the Clean Water Act gives states the power to avoid federal preemption by developing their own programs for issuing permits to polluters.<sup>71</sup> Rather than requiring that a specific branch of state government create the program, the Act requires that the state’s attorney general certify that state law provides adequate authority for the program.<sup>72</sup> Similarly, states can promulgate water-quality standards under the Act if they submit a certification from “the State Attorney General or other appropriate legal authority within the State that the water quality standards were duly adopted pursuant to State law.”<sup>73</sup> Thus, the federal government remains neutral as to which entity within the state government promulgates the standards. Similarly, regulations promulgated under the Clean Water Act require that states hold public hearings on water-quality standards.<sup>74</sup> But those regulations do not specify which entity within state government must hold the hearings. Each of these provisions, in short, leaves it to the state to decide which entity takes the action that avoids federal preemption.

Indeed, the Clean Water Act contains a provision that saves state causes of action from preemption and makes clear that it gives equal treatment to judge-made and legislatively created causes of action: “Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . .”<sup>75</sup>

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70. *See, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 (1981) (using term “cooperative federalism” to refer to conditional preemption).

71. *See* 33 U.S.C. § 1342(b).

72. *Id.*

73. 40 C.F.R. § 131.6(e). And the CWA makes *no* demand that the state adopt standards via any particular decision-maker: “Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards.” 42 U.S.C. § 7411(c)(1).

74. 40 C.F.R. § 131.20(a) (“The State shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards . . . and Federally promulgated water quality standards and, as appropriate, modifying and adopting standards.”).

75. 33 U.S.C. § 1365(e). A related provision states that except where the Act specifically provides for preemption, nothing in it “shall (1) preclude or deny the



Another major environmental statute, the Resource Conservation and Recovery Act, likewise allows states to create their own implementation plans, but imposes no restrictions on which part of state government may create the plan.<sup>76</sup>

The Occupational Health and Safety Act of 1970 (OSHA) allows states to avoid federal preemption by submitting a state plan for the development of occupational health and safety standards.<sup>77</sup> That plan must designate a state agency to implement the standards, but nothing in the statute says which entity within state government must be the source of the plan, or which agency must be designated by it.<sup>78</sup> OSHA also contains a savings clause that saves from preemption certain kinds of state-law rights, but that clause, unlike the Commerce-in-Arms Act, specifically preserves both legislatively enacted and judge-made rights.<sup>79</sup> So there are plenty of ways to do cooperative federalism without forcing decisions into state legislatures.

E. *A Different Problem: Spending Clause Enactments That Push States to Delegate*

Before we examine whether state sovereignty bars Congress from forcing decisions into state legislatures, we should be careful to distinguish two related practices: pushing decisions into state legislatures by using the preemption power, and pursuing the same goal via the Spending Clause power. This Article deals with preemption, and the distinction is significant.

Many federal statutes condition federal grants on the performance by states of specific acts, including, in some cases, legislative action.<sup>80</sup> When

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right of any State *or political subdivision thereof* or interstate agency” to regulate water pollution. 33 U.S.C. § 1370 (emphasis added).

76. See 42 U.S.C. § 6926; 40 C.F.R. §§ 271.1–271.138 (1991) (detailed requirements for state plans).

77. 29 U.S.C. § 667(b).

78. *Id.* § 667(c). However, when the federal government makes grants to the states, OSHA specifies that the governor of the state designates the appropriate agency to receive the grant. *Id.* § 672(c).

79. *Id.* § 653(b)(4) (“Nothing in this chapter shall be construed to supersede or in any manner affect any workmen’s compensation law or to enlarge or diminish or affect in any other manner the *common law or statutory* rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.”) (emphasis added).

80. See 23 U.S.C. § 405(a)(9)(A) (highway-safety grants promoting seat-belt use); 23 U.S.C. § 163(a), (b) (highway-safety grants helping prevent driving under the influence); 42 U.S.C. § 653a(a)(1)(B) (directory of new hires to facilitate enforcement of child-support obligations); 23 U.S.C. § 154(c) (penalizing states that don’t have open-container laws); 23 U.S.C. § 158 (exemptions from grant requirements related to national minimum drinking age, conditioned on state legislative action).

By contrast, one grant-making statute allows states to enact a law *or* promulgate a regulation. See 49 U.S.C. § 31141(b) (“A State receiving funds made availa-

a federal statute offers grants with conditions, some part of the state government must decide whether to accept the conditions (and thus the grants). A very useful article by Bridget Fahey collects a variety of federal statutes that designate different ways in which states may consent to the statutory scheme under which they will receive federal funds.<sup>81</sup> For example, some statutes require action by the state governor, like the Affordable Care Act and its implementing guidance, which require the governor to sign off on the creation of state insurance exchanges.<sup>82</sup> Other statutes require the governor to designate a state agency, which must then take specified action.<sup>83</sup> Yet other federal grantmaking laws designate a state agency directly, like the No Child Left Behind Act of 2001,<sup>84</sup> which designates the “State educational agency.”<sup>85</sup> And still others, like the now-repealed law that established the collaborative federal-state program for unemployment insurance, required state legislative enactments.<sup>86</sup>

Fahey offers several powerful arguments against federal laws that designate specific state officials as the decision-makers responsible for accepting or rejecting Spending Clause grants. Such laws interfere with state autonomy, prevent state officials from effectively representing their constituents and stakeholders, make it easier for the federal government to expand its power in areas traditionally governed by states, and limit states’ ability to serve as useful dissenting voices in the federal system.<sup>87</sup> In this sense, Spending Clause enactments that empower designated state actors are similar to conditional-preemption laws like the Commerce-in-Arms Act

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ble under [49 U.S.C. § 31104] that enacts a State law *or issues a regulation* on commercial motor vehicle safety shall submit a copy of the law or regulation to the Secretary immediately after the enactment or issuance.”) (emphasis added).

81. Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561 (2015).

82. *Id.* at 1573 (discussing Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)).

83. *Id.* (discussing Occupational Health and Safety Act, 29 U.S.C. §§ 651-678 (2012)). Fahey particularly discusses § 672, which asks the governor to “designate the appropriate State agency for receipt of any grant,” then requires the designated agency to submit an application requesting funds on behalf of the state. *See id.* (discussing 29 U.S.C. §§ 672(c)-(d)).

84. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of the U.S. Code).

85. *See, e.g.*, 20 U.S.C. § 6763(a) (2012) (state and local technology grants) (“To be eligible to receive a grant under this subpart, a State educational agency shall submit to the Secretary, at such time and in such manner as the Secretary may specify, an application containing a new or updated statewide long-range strategic educational technology plan (which shall address the educational technology needs of local educational agencies) and such other information as the Secretary may reasonably require.”); *see* Fahey, *supra* note 81, at 1574 n.48.

86. Workforce Investment Act of 1998, Pub. L. No. 105-220, § 303, 112 Stat. 936, 1081 (codified at 29 U.S.C. § 49c (2012), *repealed and replaced by* Workforce Innovation and Opportunity Act, Pub. L. No. 113-128 (2014)). *See* Fahey, *supra* note 81, at 1574.

87. *Id.* at 1602–19.

and the Immigration-Benefits Bar: they interfere with the same constitutional values, often in very similar ways.

Still, it is important to distinguish the two kinds of statutes. Fahey uses the term “consent procedures” to refer to both Spending Clause and preemption laws that designate specific state actors as decision-makers.<sup>88</sup> For example, she (compellingly) criticizes the “consent procedures” created by the Immigration-Benefits Bar, a conditional-preemption law, in a discussion that generally focuses on federal grant conditions.<sup>89</sup> The term “consent procedures” is certainly accurate as a description of Spending Clause requirements, which take effect only when states give consent. But conditional-preemption doctrine doesn’t invoke the concept of state consent.

The test for the validity of requirements imposed via the Spending Clause is whether the state in question has validly consented to their imposition; the test for the validity of a preemption provision is simply whether Congress intended preemption to take place.<sup>90</sup> The Immigration-Benefits Bar allows states to avoid preemption by legislative enactment, but it’s confusing to describe that as a “consent procedure.”

And the substantive values at stake in Spending Clause cases are different from the values at stake in conditional-preemption cases. True, grant conditions and conditional preemption can both be used to pressure states to make decisions through a particular actor in state government. But in the grant-condition cases, the result of inaction is foregoing federal funds. In preemption cases, the result of inaction is that the federal government steps in to make policy decisions that would otherwise be the responsibility of the state government. It is possible that one of these federal tactics is unconstitutional and the other is not.

This Article is focused on mapping the reasons why it might be unconstitutional to push decisions into state legislatures using the preemption power. It is useful and important to map the reasons why it might be unconstitutional to push decisions into state legislatures using the Spending Clause power, as Fahey’s article does. But we should keep the two analyses separate.

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88. *Id. passim*.

89. *Id.* at 1579, 1604–05, 1610.

90. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577–78 (2012) (“Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when pressure turns into compulsion, the legislation runs contrary to our system of federalism. The Constitution simply does not give Congress the authority to require the States to regulate.”) (internal quotations and citations omitted); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137–38 (1990) (“[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone.”) (internal quotations and citations omitted).

## III. THE CASE FOR STATES' RIGHT TO DECIDE WHO DECIDES

This part of the Article maps out the arguments for the unconstitutionality of federal laws that preempt all state action except legislative enactments. The first three sections argue that such laws amount to unconstitutional commandeering of state governments.

Section A reviews the anti-commandeering doctrine, and section B explains why it should be applied to laws that use preemption to push decisions into state legislatures. To preempt all state action except legislation is the functional equivalent of a statute that says "State policy on Issue X must be determined by the legislative branch of government, and not by any other branch of the state's government." As argued above, it is as if there were a state official responsible for choosing which decision-maker within the state's government should exercise the power of the sovereign on any issue, and the federal government commandeered that Delegator General. States have important reasons to delegate decisions to one branch of government rather than another. When the federal government pushes decisions on a given issue into the state legislature, it overrides structural arrangements that exist for important substantive reasons. Decisions about bar admission, for example, are often given to judicial officials because of their independence and their expertise, and decisions about tort liability are often left to judges interpreting the common-law because common-law decision-making is appropriate to the judicial role. To the extent the concept of sovereignty has meaning, it should include the power to make such delegations without interference from another government.

