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In this Essay, I shall criticize the United States Supreme Court's decision in New York v. United States,1 which invoked principles of federalism to invalidate the so-called "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 because they "commandeered the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."2 It is my view that the rule thus established rests on a misapplication of constitutional principles of federalism. The Court's opinion, authored by Justice O'Connor, relies on a distorted reading of precedent and framers' intent to support a sweeping and absolute rule against legislation compelling states to implement federal policy. Although such measures do present serious federalism-based concerns, these problems should be addressed in a case-specific manner more sensitive to the particular federalism issues raised by a particular federal program.

To present my argument, I have structured the Essay as follows. In Part I, I shall provide background for the critique by reviewing constitutional principles of federalism. In Part II, I will turn my attention to the New York v. United States opinion, describing and criticizing it in some detail to demonstrate that the justifications offered for the rule against "commandeering" simply do not hold water. Finally, Part III addresses the more fundamental question of whether federal laws compelling states to implement federal policies represent an especially grave threat to state sovereignty. Ultimately, I believe that the dangers presented by such arrangements do not warrant an absolute constitutional prohibition, but rather can and should be addressed through a more flexible analysis.

I. BACKGROUND: FEDERAL POWER AND STATE SOVEREIGNTY

The decision in New York v. United States is the latest salvo in an ongoing struggle within the United States Supreme Court over

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2. Id. at 2428 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. 2352, 2366 (1981)).
whether concepts of state sovereignty place affirmative limits on federal action that would otherwise be within the scope of federal power. In other words, assuming that federal action can plausibly be defended as the exercise of an enumerated federal power, can it be held unconstitutional because the subject matter or means chosen interferes with some reserved core of state sovereignty? New York must be understood against the background of this question, which is central to the basic relationship between state and federal power. The question arose initially in connection with the general interpretation of federal power over private actors, where following the New Deal the Court definitively rejected its prior decisions invoking state sovereignty to invalidate federal legislation. More recently, the same question has been the source of controversy when addressing federal regulation of states in their governmental capacities. While this controversy also had apparently been resolved against federalism-based affirmative limits on federal power, the New York v. United States opinion resurrects such limits.

A. The New Deal Shift

The relative scope of federal and state power has been one of the central issues of constitutional law since the adoption of the Constitution. The basic relationship between federal and state power is clear: the federal government is limited to certain enumerated powers, but it is supreme within that sphere. This division of authority, however, does not tell us where the enumerated powers cease and the sphere of reserved state authority begins. It was of course initially assumed that the powers granted to the federal government were relatively limited, and that the balance of power would remain with the states. But, in the intervening two hundred years, much has changed. Events such as the Civil War and the resulting reconstruction amendments (13th, 14th, and 15th) have changed the underlying constitutional premises about the respective roles of the state and federal governments. More importantly, perhaps, the development of an industrialized national economy has broadened the scope of national power, particularly under the Commerce Clause of the Constitution.

3. In keeping with the essay format, I shall not encumber this writing with extensive citation to secondary authority or fugue-like cross references between related points. For those readers who wish to review in greater detail the doctrinal and historical developments I outline in this Part of the Essay, I would recommend David P. Currie's two volume work, The Constitution and the Supreme Court (Vol. 1, 1985; Vol. 2, 1988).


5. See, e.g., The Federalist No. 45 (James Madison).
The crucial period in the explosion of federal power was the New Deal era. Before about 1937, the Court employed a variety of doctrines, including a narrow reading of federal powers, to restrict government regulation of economic activity. For a variety of complex reasons unnecessary to detail here, after 1937 the Court shifted its position dramatically and began to uphold economic regulation without serious inquiry, abandoning or overturning its earlier precedents. This dramatic shift produced a broad reading of federal power, particularly under the Commerce Clause, and ushered in the modern era of pervasive federal regulation.

One important aspect in this jurisprudential revolution was a change in the Court's treatment of the relationship between the enumerated federal powers and the Tenth Amendment, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." Most obviously, this language confirms the principle that federal authority is limited to the enumerated powers, but the key question is whether it also means that state sovereignty imposes affirmative external limits on Congress' exercise of those powers.

In a number of pre-New Deal cases, the Court assumed that the Tenth Amendment implicitly prohibited federal encroachment upon certain sovereign powers, such as the police power, that the framers intended to reserve to the states. Thus, in many cases addressing whether federal legislation fell within the scope of the Commerce Power, the Court seemed to ask not so much whether the language of the Commerce Power (and the Necessary and Proper Clause) supported the federal legislation, but rather whether the activity regulated was within the realm of reserved state power and thus protected from federal interference. The precise constitutional basis for such an inquiry remained unclear, however, since the text of the Tenth Amendment itself only confirms the principle of enumerated powers.

This "state sovereignty" approach to defining federal power was not uniformly followed before the New Deal, and it was


8. U.S. Const. amend. X.

9. See, e.g., United States v. E.C. Knight Co., 156 U.S. 1 (1895) (Sherman Act could not be applied to monopoly in manufacture of sugar because that would encroach upon state police power).
definitively rejected in post-New Deal cases. The post-New Deal cases indicated that the Tenth Amendment was "but a truism," and that state sovereignty and state police powers were irrelevant to construing the scope of federal power.\textsuperscript{10} Instead, the proper inquiry focused only upon whether the federal action was within the scope of federal power. If it was, then the Constitution required state power to yield. If federal action was not within the scope of federal power, then the measure was invalid for that reason, not because it infringed upon some inviolable area of state sovereignty. However, the Court since the New Deal has read federal powers very broadly, and it has consistently upheld federal regulation despite relatively tenuous justifications in terms of federal power.

As a result, the current structure of government bears little resemblance to the division of state and federal authority initially contemplated by the framers. The federal government is omnipresent and all powerful, regulating virtually every aspect of our social and economic life. While the states continue to play an active and important role in various substantive areas, federal law frequently supplements, overlaps, or overrides state regulation, even in areas traditionally reserved to states. Indeed, the federal government has increasingly sought not merely to replace or supersede state regulation, but rather to subject states themselves to regulations of various kinds. Given this dramatic shift in power, many observers consider the continued viability of states as "sovereign" units within the federal structure to be in jeopardy.

\textbf{B. The Usery Line}

Given these developments, it should not be surprising that some members of the United States Supreme Court would seek mechanisms through which state sovereignty can, at least to some degree, be protected against federal interference. Since 1976, the Court has struggled with one possible mechanism of this sort: the invocation of state sovereignty to preclude direct federal regulation of states in their governmental capacity. Because Congress' direct regulation of states was also an important factor in \textit{New York}, this line of cases provides important background for understanding that decision.

In 1976, the Court handed down its controversial \textit{National League of Cities v. Usery}\textsuperscript{11} decision, which held that the application

\textsuperscript{10} See, e.g., United States v. Darby, 312 U.S. 100, 124 (1941).
of the Fair Labor Standards Act to state employees violated the Tenth Amendment's implicit preservation of the essentials of state sovereignty because the Act (1) regulated states as states,\textsuperscript{12} (2) with respect to matters that were indisputably attributes of state sovereignty,\textsuperscript{13} and (3) so as to impair the state's ability to "structure [its] integral operations in areas of traditional government[] functions."\textsuperscript{14} Usery expressly stated that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."\textsuperscript{15} But such a limitation cannot be found in the text of the Tenth Amendment or of any other constitutional provision, and the Usery opinion is decidedly vague as to the source of this constitutional prohibition.

The Usery approach was ill-fated. In subsequent cases the Court consistently distinguished it.\textsuperscript{16} While in some instances the distinction was obvious because the measures in question did not regulate states as states, in other cases the distinction drawn was so fine as to be apparently meaningless. For example, in EEOC v. Wyoming\textsuperscript{17} the Court upheld the application of the Age Discrimination in Employment Act (ADEA) to the states as employers.\textsuperscript{18} Even though both Usery and EEOC v. Wyoming involved federal regulation of the state as an employer, the Court in EEOC v. Wyoming reasoned that the antidiscrimination requirement of the ADEA was less intrusive on state sovereignty than the minimum wage and maximum hour provisions invalidated in Usery.\textsuperscript{19}