Section C continues the commandeering analysis, explaining why the accountability concerns that motivate the anti-commandeering doctrine apply with equal force to laws that use preemption to push decisions into state legislatures. When Congress requires state officials to take action, the public may become confused as to whom should be held accountable. They may blame the state officials who implement Congress's requirements, while it is really Congress at fault. This concern should arise even more powerfully over cases in which Congress takes over states' decisions about internal delegation. What appears to voters to be a state's failure to act may in fact be a nearly inevitable result of Congress's choice about where to delegate the choice. But delegation-forcing preemption does an even better job of concealing the true decision-maker than classic commandeering.

Section D changes gears, setting aside the anti-commandeering doctrine to argue why, as a matter of constitutional policy, the Supreme Court should offer protection to state choices about who is empowered to decide. The power to decide who decides is fundamental to a state's identity. If Congress is going to allow states any power to take actions that avoid preemption, it should not dictate which actor in the state's government has the power to take those actions.

Finally, Section E invokes a separate line of precedents, in which the Supreme Court has offered constitutional protection to state decisions about who is suitable to hold state office. In allowing states to choose the office-holder, the Supreme Court has recognized the importance of allowing states to decide who decides.

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

When Congress uses the preemption power to push a decision into state legislatures, it does something very similar to the kinds of commandeering the Supreme Court has found unconstitutional. To strike down the Immigration-Benefits Bar or the Commerce-in-Arms Act on this basis would be an extension of existing law; the Court has applied the anti-commandeering doctrine to cases in which Congress dictates the substantive conduct required of state officials, but it has yet to apply the doctrine to cases in which Congress dictates states' power-conferring rules.<sup>91</sup> To analyze the case that the anti-commandeering doctrine should be applied to power-conferring rules, a review of basic principles is in order.

According to the Supreme Court, "the States entered the federal system with their sovereignty intact."<sup>92</sup> The Constitution contains explicit constitutional protections for state sovereignty, like the Tenth and Eleventh Amendments, but those provisions do not exhaust the forms of sovereignty the states retained when they ratified the Constitution.<sup>93</sup> The Supreme Court has found that various provisions in the Constitution recognize "residual state sovereignty, from the prohibition on involuntary reduction of a state's territory to the amendments provision and the Guarantee Clause."<sup>94</sup> But provisions like the Tenth Amendment are not the source of those rights. The Tenth Amendment is merely "declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment."<sup>95</sup>

Scholars have long criticized the concept of state sovereignty, preferring other concepts as descriptors of the autonomy that states enjoy within

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91. See Fahey, *supra* note 81, at 1590–94 (distinguishing between "substantive harms" like costs imposed on states with "procedural harms" like interference in states' governing processes).

92. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991).

93. *Alden v. Maine*, 527 U.S. 706, 713 (1999).

94. *Printz v. United States*, 521 U.S. 898, 919 (1997). Specific recognitions include the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states . . . and those means and instrumentalities which are the creation of their sovereign and reserved rights." *Id.* (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 414–15 (1938)).

95. *United States v. Darby Lumber*, 312 U.S. 100, 124 (1941).

our federal system.<sup>96</sup> But this discomfort with the idea of sovereignty has not deterred courts; as Heather Gerken observes, “federalism scholars (but not the courts) typically treat sovereignty talk as a quaint relic of the past.”<sup>97</sup> This Article aims to show how challenges to statutes like the Immigration-Benefits Bar and the Commerce-in-Arms Act might play out in court; accordingly, it will use the language the courts prefer.

Because of (what courts insist on calling) states’ sovereignty, “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”<sup>98</sup> Congress exercises its regulatory power over individual people—not over the states.<sup>99</sup> One implication of this principle is that Congress cannot “commandeer” the states—that is, to force them to implement a federal regulatory program. Congress has no power to commandeer states’ executive officials or legislative processes.<sup>100</sup>

Although the anti-commandeering doctrine was hinted at as early as the 1970s,<sup>101</sup> it was first adopted as the holding of a Supreme Court case

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96. Indeed, “sovereignty has been declared ‘dead’ so many times that one starts to believe in the doctrinal version of reincarnation.” Heather K. Gerken, *Living Under Someone Else’s Law*, 84 U. CIN. L. REV. 377, 385 (2016). Gerken notes that the tradition dates back at least as far as Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

97. *Id.* at 390.

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

99. *Id.* at 166 (“[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”); *see also* ACORN v. Edwards, 81 F.3d 1387, 1394 (5th Cir. 1996) (“Such regulation, however, must operate directly upon the people, and not the States as conduits to the people.”).

100. *See* *Printz v. United States*, 521 U.S. 898, 933 (1997) (executive officials); *New York v. United States*, 505 U.S. 144, 161–66 (1992) (legislative processes).

101. The Supreme Court in *Printz* described an earlier case in which a commandeering issue almost came before the Court:

Federal commandeering of state governments is such a novel phenomenon that this Court’s first experience with it did not occur until the 1970’s, when the Environmental Protection Agency promulgated regulations requiring States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes. The Courts of Appeals for the Fourth and Ninth Circuits invalidated the regulations on statutory grounds in order to avoid what they perceived to be grave constitutional issues, and the District of Columbia Circuit invalidated the regulations on both constitutional and statutory grounds. After we granted certiorari to review the statutory and constitutional validity of the regulations, the Government declined even to defend them, and instead rescinded some and conceded the invalidity of those that remained, leading us to vacate the opinions below and remand for consideration of mootness (citations omitted).

*Printz*, 521 U.S. at 925. *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981), “did not present the problem they raised because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field.” *Printz*, 521 U.S. at 926 (discussing *Hodel*). *FERC v. Mississippi*, 456 U.S. 742 (1982), “construed the most troubling provisions of the Public Utility Regulatory Policies Act of 1978 to contain only the ‘command’ that state agencies ‘consider’ federal standards, and again only as a precondition

in 1992 in *New York v. United States*, which affirmed that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.”<sup>102</sup>

*New York* struck down a federal statute that forced states to choose between passing specific legislation and taking title of radioactive waste generated within their borders.<sup>103</sup> Congress lacks the power to compel states to take title to radioactive waste, which would amount to “a congressionally compelled subsidy from state governments to radioactive waste producers.”<sup>104</sup> Equally impermissible would be “a simple command to state governments to implement legislation enacted by Congress.”<sup>105</sup> Because the federal law forced states to choose between two constitutionally impermissible options, and thus effectively “commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,” *New York* struck it down.<sup>106</sup>

After *New York* protected states’ legislative processes from commandeering, *Printz* extended that protection to state executive-branch officials. The federal Brady Handgun Violence Prevention Act required state law enforcement officials to perform background checks on people who wanted to buy handguns.<sup>107</sup> The Court found unconstitutional “the forced participation of the States’ executive in the actual administration of a federal program.”<sup>108</sup>

Most recently, the Supreme Court applied the anti-commandeering principle in *Murphy v. National Collegiate Athletic Association* to strike down a law that made it unlawful for states to “authorize” sports gambling.<sup>109</sup> Congress cannot “issue orders directly to the States.”<sup>110</sup> According to *Murphy*, Congress can no more prohibit specific state enactments than it can require them. When Congress prohibits states from authorizing a particular activity, said the Court, “It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators

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to continued state regulation of an otherwise pre-empted field.” *Printz*, 521 U.S. at 926 (discussing *FERC*). *FERC* warned that “this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.” *FERC*, 456 U.S. at 761–62.

102. *New York*, 505 U.S. at 188; *see id.* at 161–66 for the principal analysis.

103. *Id.* at 175.

104. *Id.*

105. *Id.* at 175–76.

106. *Id.* at 176 (quoting *Hodel*, 452 U.S. at 288). Congress cannot order the states to enact a program, the Fifth Circuit later held, even if the federal statute “affords the States complete discretion to determine the means employed in achieving [the federal statute’s] goals.” *ACORN v. Edwards*, 81 F.3d 1387, 1394 (5th Cir. 1996).

107. Pub. L. 103-159, 107 Stat. 1536; *see Printz*, 521 U.S. at 902.

108. *Printz*, 521 U.S. at 918.

109. *Murphy v. Nat’l Collegiate Athletic Assoc.*, 138 S. Ct. 1461, 1478 (2018) (striking down 42 U.S.C. § 3702).

110. *Id.*

from voting on any offending proposals.”<sup>111</sup> The “basic principle,” said *Murphy*, is “that Congress cannot issue direct orders to state legislatures.”<sup>112</sup>

Of course, federal statutes of general applicability sometimes apply directly to state governments.<sup>113</sup> But there is no state-sovereignty problem when a statute “regulate[s] state activities,” rather than “seeking to control or influence the manner in which States regulate private parties.”<sup>114</sup> Thus, *South Carolina v. Baker* upheld laws that “directly regulated States by prohibiting outright the issuance of bearer bonds.”<sup>115</sup> The rules also applied to private debt issuers, and even though the states would have to amend “a substantial number of statutes” to comply, the states were being regulated *qua* private parties, not *qua* sovereigns.<sup>116</sup>

Likewise, *Reno v. Condon* upheld a statute that required states to adopt procedures to protect the confidentiality of drivers’-license information.<sup>117</sup> That statute, which applied to private parties and state governments, “does not require the States in their sovereign capacity to regulate their own citizens,” but rather “regulates the States as the owners of databases.”<sup>118</sup> The states are not only sovereigns, but entities that engage in market behavior and other conduct analogous to the conduct of private actors. Congress is free to regulate them in that capacity, so long as it does not regulate them in their capacity as lawmakers.<sup>119</sup>

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111. *Id.*

112. *Id.*

113. See *Env’tl Def. Ctr., Inc. v. U.S. EPA*, 319 F.3d 398, 413 (9th Cir. 2003), *vacated and superseded on other grounds*, 344 F.3d 832 (9th Cir. 2003) (“Where state action is incidentally burdened by a federal law of general applicability, the Court has indicated that the Tenth Amendment may still be implicated if the law ‘excessively interfere[s] with the functioning of state governments.’”) (quoting *Printz*, 521 U.S. at 932 (“[W]here, as here, it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty . . . a ‘balancing’ analysis is inappropriate. . . .”).