Given such a tenuous distinction, the handwriting was on the wall, and shortly after EEOC v. Wyoming the Court overruled Usery in Garcia v. San Antonio Metropolitan Transit Authority.\textsuperscript{20} In Garcia, the issue was whether the Fair Labor Standards Act could be applied to a municipal mass-transit authority (an arm of the state). Under Usery, the question would be whether the oper-
ation of mass-transit facilities was a traditional governmental function, but the Garcia Court avoided this issue and opted instead to abandon the Uery approach altogether. The Garcia Court reasoned that the traditional government functions test was unworkable and that it was inconsistent with principles of federalism for the Supreme Court to be reviewing state activity to determine whether it was sufficiently traditional or essential to warrant special protection. More importantly, the Garcia Court concluded that the framers did not intend for the Supreme Court to police the limits of federal power, but rather relied on structural and political safeguards to protect the interests of states.

While the opinion thus purported to reject judicial enforcement of the Tenth Amendment as an affirmative restriction on the exercise of federal power, some language in the opinion might be read to imply that measures "destructive of state sovereignty" would be invalid and that judicial intervention would be appropriate if the political process did not operate as intended. Moreover, four Justices dissented, including then Justice (now Chief Justice) Rehnquist, who confidently predicted that the Uery principle would "in time again command the support of a majority of this Court."

II. NEW YORK v. UNITED STATES

It was against this background, then, that the Supreme Court last term decided New York v. United States. At issue in the case was the Low-Level Radioactive Waste Policy Amendments Act of 1985 (Act), which established a series of deadlines and incentives designed to force states, either singly or through regional compacts with other states, to develop facilities for the disposal of low-level radioactive waste, which is produced by various industries and must be isolated from humans for long periods of time. The Act was adopted when two of only three disposal sites for such waste closed, and the remaining site cut the quantity of

21. See id. at 538-47.
22. See id. at 550-54.
23. See id. at 554 ("We perceive nothing in the [provisions at issue] that is destructive of state sovereignty."); id. at 556 ("In the factual setting of these cases the internal safeguards of the political process have performed as intended."").
24. Id. at 580 (Rehnquist, J., dissenting). The other dissenters were Chief Justice Burger and Justices Powell and O'Connor.
25. 112 S. Ct. 2408 (1992). This factual summary is taken from the Court's opinion, 112 S. Ct. at 2414-17.
waste it accepted in half. Faced with a crisis in storing low-level radioactive waste, the states worked closely with Congress in devising the regulatory regime established by the Act.

The Act’s incentives were phased in over three stages that corresponded with some of the deadlines imposed by the Act. In the first stage, the three existing sites were required to remain open but could, after July 1, 1986, collect surcharges on waste generated from outside of the state or regional compact to which the state was a party. Part of the surcharges went into an escrow account from which payments were made to states that had complied with a series of deadlines. The surcharges were progressively increased until after January 1, 1990, which marked the onset of the second type of incentive, under which sites could deny access to material from states not in compliance with the Act’s deadlines. Finally, if a state could not dispose of all the waste produced within its territory by January 1, 1996, the owner of the waste could require the state to “take title to the waste, be obligated to take possession of the waste, and . . . be liable for all damages directly or indirectly incurred” by the owner as a result of the state’s failure to take possession.26 The Court upheld the first two types of incentives but invalidated the take title provision on the ground that it coerced states into implementing a federal program in violation of state sovereignty.27

A. The Basic Structure of Federalism

After reviewing the factual background of the case and the provisions of the Act, Justice O’Connor’s opinion for the Court reviewed the principles of federalism applicable to the case,28 beginning with the fundamental premise that federal action is limited to measures that are necessary and proper to the implementation of a power enumerated in the Constitution, but that the federal government is supreme within this sphere. The opinion then discussed the role of the Tenth Amendment in enforcing the principle of enumerated powers, concluding that the two are “mirror images of each other”29 and acknowledging the oft-expressed view that the “‘Tenth Amendment ‘states but a truism that all is retained which has not been surrendered.’”30 But this discussion

26. Id. (quoting § 2021e(d)(2)(C) of the Act).
27. Id. at 2435.
28. See id. at 2417-19.
29. Id. at 2417.
30. Id. at 2418 (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).
departs in subtle ways from the complete denial of any external Tenth Amendment limits on federal power espoused in the post-New Deal cases and the *Garcia* decision.

Unlike most discussions of the Tenth Amendment as a truism, Justice O'Connor concludes that reserved attributes of state sovereignty should play a significant role in determining the scope of enumerated powers. For example, she observes that the enumerated powers and Tenth Amendment inquiries are mirror images because:

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. 31

Later in the discussion, the opinion further expounds upon this view, reasoning that:

> The Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power. 32

Finally, the discussion concludes that “it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. 33

While this effort to treat the Tenth Amendment as an expression of state sovereignty principles that implicitly limit the enumerated powers ingeniously avoids any direct contradiction with the Court’s prior pronouncements that the Tenth Amendment imposes no external restriction on those powers, it is nonetheless problematic. It clearly contemplates a role for the Court in defining and enforcing essential attributes of state sovereignty that is fundamentally at odds with the decision in *Garcia*. For while the New York opinion characterizes state sovereignty as an implicit limit on the enumerated powers themselves, the language granting those powers does not suggest any such limits. Indeed, Justice O’Connor clearly relies on the Tenth Amendment as a source of these implicit limits in a way that the Court disavowed in *Garcia*.

31. *Id.* at 2417 (emphasis added).
32. *Id.* at 2418.
33. *Id.* at 2419.
Moreover, Justice O'Connor provides little or no support for the notion that state sovereignty implicitly attaches limits to the grant of federal powers, aside from citing general statements that the Constitution contemplates a significant measure of retained authority by the states.\textsuperscript{34} Such general pronouncements, however, do not necessarily imply that state sovereignty imposes a judicially enforceable external limit on federal power when such a limit is nowhere to be found in the language of the enumerated powers or in the text of the Tenth Amendment. Justice O'Connor neither explains how the language of the Constitution creates this limit nor refers the reader to any evidence that the framers understood state sovereignty to impose it.

Justice O'Connor might have relied on Chief Justice Marshall's interpretation of the Necessary and Proper Clause in\textit{ McCulloch v. Maryland},\textsuperscript{35} which required that any measure be consistent with the "letter and spirit" of the Constitution.\textsuperscript{36} Arguably, a measure that interferes with state sovereignty is inconsistent with the spirit of the Constitution, insofar as the framers assumed that the sphere of reserved state powers would be significant because the enumerated federal powers were narrow. Given the contemporary expansion of federal power, one might contend that preservation of the spirit of federalism requires that the Court construct a sphere of state sovereignty and protect it.

Although Justice O'Connor developed a similar argument in her\textit{ Garcia} dissent,\textsuperscript{37} her opinion in\textit{ New York} does not expressly make the connection between expanded federal power and the need to assert state sovereignty as an external limit on federal power. Perhaps Justice O'Connor or some of the Justices who joined her opinion were reluctant to acknowledge that the Court was creating a nontextual right of sovereignty for the states. Such a result would be quite analogous to the recognition of nontextual individual rights, which are opposed by some of the Justices in the\textit{ New York} majority.

Ultimately, while Justice O'Connor's use of the Tenth Amendment to construct an implicit limit on enumerated federal powers in the name of state sovereignty is not well defended in the\textit{ New York} opinion, it may be an appropriate response to the virtually unchecked expansion of federal power. Thus, this aspect of the decision is not the focus of my criticism, and I shall accept as a

\textsuperscript{34} See id. at 2418-19.
\textsuperscript{35} 17 U.S. (4 Wheat.) 316 (1819).
\textsuperscript{36} Id. at 421.
\textsuperscript{37} See 469 U.S. 528, 584-87 (1985) (O'Connor, J., dissenting).
given that state sovereignty may impose limits on the scope of federal authority. The crucial question is whether the take title provision invalidated by the Court should be regarded as so incompatible with state sovereignty as to justify the conclusion that it exceeds those limits. It is to this part of the New York analysis that I shall now turn.

B. The Constitutional Pedigree of the No-Commandeering Rule

The cornerstone of the New York decision is the conclusion that Congress may not "commandeer" the states to implement a federal program; that is, that Congress may not compel states to regulate in accordance with federal directives. To support this premise, Justice O'Connor relies on both precedent and framers' intent. At first glance, this authority appears overwhelming, but closer examination reveals that neither the case law nor the historical materials provides much support for a per se rule against federal commandeering.