114. *Reno v. Condon*, 528 U.S. 141, 150 (2000) (quoting *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988)).

115. *South Carolina v. Baker*, 485 U.S. 505, 511 (1988).

116. *Id.* at 514; see *New York v. United States*, 505 U.S. 144, 160 (1992) (explaining that statute in *Baker* survived because it simply “subjected a State to the same legislation applicable to private parties”).

117. *Reno*, 528 U.S. at 151.

118. *Id.*

119. Likewise, the First Circuit has found no commandeering problem with a court injunction that directs state governments to take action to avoid issuing permits that cause the “taking” of an endangered animal in violation of the Endangered Species Act. *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) (“The statute not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking. We believe that, contrary to the defendants’ argument on appeal, the district court properly found that a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.”). An injunction directing the state to come into compliance with the Endangered Species Act, even though it requires specific



Relatedly, Congress does not impermissibly commandeering the states when it uses its preemption power, even when it regulates individuals directly in an area where states have traditionally been the primary regulators.<sup>120</sup> “When Congress passes a law that operates via the Supremacy Clause to invalidate contrary state laws, it is not telling the states what to do.”<sup>121</sup> By contrast, “using the States as the instruments of federal governance” is impermissible.<sup>122</sup>

One of the most important boundaries of the anti-commandeering doctrine is that it does not prevent the federal government from demanding that states apply federal law in their courts.<sup>123</sup> The Supremacy Clause specifically binds state-court judges to apply federal law, stating that federal law “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>124</sup> In *Testa v. Katt*, the Supreme Court held that state courts cannot refuse to apply federal law.<sup>125</sup> *New York* notes that “[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal ‘direction’ of state judges is mandated by the text of the Supremacy Clause.”<sup>126</sup> And *Printz* distinguished state judges from other state officials, making clear that the power to compel state judges to accept federal law survives any anti-commandeering analysis.<sup>127</sup>

The Commerce-in-Arms Act might seem to fall within this carve-out: it requires state courts to dismiss certain kinds of lawsuits. Doesn’t the Supremacy Clause allow Congress to require specific outcomes in state-court proceedings? But there is a difference between requiring state courts to apply federal substantive law and dictating whether state courts have the power to make state law on a given issue. All state entities are required to treat federal law as if it were part of the law of their state;

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conduct by state officials, does not violate state sovereignty because it does not direct the states to enact a federal program; rather, it directs the states to come into compliance with a federal law of general applicability in the same way any private actor might be ordered into compliance. *Id.* at 170.

120. *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997).

121. *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208, 230 (3d Cir. 2013); *see also Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 832 F.3d 389 (3d Cir. 2016), *rev’d on other grounds*, *Murphy v. Nat’l Collegiate Athletic Assoc.*, 138 S. Ct. 1461, 1478 (2018).

122. *Printz v. United States*, 521 U.S. 898, 919 (1997).

123. *See Tonya M. Gray, Separate but Not Sovereign: Reconciling Federal Commandeering of State Courts*, 52 VAND. L. REV. 143, 145–46 (1999).

124. U.S. CONST. art. VI, cl.2. *See Martin H. Redish & Steven G. Sklaver, Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 110 (1998) (discussing the “State Judges Clause,” and arguing that federal power over state courts in fact derives from other constitutional sources).

125. *Testa v. Katt*, 330 U.S. 386, 394 (1947).

126. *New York*, 505 U.S. at 178.

127. *Printz*, 521 U.S. at 907.

requiring state courts to accept federal claims is thus a form of preemption, not a form of commandeering.

The *Testa* rule is not really an exception to the anticommandeering doctrine.<sup>128</sup> Requiring state courts to apply federal law is not a case of the federal government compelling state governments to govern or regulate in a desired way, because once Congress enacts a substantive rule of law that validly preempts state law, the federal rule becomes part of the law of every state. In other words, the rationale for the *Testa* rule is that “federal law is as much the law of the several States as are the laws passed by their legislatures.”<sup>129</sup> State courts that apply federal substantive laws are in fact applying the law of their own states.

But state courts’ duty to treat federal law as their own law does not imply federal control over state courts as institutions. “The general rule, ‘bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.’”<sup>130</sup> This principle should be understood to include taking the state courts with power to make state law over whatever substantive issues state law chooses to delegate to them. “The States . . . have great latitude to establish the structure and jurisdiction of their own courts.”<sup>131</sup> They should likewise have latitude to establish the kinds of issues over which state courts have the power to create state law.

Although Congress undoubtedly has the power to preempt state judge-made substantive rules, the Commerce-in-Arms Act does more than prescribe rules for state courts to apply. It takes the power of decision away from state courts and gives it to another branch of state government. Congress can preempt state law, but that need not mean Congress can dictate who makes it.

#### B. *Commandeering States’ Power-Conferring Rules*

The reasons *Printz* gave for striking down the background-check requirement, and the reasons *New York* gave for striking down the take-title requirement, are also reasons to strike down statutes that use preemption to push decisions into state legislatures.

*Printz* offered a long discussion of constitutional history to show that the Framers intended to create a federal government that exercises power

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128. See Ellen D. Katz, *State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz*, 1998 WIS. L. REV. 1465, 1504 (1998) (“[T]he contexts in which federal law may permissibly require state judicial action should not be understood functionally to constitute compelled administration of federal law within the meaning of the anti-commandeering rule.”).

129. *Haywood v. Drown*, 556 U.S. 729, 734 (2009).

130. *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (quoting Henry Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

131. *Howlett*, 496 U.S. at 372.

only over individuals, not over state governments.<sup>132</sup> The same concern applies to federal laws like the Commerce-in-Arms Act and the Immigration-Benefits Bar. Those laws effectively regulate state governments directly, by forcing states to assign specific decisions to a specific branch of their legislature. States that would otherwise delegate to their executive or judicial branches decisions about gun-seller liability or noncitizens' benefits are forced to reassign those decisions to their legislatures. Federal laws like the Commerce-in-Arms Act and the Benefits Bar compel the states to do otherwise.

Remember the distinction, determinative in the Supreme Court's eyes, between a statute that "regulate[s] state activities" and a statute that "seek[s] to control or influence the manner in which States regulate private parties."<sup>133</sup> Statutes that use preemption to push decisions into state legislatures seek to "control or influence the manner" in which states regulate private parties. Even if these statutes do not absolutely "control" state regulation, because they do not command it but rather leave the legislature the choice of not regulating, those statutes certainly seek to "influence the manner."

From the perspective of an individual who is affected by the laws in question, there is little difference between statutes like those struck down in *New York* and *Printz* and statutes like the Commerce-in-Arms Act and the Immigration-Benefits Bar. The Brady Act compelled law-enforcement officials to take actions with which affected people might disagree: performing background checks before gun sales. The Commerce-in-Arms Act requires state judges to take a similarly controversial action: denying negligence claims against gun sellers. The only difference is the grounds for the required action: the state judges must deny the claims because only a different actor in state government is empowered to grant them. Likewise, the Immigration-Benefits Bar requires state executive-branch officials to deny applications for benefits because only a different entity within government (the legislature) has the power to grant those benefits. But the state judge or bureaucrat who must make the denial is doing so under federal coercion, just like the officials who were forced to perform the background checks in *Printz* or enact the regulatory program in *New York*.

True, federal laws like the Commerce-in-Arms Act or the Immigration-Benefits Bar do not compel state legislatures to enact a specific federal regulatory program. Like other conditional-preemption statutes,<sup>134</sup> they leave the states the option of taking no action and allowing federal preemption. And they do not require any specific behavior from state offi-

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132. *Id.* at 904–22. For criticism of that analysis, see Wesley J. Campbell, *Com-mandereering and Constitutional Change*, 122 *YALE L.J.* 1104, 1107 (2013).

133. *Reno v. Condon*, 528 U.S. 141, 150 (2000) (quoting *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988)).

134. *See infra* Part III, below.

cials. But they arguably commandeer an even more fundamental function of state government.<sup>135</sup>

We should distinguish between two ways in which Congress can directly (and thus impermissibly) regulate state governments. One way is to dictate the rules about what conduct is required of state officials, such as whether state legislators must pass laws about nuclear-waste disposal, or whether law-enforcement officers must perform background checks. Another way Congress can commandeer the states is by dictating what H.L.A. Hart called “secondary rules,” meaning rules about how law is made.<sup>136</sup>

Hart’s influential book *The Concept of Law*<sup>137</sup> distinguished two kinds of legal rules: “primary” and “secondary.” Primary rules dictate which kind of conduct people can and cannot engage in, like criminal laws that prohibit specific behavior, or constitutional amendments that protect people’s right to express themselves.<sup>138</sup> Secondary rules confer or regulate the power to make primary rules; examples are rules about which contracts are binding, and rules about who can hold a given public office or which government agency can issue a certain kind of order.<sup>139</sup>

*New York* and *Printz* struck down attempts by Congress to dictate primary rules. When Congress told the state legislatures to enact a given regulatory program, and when it told state law enforcement officers to conduct background checks, Congress was announcing primary rules that governed the conduct in which state officials were required to engage. Statutes like the Commerce-in-Arms Act and the Immigration-Benefits Bar do not dictate primary rules; instead, they dictate secondary rules—rules conferring power on specific decision-makers within state government.

So the question is whether the anti-commandeering doctrine covers cases in which Congress dictates state governments’ power-conferring rules. The best way to analyze this question is to look to the policy con-

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135. It might seem that forcing state legislatures to decide a given issue is not as coercive as forcing them to enact a specific program. But it could be argued that commandeering a state’s power-conferring functions is more intrusive than simply dictating the behavior required of state officials.

136. H.L.A. HART, *THE CONCEPT OF LAW* 95–96 (2d ed. 1994).

137. *Id.*; see John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN ST. L. REV. 119, 123 (2009).

138. HART, *supra* note 136, at 95–96.

139. *Id.*; see Frederick Schauer, *(Re)taking Hart: A Life of H.L.A.*, 119 HARV. L. REV. 852, 870 (2006) (reviewing NICOLA LACEY, *HART: THE NIGHTMARE AND THE NOBLE DREAM* (2004)) (“Among these [secondary rules] are the rules of change, which specify how the stock of primary rules may be increased and how primary rules may be eliminated or modified. And there are also rules of adjudication, which determine how disputes about the application of primary rules of conduct will be resolved. But most fundamental among the secondary rules are the rules of recognition, which enable citizens and officials to ascertain what the rules of law are, and thus to understand, for example, why the prohibition on insider trading in section 16 of the Securities Exchange Act of 1934 is a rule of law while the moral prohibition on being nasty to your elderly mother is not.”).

cerns that the Court invoked in explaining the anti-commandeering doctrine.

### C. *The Threat to Accountability*

One problem with commandeering, according to the Supreme Court, is that it hides the true decision-makers from the voters to whom those decision-makers are supposed to be accountable.<sup>140</sup> Voters cannot hold policymakers accountable unless they understand clearly who is responsible for the policies in question.

This justification has come under fire from both empirical and theoretical perspectives.<sup>141</sup> As Andrew Coan writes, “it is difficult to think of a more frequently and persuasively criticized element of the Court’s modern federalism jurisprudence.”<sup>142</sup> The theory behind the accountability argument is that commandeering hides the true decision-maker, confusing voters about whether the federal government or the state and local authorities are responsible for the policies voters may care about. But this argument seems to discredit all federal-state cooperation.<sup>143</sup> When Congress acts under its Spending Clause authority to incentivize state action, for example, voters may be confused, but Spending Clause laws are well-accepted.<sup>144</sup>

In fact, the accountability argument “seems to condemn not merely federal laws that commandeer state or local services but also even voluntary intergovernmental cooperation.”<sup>145</sup> Imagine the FBI and the local police show up on your doorstep together. They may have simply run into each other on the sidewalk outside, but how can the voter tell who is responsible for what looks like a joint government action? As long as two governments are working together, the accountability concern will be present.

And the empirical assumptions underlying the Court’s concern for accountability are also highly questionable.<sup>146</sup> Political scientists have found that voters often do not know which officials endorse policies that

140. See *New York v. United States*, 505 U.S. 144, 168 (1992); *Murphy*, 138 S. Ct. at 1477.

141. See, e.g., Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and ‘Dual Sovereignty’ Doesn’t*, 96 MICH. L. REV. 813, 825–26 (1998).

142. Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 3–4 (2015).

143. See Hills, *supra* note 141, at 826.

144. See Edward A. Zelinsky, *Accountability and Mandates: Redefining the Problem of Federal Spending Conditions*, 4 CORNELL J.L. & PUB. POL’Y 482 (1995).

145. Hills, *supra* note 141, at 826.

146. See Evan H. Caminker, *Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1061–67 (1995); see also Coan, *supra* note 142, at 15.

match the voters' preferences.<sup>147</sup> In fact, voters often do not know their own preferences; they express dramatically different policy preferences depending on how questions are framed, and show remarkable inconsistency over time.<sup>148</sup>

Nor do voters hold politicians accountable for policy decisions in any way that tracks real-world causality. While voters do not seem to impose any reliable reward for good economic performance, for example, they do impose a stiff penalty on presidents for uncontrollable misfortunes that occur during a president's tenure, like shark attacks, even where the official in question had no control over the response to those incidents.<sup>149</sup> These problems are particularly acute in state and local elections, where voters often make choices based on their understanding of federal politics, rather than any assessment of the policies or performance of state and local officials.<sup>150</sup>

So accountability may be, in the real world, a hopelessly unrealistic goal. But perhaps that makes it all the more important to prohibit congressional maneuvers that confuse the electorate. Then again, it can also be argued that commandeering doesn't really threaten accountability at all. Neil Siegel points out that if a voter is able to sort out which level of government is responsible for government regulations in general, they may well be able to sort out who is responsible for commandeering.<sup>151</sup>

We will have to bury these eminently reasonable concerns to assess the likelihood that the Immigration-Benefits Bar, the Commerce-in-Arms Act, and similar laws might be successfully challenged in court. The Supreme Court has wholeheartedly endorsed a concern for democratic accountability as a key justification for the anti-commandeering doctrine, so that concern should at least be considered in our analysis of where the anti-commandeering doctrine applies and how it might be extended.

When the federal government exercises its preemption power in the traditional way, the Supreme Court tells us, there is no question about who is responsible for the resulting policy outcomes. "[I]t is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular."<sup>152</sup> The situation is different when Congress commandeers state government. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory

147. CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 36–49 (2016).

148. *Id.* at 30–34.

149. *Id.* at 126–127; 175–77.

150. See David Schleicher, *Federalism and State Democracy*, 95 *TEX. L. REV.* 763 (2017) (discussing the implications of "second-order elections" for federalism).

151. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 *VAND. L. REV.* 1629, 1632 (2006).

152. *New York v. United States*, 505 U.S. 144, 168 (1992).

program may remain insulated from the electoral ramifications of their decision.”<sup>153</sup>

The idea here is that voters may hold accountable the last policymakers to take action. Voters, apparently, are capable of identifying the policymakers who enact a regulatory program, but not capable of understanding that they did so because the federal government ordered them to. Put differently, there is a significant risk of voter misunderstanding when the state legislature takes an action under federal command. Voters will see the headline, “State Legislature Enacts Program X,” but will not read far enough to find out why.

In the case of executive-branch commandeering, this risk is easier to imagine. When Congress orders state officials to conduct background checks, “it will be the [state official] and not some federal official who stands between the gun purchaser and immediate possession of his gun.”<sup>154</sup> In effect, Congress positions the states to bear the political consequences of Congress’s choices. The fear is that commandeering pushes *apparent* responsibility onto state officials, while the real responsibility for the policy remains with Congress.

The same concern applies when Congress pushes a decision into state legislatures. Consider the Commerce-in-Arms Act. Voters may be frustrated that gun-sellers in their state cannot be held liable when their negligence in selling weapons causes the deaths of innocent victims. Whom should they hold responsible for this state of affairs? Before the Commerce-in-Arms Act, voters might have held accountable members of the legislative or (if the state has elected judges) the judicial branch, either of whom had power to hold gun-sellers liable. But now the situation is confused. If the judiciary has traditionally set standards in this area, knowledgeable voters will be primed to hold their elected judges responsible. But Congress has now taken that power away from them. *New York* and *Printz* tell us that this is too confusing for voters.

Or consider the Immigration-Benefits Bar. Imagine that voters in a given state may be frustrated that undocumented immigrants are denied public benefits. (Perhaps this seems politically unlikely in our current climate,<sup>155</sup> but structural concerns like anti-commandeering should open channels of accountability for all voters, no matter how typical their views.) Traditionally, perhaps, decisions about which noncitizens receive state benefits may lie with a different branch. This was the case in *Vargas*, in which it was elected members of the judiciary who traditionally made decisions about noncitizens’ eligibility for bar admission. But Congress took that power away from them, reserving it solely for the state legislature. If

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153. *Id.*

154. *Printz v. United States*, 521 U.S. 898, 930 (1997).

155. Perhaps it is easier to imagine the opposite. See generally MARISA ABRAJANO & ZOLTAN L. HAJNAL, *WHITE BACKLASH: IMMIGRATION, RACE, AND AMERICAN POLITICS* (2015).

the application in *Vargas* had been denied, who should voters hold responsible? *New York* and *Printz* tell us that voters are likely to be confused. The policy with which they disagree (the denial of benefits) appears to emanate from the entity within state government that denies the benefits, but in fact the federal government has ordered that entity to deny them—not on substantive grounds, but on the grounds that only a different entity within state government can deny the benefits.

Although accountability was the main reason for concern about commandeering, there are others.<sup>156</sup> For example, there is the concern that commandeering makes it too easy for Congress to regulate, which will cause too much of whatever regulation is eased.<sup>157</sup> There is a similar concern here: Congress makes it unduly easy to deny benefits to undocumented immigrants by assigning that decision to state legislatures. The concern in *Printz* was about resources—Congress can do background checks without paying for them.<sup>158</sup> In the legislative context, the resources required are smaller in scale, but floor time in any legislature is a significant resource, and avoiding the floor time and informal work necessary to achieve consensus on a denial of benefits makes it much easier to effect that denial.

Another concern is temptation. *New York* warns us that arrangements like these may be very appealing to both federal and state officials who want to avoid accountability for their decisions. For example, a federal official may well prefer that states decide where radioactive waste is to be sent.<sup>159</sup> But state officials, if they lack political courage, may prefer that Congress order them to make a certain choice, so that they can later try to blame the results on Congress.<sup>160</sup> Thus, along with the risk that voters will mistakenly direct their ire at state officials, the availability of commandeering creates a risk that state officials will be relieved of the duty to do their jobs. “The interests of public officials thus may not coincide with the Constitution’s intergovernmental allocation of authority. Where state offi-

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156. Another concern was too much federal power over states. “The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.” *Printz*, 521 U.S. at 922. But this can hardly be a required element of the commandeering analysis, since it is not present in *New York*’s facts—commandeering of state legislatures involves no undue augmentation of federal enforcement resources.

Another concern in *Printz* was separation of powers within the federal government. If Congress could use state officials to execute its laws, it would no longer need to rely on the U.S. president to do so, a dangerous imbalance. *Printz*, 521 U.S. at 922–23.

157. See Siegel, *supra* note 151, at 1644 (“As law and economics posits, actors that do not internalize the full costs of their behavior tend to engage in too much of the behavior.”).

158. See *Printz*, 521 U.S. at 922.

159. *New York v. United States*, 505 U.S. 144, 182–83 (1992).

160. *Id.* at 193.



cials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.”<sup>161</sup>

For scholars who think the accountability concerns expressed in *Printz* and *New York* are bogus, there are more palatable ways of formulating the argument. Coan, for example, argues that the problem with commandeering is not that it confuses voters, but that it “threaten[s] the independent relation of state governments to their electoral constituencies.”<sup>162</sup> A state government that acts under commandeering—or under the kind of Spending Clause coercion rejected in *NFIB*—acts at the behest of a national electoral constituency, rather than its own.<sup>163</sup> The problem, in other words, isn’t that voters will mistakenly blame or praise the state government for a federally mandated program; the problem is that the state government is no longer working for its constituents, but for the constituency of the federal government.<sup>164</sup>

This constituency-based concern is just as present when Congress exercises undue influence over states’ delegation function. If a proposal to grant public benefits to noncitizens stalls out in a given state’s dysfunctional legislature, rather than sailing smoothly through an executive agency, voters may or may not know who to blame. But regardless of what voters perceive, that procedural decision should be made by officials who have a principal–agent relationship with the people of the state, not officials who act on behalf of the entire country.