1. Precedent

The reader of the New York v. United States opinion is given the impression that the rule against commandeering is well established by prior decisions, and currently beyond dispute. But this impression is, quite simply, inaccurate. Despite its apparent force, Justice O'Connor's treatment of the cases is flawed in three crucial respects. First, the opinion depicts certain decisions as conclusively establishing a rule against commandeering, when the decisions at best leave consideration of the rule for another day. Second, the treatment of case law largely ignores the implications of Garcia, which draws into question even the limited support for the no-commandeering rule that might be fairly drawn from the cases. Finally, Justice O'Connor's effort to distinguish commonly accepted regulatory programs is both overly formalistic and inconsistent with her own rejection of a waiver argument considered elsewhere in the opinion.

a. Was the No-Commandeering Rule Clearly Established?

As authority for the no-commandeering rule, Justice O'Connor first relies on precedent, most notably two pre-Garcia decisions, Hodel v. Virginia Surface Mining & Reclamation Ass'n38 and FERC
v. Mississippi. 39 Contrary to the implications of the New York opinion, however, neither case provides strong support for the rule, much less firmly establishes it.

The discussion begins with the following misleading quotation from Hodel: "As an initial matter, Congress may not simply 'commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" 40 This statement clearly suggests that Hodel explicitly establishes a rule against commandeering, but the passage from which Justice O'Connor lifts the Hodel language does not do so. In the context of concluding that the Usery rule against regulating states as states is inapplicable, the Hodel Court actually stated:

As the District Court itself acknowledged, the [provisions in question] govern only the activities of coal mine operators who are private individuals and businesses. Moreover, the States are not compelled to enforce the . . . standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. 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 commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. 41

As should be clear from this language, the Hodel Court is rejecting the effort to characterize the Act in question as commandeering, and does not explicitly adopt such a rule.

Given its conclusion that commandeering was not involved, the Hodel Court did not address the underlying question whether a no-commandeering rule was required by the Tenth Amendment. Thus, while Justice O'Connor is correct when she states that the Hodel Court found that the statute in question did not compel states to enforce its provisions, she overstates the case when she says that the Court upheld the Act in question "precisely because it did not 'commandeer' the States." 42 At best, then, Hodel provides some implicit support for the rule by assuming the validity of the rule for purposes of argument, and concluding that it was inapplicable on the facts, rather than rejecting the rule outright.

The significance of this implicit support should not be overstated, however. The discussion in Hodel itself does not suggest that there

41. 452 U.S. at 288.
42. 112 S. Ct. at 2420.
was a strong foundation for the rule or that the Court was favorably disposed to it. The Court mentions the argument only to reject it, referring without discussion to three lower court decisions that had been vacated by the Supreme Court on mootness grounds in *EPA v. Brown*.\(^{43}\) Even if these cases had expressly adopted a no-commandeering rule, decisions vacated on mootness grounds have no precedential authority. But the lower court decisions did not even squarely resolve the issue, because they addressed only the validity of EPA regulations, using potential objections to federal commandeering as a basis for narrowly construing the EPA’s statutory authority.\(^{44}\)

Thus, *Hodel* simply concludes that an alleged rule of scant precedential authority does not apply on the facts of the case. Such a result provides at best limited support for a no-commandeering rule, and certainly does not explicitly establish the rule, as suggested in Justice O’Connor’s opinion. The same problems are evident in Justice O’Connor’s treatment of *FERC v. Mississippi*.\(^{45}\) Interestingly, while Justice O’Connor relies heavily on *FERC* in *New York v. United States*, she dissented in the earlier case, unsuccessfully advancing much the same theory invoked in *New York* to support the no-commandeering rule.\(^{46}\)

In *FERC*, as in *Hodel*, the Court was asked to hold that state sovereignty precluded the federal government from compelling states to implement federal programs, but found it unnecessary to resolve the issue because the provisions in question did not compel state implementation of federal law.\(^{47}\) However, while the Court in *Hodel* was prepared to conclude that any potential no-commandeering rule was inapplicable without much discussion of the validity of such a rule, the *FERC* Court offered a number of observations casting doubt on the rule.

The first set of provisions at issue in *FERC* directed states to adopt regulations requiring the purchase and sale of electric power between utilities and smaller producers, and to provide a forum to resolve disputes arising out of such sales and purchases in an appropriate state regulatory commission. These provisions effectively compelled the state to implement a specific substantive

\(^{43}\) 452 U.S. at 288-89 (citing EPA v. Brown, 431 U.S. 99 (1977)).


\(^{45}\) 456 U.S. 742 (1982).

\(^{46}\) See id. at 775-97 (O’Connor, J., dissenting).

\(^{47}\) Id. at 758-71.
policy, but this did not disturb either the FERC majority or Justice O'Connor, who did not dissent from this part of the Court's opinion. The Court concluded that the provisions "simply require the Mississippi authorities to adjudicate disputes arising under the statute," and that such dispute resolution was part of the state commission's customary activity. Such coercion was, the Court held, permissible under the authority of Testa v. Katt, which upheld a statutory provision requiring state courts to entertain treble damage actions arising under the Emergency Price Control Act. Thus, FERC clearly contemplates that at least some forms of federal commandeering are permissible.

In her New York opinion, Justice O'Connor distinguishes Testa v. Katt and similar cases as involving the requirement that state courts implement federal law, which involves "no more than an application of the Supremacy Clause's provision that federal law 'shall be the supreme Law of the Land.'" Thus, although these cases upheld congressional power to direct an arm of state governments (the courts) to implement federal policy, "this sort of federal 'direction' . . . is mandated by the text of the Supremacy Clause," while no similar provision allows "Congress to command state legislatures to legislate."

But such a reading of the Supremacy Clause proves too much. Justice O'Connor surely cannot mean to suggest that because state legislatures and executive branch officials are not included in the phrase "and the Judges in every State shall be bound thereby," legislatures and executive branch officials are free to disobey federal law. And if other state officials are bound by federal law as supreme law, despite the failure of the Supremacy Clause to mention them explicitly, then it would seem to follow that what Congress can require judges to do (implement federal law), Congress may also require other state officials to do. Indeed, FERC itself extends Testa beyond the state courts to a regulatory agency, and later in the opinion the Court relies on Testa to question the basic premise that the federal government may not compel state implementation of federal policy.

One might attempt to limit the actual holding in FERC to quasi-judicial agencies engaged in "dispute resolution," but Justice O'Connor makes no effort to do so in New York, conveniently

48. Id. at 760.
51. Id. at 2430.
52. U.S. Const. art VI.
ignoring the entire issue.\textsuperscript{53} She offers no explanation as to why federal compulsion of state enforcement may be extended beyond the text of the Supremacy Clause to quasi-judicial officials within the executive branch of a state, but not to other parts of state government. As a textual matter, it is hard to justify such a distinction: although the agency in FERC was quasi-judicial in nature, it was not a court and the officials involved were not judges.

The FERC Court's treatment of the second set of provisions at issue, which require state agencies to consider certain federal standards,\textsuperscript{44} is even more damaging for Justice O'Connor's reliance on that case in \textit{New York}. The FERC majority ultimately concluded that these provisions did not compel state enforcement because they required only consideration of the standards and because the state could avoid the requirement altogether by withdrawing its regulatory apparatus from the field.\textsuperscript{55} Thus, as in \textit{Hodel}, the Court avoided deciding the validity of a rule against compelling state implementation, but not before it had cast considerable doubt on the validity of such a rule.

The FERC majority began this discussion by noting that the rigid nineteenth-century view requiring strict separation of state and federal governments as coequal sovereigns "is not representative of the law today."\textsuperscript{56} In a footnote accompanying this statement, the Court expressly rejected the statement in Justice O'Connor's dissent that "the Framers intended to deny the Federal Government the authority to exercise 'military or legislative power over state governments,' \textit{instead} 'allow[ing] Congress to pass laws directly affecting individuals.'"\textsuperscript{57} The majority's rejection of this statement could not have been more categorical: "If JUSTICE O'CONNOR means this rhetorical assertion to be taken literally, it is demonstrably incorrect."\textsuperscript{58}