In short, the concerns motivating the anti-commandeering doctrine also militate against allowing Congress to require that a decision be made by state legislatures on pain of preemption. As the next two sections will explain, the anti-commandeering doctrine is not the only reason to prevent Congress from using its preemption power to push decisions into state legislatures.

#### D. *The Delegation Power is Fundamental to State Sovereignty*

In addition to the anti-commandeering rationales discussed above, at least two significant arguments militate against delegation-forcing preemption. Both of them are, loosely speaking, policy arguments, but they are grounded in policies that are well-recognized in constitutional precedent. First, the states’ internal-delegation power is worthy of protection because it is so fundamental to the states’ identity as sovereign or autonomous governments. Section E, below, will pursue a second point: that the states’ power to assign decisions to specific offices is analogous to their constitutionally protected power to choose the officials who will occupy decision-making offices.

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161. *Id.* at 183.

162. Coan, *supra* note 142, at 18.

163. *Id.* at 23–24.

164. *Id.*

1. *Delegations Happen for a Reason*

Delegation-forcing preemption interferes with states' ability to choose their own decision-makers. This ability is not merely procedural. Policies about who decides are chosen for substantive and significant reasons. Different branches of government serve different purposes, and the architects of state government have important reasons for assigning a given decision to one branch or another.

Consider the diversity of possible delegations on any given issue. States reserve some questions for their legislatures, while other decisions are assigned to the executive branch (which in some cases means assignment to an independent agency, or an executive official elected separately from the governor).<sup>165</sup> Other questions, like the interpretation of statutes, are left to the courts. Still other issues are addressed by constitutional amendment, referendum, delegation to local governments, or other non-legislative processes.

These decisions are made for reasons that are worth caring about. Indeed, entire bodies of law have evolved to govern the choices states make about delegation. These power-conferring rules are among the most important subjects taught in law school: in constitutional law, separation-of-powers rules to decide which branch of government handles a given question; in administrative law, anti-delegation principles and doctrines of deference that identify the circumstances in which agencies may decide certain questions; in civil procedure, doctrines of justiciability to decide when the judiciary may handle a certain question; and in constitutional law, constitutional rights that place certain questions forever beyond the power of any government agency to resolve. Different states evolve very different versions of these doctrines.<sup>166</sup>

Some decisions are better suited than others to certain kinds of governmental decision-makers. If sovereignty means in part the state's power to design and control its own governmental structure, then the assignment of decisions to specific decision-makers is an important part of that sovereignty.

Consider, for example, the Immigration-Benefits Bar, which forces states to deny public benefits to various groups of noncitizens unless the state legislature says otherwise.<sup>167</sup> By preventing states from assigning decisions about immigrants' benefits to other branches of government, the Benefits Bar interferes with significant state interests. The judicial branch traditionally determines who should be admitted to practice as an attorney, because judges are plausibly thought well-suited to make judgments about the qualities that attorneys should have. But the Benefits Bar pro-

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165. New Jersey is the only state in which there are no elected executive-branch officials other than the governor. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 17 (1998).

166. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 16 n.40 (1998).

167. 8 U.S.C. § 1621 (2018).

hibits the state judiciary from making such decisions when the applicants are certain kinds of noncitizens. The Benefits Bar thus overrules the state's substantive judgment about which entity within state government is best suited to determine the suitability of candidates for bar admission.

The Supreme Court has long taken care to avoid any suggestion that the federal government has a say in how states allocate power within their government. "Indeed, the federal government cannot even dictate whether a state must respect a separation of powers within its government."<sup>168</sup>

Constitutionally speaking, internal delegations are none of the federal government's business. In 1902, the Court rejected an argument that Illinois violated due process by delegating legislative responsibilities to a parole board, holding that questions of internal state delegation were matters for the state government alone to determine:

Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state.<sup>169</sup>

Similarly, in 1937, the Court rejected a claim that Virginia violated the U.S. Constitution when its legislature delegated power over milk markets to a milk commission.<sup>170</sup> The United States Constitution, the Court explained, has no application to questions about how a state chooses to delegate state-governmental powers.<sup>171</sup> Again, the language went beyond due process to broadly endorse states' freedom to structure their internal distribution of powers in whatever way they chose. Justice Cardozo wrote, "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."<sup>172</sup>

In 1957, the Supreme Court held that a state attorney general's investigation of "subversive" activities violated due process, but took care to make clear that its holding was *not* grounded in any concerns about separation of powers.<sup>173</sup> Justice Frankfurter, concurring, wrote that "[i]t would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the . . . States."<sup>174</sup>

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168. Brief of Appellant at 49, *Delana v. CED Sales, Inc.*, 486 S.W.3d 316 (Mo. 2016) (No. SC95013) (quoting *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902)).

169. *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

170. *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937).

171. *Id.*

172. *Id.*

173. *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (plurality opinion) ("[T]he concept of separation of powers embodied in the United States Constitution is not mandatory in state governments.").

174. *Id.* at 256 (Frankfurter, J., concurring) (cited approvingly in *Minnesota*, 449 U.S. at 461 n.6).

The Supreme Court, then, has recognized that the federal government should avoid telling states how to delegate their decision-making authority. This principle, when added to the anti-commandeering doctrine and the policies behind it, amounts to a strong case against delegation-forcing preemption.

## 2. *How Far Could This Go?*

To see how troubling delegation-forcing preemption is, we should look at how far it might go. The Immigration-Benefits Bar would override not only a state's decision to delegate bar admission questions to its judiciary, but also other judgments about how to delegate within state government. It would apparently override a state's decision to hold a ballot referendum on the question of public benefits for noncitizens—as indeed California did in 1994 with Proposition 187, the famous “Save Our State” initiative that would have denied various benefits to undocumented immigrants if it had not been struck down on preemption grounds.<sup>175</sup>

Of course, opponents of Proposition 187, or of ballot initiatives more generally, might celebrate that particular outcome. But other modes of lawmaking would be equally impermissible. Depending on a state's process for constitutional amendment, the Immigration-Benefits Bar might well prohibit a state from enshrining protections for noncitizens in its constitution, because a constitutional amendment (particularly in states that amend their constitutions primarily through popular initiatives) is arguably not a legislative enactment.<sup>176</sup>

Indeed, there are more than hypothetical questions about whether the Immigration-Benefits Bar prevents a state from giving benefits to noncitizens via its constitution, rather than a statute. New York State's constitution guarantees a right to “[t]he aid, care and support of the needy,”<sup>177</sup> and this right prohibits state agencies from denying welfare

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Whether the state legislature should operate largely by committees, as does the Congress, or whether committees should be the exception, as is true of the House of Commons, whether the legislature should have two chambers or only one, as in Nebraska, whether the State's chief executive should have the pardoning power, whether the State's judicial branch must provide trial by jury, are all matters beyond the reviewing powers of this Court.

*Id.*

175. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), *on reconsideration in part*, 997 F. Supp. 1244 (C.D. Cal. 1997).

176. See TARR, *supra* note 165, at 25–27 (1998) (describing state processes for constitutional amendment and the extent to which legislatures and popular referenda are involved in those processes). For an example of a state giving constitutional protection to noncitizens via a judicial interpretation of the state's equal-protection clause, see *Aliessa v. Novello*, 96 N.Y.2d 418 (2001).

177. N.Y. CONST. art. 17, § 1 (“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”).

benefits on the basis of any “eligibility condition having nothing to do with need.”<sup>178</sup> In other words, it is unconstitutional to deny state welfare benefits to someone because of their immigration status.<sup>179</sup> The Benefits Bar, by its terms, could be seen to preempt this state constitutional provision because it is not a statute.<sup>180</sup> It is difficult to imagine any legitimate federal purpose that could be served by giving effect to state statutes, but not state constitutions.

And if Congress has the power to limit states to legislative enactment, it seems natural to think it could limit states to other modes of lawmaking. Imagine, then, a federal law that preempted all state laws and policies unless they were created by popular referendum. This would be a remarkably intrusive law, even though it allowed the state the option to do nothing. If a state’s residents cared deeply about the issue, the federal law would refocus public debate in that state onto the question of whether to hold a referendum. But that procedural question is necessarily one about the workings of the state government: are referenda a good way to make policy? Do they unduly infringe the responsibilities of the legislature? The resulting public debate and its outcome might well have long-lasting impacts on the state’s internal political processes by causing referenda to become more or less popular, or by aligning one political party with or against the effort to hold a referendum.

Aside from the substantive reasons to assign a decision to one branch rather than another, there are reasons to allow multiple branches a say in the decision. Actions by state courts often prompt action by state legislatures, and vice versa, as witnessed in the pre-*Obergefell* state proceedings dealing with same-sex marriage.<sup>181</sup> Action by a single branch can prompt a useful conversation within a state, which delegation-forcing preemption would interrupt or even prevent.

And if these prospects aren’t troubling, we can invent even more intrusive scenarios: say, a federal law that says all state action is preempted except for executive orders issued by governors who are within one year of running for re-election. Or imagine a federal law that says states can only enact a certain policy if the legislature of every county in the state votes to approve it. Or imagine that states can only pass a given law if their state comptroller certifies it—a particularly intrusive requirement, given that

178. *Aliessa v. Novello*, 96 N.Y.2d 418, 429 (2001).

179. *Id.*

180. Even if the state constitution were a statute, the Benefits Bar would still refuse to give it effect because it was enacted before 1996. See 8 U.S.C. § 1621(d) (“A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.”) (emphasis added).

181. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596–97 (2015) (discussing state proceedings and debates).

only fourteen states have comptrollers.<sup>182</sup> Again, if Congress can use its preemption power to specify the entity within state government that has power to decide, it is hard to see why we shouldn't allow Congress to make such specifications with highly intrusive specificity.<sup>183</sup>

All of these possibilities are contrary to the spirit of the federal Constitution, which allows states significant flexibility in the way they adapt their form of government to the policymaking challenges they see. To be sure, there are limits; as Deborah Jones Merritt writes, “[n]o state may establish a monarchy, a dictatorship, or any other form of government inconsistent with popular representation.”<sup>184</sup> But within those limits, some scholars say, the Guarantee Clause<sup>185</sup> restricts the federal government's ability to dictate any limits on how states shape their governments.<sup>186</sup>

Whether because of the Guarantee Clause or simply because of a tradition of respecting states' sovereignty, there is significant variation in the way states structure their government. While most states have bicameral legislatures, Nebraska's is unicameral, and at the time of the Constitution three of the thirteen colonies had unicameral legislatures.<sup>187</sup> And many states have periodically debated switching to a unicameral model.<sup>188</sup>

These hypotheticals show that although the accountability concerns raised in *New York* and *Printz* must be taken seriously, delegation-forcing preemption raises an additional concern not present in those cases. The federal laws in those cases did not override states' judgments about which decision-maker was best suited to resolve a given issue. This, ultimately, is the most convincing reason to regard delegation-forcing preemption as unconstitutional.

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182. See *Controller* (state executive office), BALLOTPEDIA, <https://ballotpedia.org/Controller> [<https://perma.cc/PBE2-MAZH>] (last visited Apr. 19, 2018).

183. Fahey offers a wonderful *reductio ad absurdum* for Spending Clause conditions: what if the federal government designated Bridget Fahey as the person responsible for deciding whether her state should consent to the federal scheme? Fahey, *supra* note 81, at 1595–96. Of course, this might be thought troubling because it is arbitrary to empower a private citizen to consent on behalf of a government with which she is unaffiliated. But Fahey's hypothetical provokes us to imagine others in which Congress designates a random state employee, by name, as the person who must decide whether the state will accept federal funding (or, for purposes of this article, the person who decides whether the state will take the action that avoids federal preemption).

184. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for A Third Century*, 88 COLUM. L. REV. 1, 25 (1988).

185. U.S. CONST. art. IV, § 4.

186. See *Cintron-Garcia v. Romero-Barcelo*, 671 F.2d 1 (1st Cir. 1982) (suggesting that the Guarantee Clause “embodie[d]” the “wisdom of allowing the states themselves to decide whether, and when, to fill interim vacancies” in their legislatures); see also Merritt, *supra* note 184, at 25.

187. Jonathan S. Ross, *A New Answer for an Old Question: Should Alaska Once Again Consider A Unicameral Legislature?*, 27 ALASKA L. REV. 257, 272 (2010).

188. *Id.* at 272–73.

The decision whether to make state policy by legislative enactment is no less substantive, and no less potentially fraught, than decisions about whether to make state policy by popular referendum. If we are troubled by the prospect of a federal law that preempts all state policy not made by referendum, we should also be troubled by a federal law that preempts all state policy not made by statute. State courts take action, which prompts state legislatures to take action, and vice versa, within and between states.<sup>189</sup> When all non-legislative action is preempted, the state's deliberative processes suffer, because this intra-governmental dialogue is disrupted. The bad effects of delegation-forcing preemption, in other words, are more than the sum of its parts.

#### E. *The Power to Choose State Officials*

A final reason to treat delegation-forcing preemption as unconstitutional is that the Supreme Court has long given special consideration to the states' interest in choosing their own officeholders. Of course, delegation-forcing preemption involves the federal government channeling decisions to a specific *office*, not a specific officeholder. But the choice of which office should be assigned a given decision, and which human being should be sitting in the office when the decision arrives in its mailbox, are closely related. Both involve the power to decide who decides.

The separation of state and federal sovereignty extends to their officeholders. As the Supreme Court has said, "[t]he positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart."<sup>190</sup> The Court has protected states' power to choose their own officeholders in a variety of ways.

In *Gregory v. Ashcroft*, the Court allowed Missouri to enforce a mandatory-retirement rule for state-court judges, despite the Age Discrimination in Employment Act.<sup>191</sup> *Gregory* refused to conclude that the Act applied to state judges without a sufficiently "plain statement" of Congress's intent to do so. It cited the principle that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"<sup>192</sup> Applying the federal statute to state judges would alter the constitutional balance because the selection of state officers is so fundamental to the state's identity as a sovereign. A decision about who holds office is "a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a

189. I'm grateful to Patricia Reyhan for observations along these lines.

190. *New York v. United States*, 505 U.S. 144, 188 (1992).

191. *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991); see Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, §§ 2-15, 81 Stat. 602 (1967), *amended by* 29 U.S.C. §§ 621-634 (1974).

192. *Gregory*, 501 U.S. at 460-61 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).

sovereign.”<sup>193</sup> Thus, *Gregory* strongly endorsed “the authority of the people of the States to determine the qualifications of their most important government officials,” which it said “lies at the heart of representative government.”<sup>194</sup>

*Gregory* invoked another line of cases implicating state sovereignty: the Equal Protection cases in which state governments barred noncitizens from employment in certain sovereignty-related jobs. Strict scrutiny applies to most state laws affecting aliens, but the Court makes an exception for state rules about who can hold important state governmental office or serve in other positions performing functions that are important to state sovereignty.<sup>195</sup> These “sovereign-function” cases exempt from strict scrutiny a state’s decisions about eligibility for such positions, because those decisions are “intimately related to the process of democratic self-government.”<sup>196</sup>

*Gregory* found these cases helpful in analyzing a challenge under the Age Discrimination in Employment Act to Missouri’s mandatory-retirement laws for judges, because both issues implicated “the States’ constitutional power to establish the qualifications for those who would govern.”<sup>197</sup> The state has just as compelling an interest in deciding which state officials are empowered to make a given decision as it does in deciding who is eligible to be a state official.

Into this mix of protections for state office-holders we might add the doctrine of sovereign immunity, which protects the independence of the officials who act on states’ behalf. The Supreme Court has taken care to circumscribe the extent to which state officials are subject to suit, partly because of concerns about the integrity of state government. Since “a State can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty. . . .”<sup>198</sup> As with the anti-commandeering rule, the principle of sovereign immunity is grounded in “structural” principles rather than specific passages in the Constitution: “[W]e have understood the Eleventh Amendment to confirm the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III’s jurisdictional grant.”<sup>199</sup>

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193. *Id.* at 460. The Court cited *Taylor v. Beckham*, 178 U.S. 548, 570–71 (1900) (“It is obviously essential to the independence of the states, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States.”) and *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892) (“Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen . . .”).

194. *Gregory*, 501 U.S. at 452, 463 (internal quotations omitted).

195. *See, e.g.*, *Sugarman v. Dougall*, 413 U.S. 634 (1973).

196. *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

197. *Gregory*, 501 U.S. at 460.

198. *Alden v. Maine*, 527 U.S. 706, 747 (1999).

199. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011).



In short, the power to decide who decides is fundamental. If we add together the anti-commandeering doctrine, the fundamental importance of the states' internal-delegation power, the threat to accountability posed by delegation-forcing preemption, and the Supreme Court's protection of states' power to choose their own officeholders, we have a powerful case for the unconstitutionality of statutes that use preemption to push decisions into state legislatures.<sup>200</sup>

#### IV. THE THREE BEST DEFENSES OF DELEGATION-FORCING PREEMPTION

This Article has, so far, focused on arguing the unconstitutionality of statutes that push states to make decisions via their legislatures on pain of preemption. But there is a formidable argument that nothing is wrong with such statutes. They do not simply direct the states to make decisions via their legislatures; rather, they offer states a choice between doing so and being preempted altogether. The Supreme Court has repeatedly approved this kind of conditional preemption, and closely related forms of what it calls "cooperative federalism."

The simple answer is that while cooperative federalism, including conditional preemption, is *in general* constitutional, the specific kind of conditional preemption that drives decisions into state legislatures is not. To see how this can be so, this section of the Article will review the general principles the Supreme Court has applied in approving various forms of conditional preemption and other kinds of cooperative federalism. None of those principles require endorsing delegation-forcing preemption.

##### A. *But the Supreme Court Loves Cooperative Federalism*

We should begin with a review of cooperative federalism and why the Supreme Court has generally endorsed it. Conditional preemption is one kind of cooperative federalism.<sup>201</sup> The other kind is Spending Clause legislation, in which states that accept federal funds agree to regulate in certain ways.<sup>202</sup> Both involve inducing states to act, rather than compelling

200. What remedy would be appropriate if a constitutional challenge to delegation-forcing preemption succeeded? If the Immigration-Benefits Bar unconstitutionally limits the power to avoid preemption to the state legislature, is the remedy to allow other actors to avoid preemption, or to extend preemption absolutely? Since the test for preemption is Congressional intent, it seems wrong to completely deny states the opportunity to avoid preemption—Congress did, after all, intend to allow them some such opportunity. And courts could avoid these problems by construing phrases like "enactment of a State law" to include action by other government bodies. But it is easy to imagine these issues becoming the subject of litigation.

201. See *Stewart*, 563 U.S. at 253. For an overview of cooperative federalism, and the cases that have upheld it, see Philip J. Weiser, *Towards A Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668–77 (2001).

202. *New York v. United States*, 505 U.S. 144, 167 (1992); see also U.S. CONST. art. I, § 8, cl. 1 (Congress may "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (under Con-

them to do so. The reason for calling these laws “cooperative federalism” is that they involve “a shared federal and state government responsibility for standard setting, funding, and enforcement.”<sup>203</sup>

Meaningful choice is key to cooperative federalism’s appeal. *New York* said: “[W]e have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”<sup>204</sup> Conditional preemption and Spending Clause conditions are acceptable because “the residents of the State retain the ultimate decision as to whether or not the State will comply.”<sup>205</sup> Thus, “[i]f a State’s citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.”<sup>206</sup> The key is that Congress is merely incentivizing, not compelling, state decision-making. “Where 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.”<sup>207</sup> So in general, the Supreme Court has found conditional preemption acceptable because the state retains a meaningful choice about whether to comply with the conditions.

It could be argued that the Supreme Court’s approval of conditional preemption swallows any argument against delegation-forcing preemption, but to this there is a ready answer. As the next section explains, things that are generally appropriate may be impermissible in certain circumstances.

#### B. *But the Greater Includes the Lesser*

The simplest argument in favor of delegation-forcing preemption is that greater powers include lesser powers. If Congress can preempt all state action in a certain field, it should be able to preempt all non-legislative state action in that field.<sup>208</sup> If total preemption is permissible, so should conditional preemption.

This is a classic argument. Oliver Wendell Holmes wrote that “[e]ven in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way.”<sup>209</sup> As Michael Herz has observed, it is also a dangerously misleading

gress’s spending power, “Congress may attach conditions on the receipt of federal funds . . .”).

203. John D. Edgcomb, Comment, *Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 TUL. L. REV. 299, 299 (1983).

204. *New York*, 505 U.S. at 167.

205. *Id.* at 168.

206. *Id.*

207. *Id.*

208. This is only “a precondition to continued state regulation of an otherwise pre-empted field . . . .” *Printz v. United States*, 521 U.S. 898, 926 (1997).

209. *Western Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting).

one.<sup>210</sup> “[S]odium chloride is a harmless substance (table salt). But that does not mean that either sodium or chlorine is harmless; because of their interaction the components do not necessarily share the characteristics of the whole, and vice versa.”<sup>211</sup>

Thus, in the context of laws that apply to individual people, an entire body of jurisprudence has arisen to determine when it is unconstitutional to impose conditions on the receipt of government benefits.<sup>212</sup> The Supreme Court has recognized that “even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . .”<sup>213</sup> The same principle should apply to federal laws that affect the states. And indeed it does: in the Spending Clause context, where the federal government is generally free to spend money in ways that promote the general welfare, the government nonetheless must not condition federal expenditures in ways that violate independent constitutional prohibitions.<sup>214</sup>

In the preemption context, it is similarly misleading to say that the existence of a general preemption power makes any use of conditional preemption acceptable. For example, it would surely be unacceptable for the federal government to say, “state actions are preempted unless all rele-

210. Michael Herz, *Justice Byron White and the Argument That the Greater Includes the Lesser*, 1994 B.Y.U. L. REV. 227, 243 (1994).

211. *Id.*; see also Thomas Wm. Mayo, *Abortion and Speech: A Comment*, 46 SMU L. REV. 309, 313 (1992) (referring to “the greater power includes the lesser power” as a “semi-mystical aphorism”).

212. See Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61 (2013); Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 480 (2012); Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990); Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175 (1989); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). For specific application in the land-use context, see Brian T. Hodges, *Are Critical Area Buffers Unconstitutional? Demystifying the Doctrine of Unconstitutional Conditions*, 8 SEATTLE J. ENVTL. L. 1, 6 (2018); Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 578 (2009). For an attempt to generally solve the problem of why threats (including conditions on government benefits) are sometimes permissible and sometimes not, see Einer Elhauge, *Contrived Threats Versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503, 544 (2016).

213. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); see also Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L.J. 1051, 1053 (1995).

214. See *Lawrence Cty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 269-70 (1985).

vant decision-makers are more than six feet tall.” The argument against delegation-by-conditional-preemption has the same structure: it is improper to say, “you can grant benefits only if you accept federal interference with your sovereign right to delegate decisions within your state government.”

The preemption power must be exercised in a way that does not violate independent constitutional limitations. Now we are back to the question of whether such an independent limitation exists here, and if so, whether it has been violated. On this point, some pre-*New York* cases pose a significant challenge.

C. *But the Supreme Court Has Upheld Statutes That Push Decisions Into State Legislatures*

Any challenge to delegation-forcing preemption would have to overcome the precedent established in *Hodel v. Virginia Surface Mining & Reclamation Association*,<sup>215</sup> a 1981 case that upheld a statute much like the ones this article criticizes.

1. *Hodel and the Legislative-Action Requirement*

*Hodel* upheld a federal law under which states could assume regulatory authority over coal-mining only if they enacted certain environmental standards via their state legislature.<sup>216</sup> *Hodel* found this permissible because the states could choose to allow federal preemption, rather than enact the federal standards. “If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”<sup>217</sup> The case was cited with approval in *Printz* and *New York* for the proposition that federal laws are permissible when they “merely ma[k]e compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field.”<sup>218</sup>

The federal law in *Hodel*, then, did precisely what the Immigration-Benefits Bar and the Commerce-in-Arms Act do. It used conditional preemption to push decisions into state legislatures. But the question the

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215. 452 U.S. 264 (1981).

216. *See id.* at 271 (“The proposed program must demonstrate that the state legislature has enacted laws implementing the environmental protection standards established by the Act . . .”).

217. *Id.* at 288.

218. *Printz v. United States*, 521 U.S. 898, 926 (1997) (citing *Hodel*, 452 U.S. at 288); *see also New York v. United States*, 50 U.S. 144, 173–74 (1992) (“Where federal regulation of private activity is within the scope of the Commerce Clause, we have recognized the ability of Congress to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”) (citing *Hodel*, 452 U.S. at 288).

Court addressed in *Hodel* was whether Congress could use its preemption power to pressure states to regulate in general. The issue was whether Congress could pressure *states* to act, not whether it could limit the power to act to state legislatures. The Court said not a word about the permissibility of channeling decisions into state legislatures. So it would be inaccurate to cite *Hodel* for the proposition that delegation-forcing preemption is constitutional.<sup>219</sup>

## 2. New York and the Spending Clause

Another precedent that might be cited in defense of delegation-forcing preemption is the Spending Clause analysis in *New York v. United States* itself, which upheld a practice that is similar to delegation-forcing preemption. The case dealt with challenges to three separate statutory provisions (one of which was the commandeering provision discussed above), each of them designed to encourage states to arrange for the disposal of nuclear waste generated within their borders.<sup>220</sup>

One of the statutory provisions challenged in *New York* allowed the payment of money to states that adopted certain pieces of legislation.<sup>221</sup> As discussed above, this is not unusual; there are more than a few federal

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219. The same argument applies to another pre-*New York* case that might be cited in defense of delegation-forcing preemption. *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982), upheld a federal law that required states to consider certain factors in their regulatory decision-making, on pain of federal preemption. “In *FERC*, we construed the most troubling provisions of the Public Utility Regulatory Policies Act of 1978, to contain only the ‘command’ that state agencies ‘consider’ federal standards, and again only as a precondition to continued state regulation of an otherwise pre-empted field.” *Printz*, 521 U.S. at 926. This statute arguably intrudes into states’ internal decision-making procedures just as much as forced delegation; it sets part of the agenda for state rulemakers. Nonetheless, the Court upheld the statute because it didn’t compel the *states* to do anything; it was merely a condition on which the states could avoid otherwise-permissible federal preemption. See *New York*, 505 U.S. at 161; see also *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1433 (10th Cir. 1994), *cert. granted, judgment vacated on other grounds sub nom. Oklahoma v. Ponca Tribe of Oklahoma*, 517 U.S. 1129 (1996) (“If *New York* teaches that the Tenth Amendment prohibits a federal directive that *requires* the states to enact or enforce a federal regulatory program, *FERC* instructs that Congress may require the states to *consider*, but not necessarily adopt, a federal program.”).

But, again, the Court did not consider any argument about states’ control over their own decision-making procedures. So *FERC* does not endorse Congress’s power to choose which branch of a state government Congress wishes to handle a given decision.

220. *New York*, 505 U.S. at 152. The states were compelled to either join an interstate compact or create disposal sites within their own borders. *Id.* at 151–52.

221. Basically, states that had disposal sites collected fees, and transferred a portion of those fees into an escrow account, which was then paid out to states that adopted specific legislation. “By July 1, 1986, each State was to have ratified legislation either joining a regional compact or indicating an intent to develop a disposal facility within the State.” *New York*, 505 U.S. at 152 (citing 42 U.S.C. §§ 2021e(d)(B)(i), (e)(1)(A)).

statutes on the books that similarly condition federal spending on the passage of state legislation.<sup>222</sup>

The Supreme Court upheld the provision at issue in *New York*.<sup>223</sup> It applied the four requirements for a valid Spending Clause enactment,<sup>224</sup> and found each one satisfied: the expenditure was “for the general welfare”; the conditions the states had to meet were unambiguous; the conditions were “reasonably related to the purpose of the expenditure”; and they did not violate any independent constitutional prohibition.<sup>225</sup>

Thus, a defender of delegation-forcing preemption could argue that the Supreme Court endorsed something indistinguishable in *New York*. Conditional preemption and Spending Clause incentives are the two classic forms of cooperative federalism. If Congress can encourage states to delegate to their legislatures via the Spending Clause, why not via preemption?

To this argument there is a ready answer—in fact, two of them. First, *New York* did not approve the use of the Spending Clause to push decisions into state legislatures. The Supreme Court in *New York* was not presented with an argument that there was anything wrong with conditioning a federal expenditure on passage of state legislation. And it thus failed to consider whether the provision at issue violated an “independent constitutional prohibition” like the various protections for state sovereignty discussed above.<sup>226</sup>

Alternatively, challengers might argue that the Spending Clause and preemption are different. Spending Clause incentives are less coercive than the threat of preemption. If the state declines Spending Clause money, it loses money. To be sure, losing money can be bad for a state; but *NFIB* made clear that the Court will not allow Congress to use the Spending Clause to inflict coercive Spending Clause penalties on states.<sup>227</sup> When the threatened denial of spending goes beyond a “financial inducement” and becomes “a gun to the head,” the Spending Clause power is exceeded and the federal law is struck down.<sup>228</sup> Thus, Spending Clause incentives cannot amount to much more than the threat of losing money.

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222. See, e.g., 23 U.S.C. § 405(a)(9)(A) (highway-safety grants promoting seat-belt use); 23 U.S.C. § 163(a)–(b) (highway-safety grants helping prevent driving under the influence); 42 U.S.C. § 653a(a)(1)(B) (directory of new hires to facilitate enforcement of child-support obligations); 23 U.S.C. § 154(c) (penalizing states that don’t have open-container laws); 23 U.S.C. § 158 (exemptions from grant requirements related to national minimum drinking age, conditioned on state legislative action).

223. *New York*, 505 U.S. at 171–73.

224. See *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987).

225. *New York*, 505 U.S. at 171–72.

226. For more on independent constitutional prohibitions and challenges to Spending Clause enactments, see *Lawrence Cty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 269–70 (1985).

227. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575–82 (2012).

228. *Id.*

Conditional preemption is different. If a state declines to pass legislation that overrides the Immigration-Benefits Bar, then noncitizens within the state are forced to go without professional licenses, cash assistance, and other public benefits. Likewise, if the states decline to pass legislation holding gun sellers liable for negligence, then under the Commerce-in-Arms Act the victims of gun sellers' negligence will lose their cases in court. The alternative to state legislative action in conditional-preemption cases, in other words, is the acceptance of a federal regulatory scheme that imposes policy outcomes with which state officials or state voters may vehemently disagree. This is more intrusive, or at the very least differently intrusive, than a simple denial of money, because in the preemption context, states can't step out of the field.

#### D. *States Can't Step Out of the Field*

Cases like *Hodel* and *New York*, when they endorse Congress's power to pressure states to regulate, assume that states have a meaningful choice in the matter. The states in those cases could have chosen to forego federal funds or allow federal preemption. But the matter of state choice is a sliding scale: the more pressure Congress exerts, the less meaningful the states' choice. This is why *NFIB* limited the amount of federal funds Congress can threaten to take away: at a certain point of pressure, free choices are no longer really free.<sup>229</sup>

The same thing is true with conditional preemption: free choices are no longer really free, because state legislatures are only hypothetically empowered to take no action. In reality, doing nothing is a substantive choice—it is regulating by inaction. Statutes like the Immigration-Benefits Bar do not allow the state legislature to step out of the regulatory field in a meaningful way. If conditional spending can become the equivalent of commandeering—as *NFIB* makes clear it can<sup>230</sup>—then so too can conditional preemption.

Allowing federal preemption is a substantive policy choice of great consequence. Once the decision whether to allow federal preemption is given to the state legislature, and only the state legislature, state legislators should reasonably expect to be held accountable for it. As Fahey observes, “acts of omission can be just as inconsistent with the will of the state electorate as acts of commission.”<sup>231</sup> Once federal law designates a single state actor as the decision-maker, that actor's inaction becomes the sole cause of the substantive policy outcome—even if the inaction is attributable to

229. *Id.* Samuel Bagenstos interprets *NFIB* as holding that “[w]hen Congress takes an entrenched federal program that provides large sums to the states and tells states that they can continue to participate in that program only if they also agree to participate in a separate and independent program, the condition is unconstitutionally coercive.” Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 866 (2013).

230. See Coan, *supra* note 142, at 16.

231. Fahey, *supra* note 81, at 1608.

unrelated factors, like the state legislature being too busy or out of session.<sup>232</sup>

Take, for example, the Commerce-in-Arms Act, which preempts state-law civil claims against gun sellers unless the state legislature authorizes such claims.<sup>233</sup> State legislators can choose to take no action—to pass no statute creating liability for gun sellers. If the legislators take no action, federal preemption applies, and there is no liability for negligent gun sellers. This is not a neutral outcome.

State legislatures that take no action help create a state of affairs in which gun sellers cannot be sued even if their negligence causes death or serious injury. While the state legislatures did not *alone* create this state of affairs (the federal government is arguably more responsible), no other entity within state government had the power to change it. The decision has been forced into the state legislature in the sense that only the state legislature has the power to avoid federal preemption or, by defaulting, allow it. Forcing one branch of the state government to take responsibility for a politically sensitive decision, when the state might prefer other branches handle it, is not cooperative federalism.

#### V. CONCLUSION: WHY IT MATTERS WHO DECIDES

This article has argued that states have a sovereign right to decide who decides. Congress acts unconstitutionally when it tries to use conditional preemption to push decisions into state legislatures.

If true, or even plausible, this argument has important implications in three realms: public policy, a realm in which states have become newly activist in challenging federal policy under the Trump administration; legal doctrine, particularly case law dealing with states' rights; and legal theory, particularly scholarly accounts of federalism.

*First*, in the realm of policy, the establishment of a state's right to decide who decides would represent an important tool for states that want to resist federal policy on issues like immigration and gun control. While states have long been active in making policy in areas like immigration,<sup>234</sup> progressive states in particular have become newly energized and active in the aftermath of Donald Trump's inauguration—not just in making their own laws, but in resisting the federal government's agenda on issues in-

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232. Some state legislatures work part-time and have small staffs. See *Full- And Part-Time Legislatures*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 14, 2017), <http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx#average> [https://perma.cc/DHN5-LBPC]. And some legislatures meet for only brief periods; Wyoming's legislature, for example, met for less than two months in 2017. See *2017 Legislative Session Calendar*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 6, 2017), <http://www.ncsl.org/documents/ncsl/2017sessioncalendar.pdf> [https://perma.cc/DU4U-TK8U].

233. 15 U.S.C. §§ 7902(a)–(b), 7903(5)(A) (2018).

234. See generally PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* (2015).



cluding immigration and firearms.<sup>235</sup> These, of course, are two of the areas in which Congress has attempted to use delegation-forcing preemption to push decisions into state legislatures.

The Immigration-Benefits Bar and the Commerce-in-Arms Act have major impacts on immigration and gun policy; they deny welfare benefits and many other benefits to large groups of noncitizens, including some of the most vulnerable, and protect negligent gun sellers from liability. A legal theory that allows states to challenge those laws successfully has the potential to make a major impact on national policy. And, as the discussion above showed, those are just two of the examples of statutes that are potentially vulnerable to such challenges.

*Second*, in the realm of legal doctrine, the idea of a state's right to decide who decides would become a significant part of the rising tide of new protections for state sovereignty. These new protections have come in a variety of areas, including the Spending Clause context discussed above, where the Supreme Court for the first time gave substance to the anti-coercion doctrine in *NFIB v. Sebelius*.<sup>236</sup> And *Shelby County v. Holder* found sections of the Voting Rights Act unconstitutional because they require states to "beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own."<sup>237</sup> Again, the concern here is for the integrity of states' decision-making procedures—the same value that is threatened by the kind of delegation-forcing preemption described in this article.

In each case, scholarly work provides a structure for the Court to go even further in protecting state sovereignty if it chooses to do so. Scholars have been skeptical of conditional preemption,<sup>238</sup> too, and of the whole idea of cooperative federalism.<sup>239</sup> And Fahey's work provides a sound theoretical foundation for the recognition of a state right to decide which state actor can consent to federal grant conditions on the state's behalf.<sup>240</sup> This article has shown, I hope, that there is more than adequate reason for the Supreme Court to add to these state-sovereignty protections a prohibition of conditional-preemption statutes that infringe states' right to decide

235. See Laura Krantz and Jim O'Sullivan, *Blue-State Attorneys General Lead Trump Resistance*, BOSTON GLOBE (Feb. 7, 2017), <https://www.bostonglobe.com/metro/massachusetts/2017/02/06/state-ags-lead-charge-against-trump/LCHc5CQrZMzV1JUd4c027M/story.html> [https://perma.cc/U3V9-4396?type=image]; see also Steve Peoples, *Dem Attorneys General Unite Against Concealed-Carry Gun Law*, AP NEWS (Oct. 23, 2017 8:48 AM), <https://apnews.com/2b9ed600c9f14f8d876b2f36d08c0106> [https://perma.cc/5WZM-S3GG].

236. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574–83 (2012).

237. Shelby Cty. v. Holder, 570 U.S. 529, 544 (2013).

238. See, e.g., Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 104; Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 426–27 (1998).

239. See, e.g., Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 559 (2000).

240. Fahey, *supra* note 81.

who decides. Whether the courts will walk down this road is another question; but if they do, it is adequately paved.

*Third*, this Article's argument about the unconstitutionality of delegation-forcing preemption is relevant to the ongoing scholarly conversation about how federalism works and what values it serves.<sup>241</sup> Scholars have developed many models of the relationship between our federal and state governments, with some stressing the separateness of the federal and state governments, and others stressing the cooperative relationships between the two.<sup>242</sup> Others argue that the two roles go together: that "the state's status as servant, insider, and ally might enable it to be a sometime dissenter, rival, and challenger."<sup>243</sup> States contribute to national political debates by airing competing views<sup>244</sup> and by giving opportunities to people and groups who do not control the levers of federal power.<sup>245</sup>

The federal laws described in this article illustrate how the interaction between state and federal power can be politically fraught, as well as consequential, when federal power and state power interact in novel ways. The Immigration-Benefits Bar has provoked states to assert themselves, either by going ahead with state legislation that satisfies its requirement (as in the case of California) or by insisting on the state's right to decide who decides despite what the Benefits Bar appears to require (as in the case of New York).<sup>246</sup>

These debates have the potential not just to serve as examples of the dynamics that federalism theorists have observed, but to add an important insight to their observations: that when "cooperative federalism" statutes plunge states into disputes with the federal government, what is at stake in those disputes is not just the substantive policies in question, but the struc-

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241. See *id.* at 1892–93 ("[F]ederalism can be a tool for improving national politics, strengthening a national polity, bettering national policymaking, entrenching national norms, consolidating national policies, and increasing national power."); see generally Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1891 (2014) ("Supporters of conventional federalism have a ready list of reasons why states matter. Federalism promotes choice, fosters competition, facilitates participation, enables experimentation, and wards off a national Leviathan.").

242. See generally Hills, *supra* note 141, at 815–16; Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 1 (2011).

243. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009).

244. See Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014).

245. See Gerken, *supra* note 241, at 1898 ("Decentralization, then, gives democracy's outliers the same opportunities that members of the majority routinely enjoy. It gives dissenters the ability to speak truth with power, not just to it.").

246. Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 148 (2016) ("This Section describes two instances in which federal executive decisions under President Obama spurred state-level lawmaking. In the first instance, the DOJ intervened in a California state court lawsuit in a manner that influenced state legislation on professional licensing for unauthorized migrants.").

ture of government itself. What is at stake in these conflicts is not just immigrants' rights, or relief for victims of gun violence, but also the shape and integrity of state governments across the nation.

There is no such thing as a Delegator General. But the job description that would go along with such a position—"chooses which part of state government will handle every decision, big and small"—matches a very real function of every sovereign government. Given current boiling controversies over states' rights, and the eagerness and creativity with which activist state governments are now reaching for every available tool to challenge federal government policies, there is every reason to think that we will soon see more intense and widespread controversies over states' right to decide who decides.