After rejecting the broad premise of Justice O'Connor's dissent, the FERC majority noted that "[w]hile this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, . . . there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking

\begin{footnotes}
\item 53. \textit{See} 112 S. Ct. at 2429-31.
\item 54. \textit{See} 456 U.S. 742, 761-70 (1982).
\item 55. \textit{Id.} at 769-70.
\item 56. \textit{Id.} at 761.
\item 57. \textit{Id.} at 761-62 n.25 (quoting \textit{id.} at 795 (O'Connor, J., dissenting)).
\item 58. \textit{Id.}
\end{footnotes}
certain actions.\textsuperscript{59} The majority then indicated that a number of cases, including \textit{Testa v. Katt}, had eroded the strict nineteenth-century view of state sovereignty.\textsuperscript{60} The majority specifically rejected Justice O'Connor's efforts in dissent to limit those cases as "little more than exercises in the art of \textit{ipse dixit}."\textsuperscript{61} Yet, as noted in my previous discussion of \textit{Testa v. Katt}, these rejected distinctions resurface in Justice O'Connor's \textit{New York} opinion without any reference to their rejection in \textit{FERC}.\textsuperscript{62}

The \textit{FERC} majority then concluded that "whatever all this may forebode for the future, or for the scope of federal authority in the event of a crisis of national proportions, it plainly is not necessary for the Court in this case to make a definitive choice between competing views of federal power to compel state regulatory activity."\textsuperscript{63} This conclusion was followed by an analysis of the provisions at issue in which the Court found that, as in \textit{Hodel}, the federal government had not compelled state implementation of federal policy because states could withdraw entirely from the regulatory field.\textsuperscript{64}

Finally, the \textit{FERC} majority upheld the third set of provisions, which required state commissions to follow certain procedures in considering federal standards (as required by the provisions at issue in the foregoing discussion).\textsuperscript{65} While noting that these provisions were, in a sense, more coercive than the essentially "hortatory" mandatory consideration provisions, the Court upheld them after only a cursory discussion, concluding that "if Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field—and we hold today that it can—there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks."\textsuperscript{66}

\textit{FERC}, like \textit{Hodel}, thus falls far short of expressly adopting a no-commandeering rule; it merely avoided deciding the issue. Justice O'Connor's implication in \textit{New York} that \textit{FERC} provides additional authority for a no-commandeering rule is misleading. Indeed, the majority's treatment of the issue in \textit{FERC} casts doubt on the

\textsuperscript{59} \textit{Id.} at 761-62.
\textsuperscript{60} \textit{Id.} at 762.
\textsuperscript{61} \textit{Id.} at 762 \& n.27.
\textsuperscript{63} 456 U.S. at 763-64.
\textsuperscript{64} \textit{Id.} at 764-70.
\textsuperscript{65} \textit{Id.} at 770.
\textsuperscript{66} \textit{Id.} at 771.
underlying premise that there is something especially inconsistent with federalism when the federal government compels state enforcement of federal law, and expressly rejected Justice O'Connor's broad statement of the rule.

Perhaps recognizing the inherent weakness of her reliance on both *Hodel* and *FERC*, Justice O'Connor attempted to bolster her reading of these decisions in *New York* by citing additional cases, both recent and of older vintage. But these citations are also misleading.

After the *FERC* discussion, for example, Justice O'Connor invokes two additional decisions, *South Carolina v. Baker* and *Garcia*, in a "see also" cite:

- *See also South Carolina v. Baker*, supra, 485 U.S., at 513 . . . (noting "the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests"); *Garcia v. San Antonio Metropolitan Transit Authority*, supra, 469 U.S., at 556 . . . (same).

This citation misrepresents both decisions. *South Carolina* did not itself "note the possibility" of limits on federal compulsion, but rather indicated that *FERC* had left open this possibility. More importantly, the *South Carolina* Court then questioned the continued viability of such an argument after *Garcia*, an issue that will be addressed more fully below. On balance, then, *South Carolina* arguably undermines, rather than supports the proposition for which Justice O'Connor cites it.

The use of the parenthetical "same" following the citation to *Garcia* is even more troubling. The word "same" obviously conveys the idea that *Garcia* also recognized the possibility of limits on federal compulsion, but as the previous discussion of *Garcia* makes clear, the general tenor of that decision cut against such limits. And even a cursory reading of the referenced page reveals that the *Garcia* Court never mentioned this possibility. At best, the *Garcia* Court recognized on the cited page that "the States occupy a special and specific position in our constitutional system," that the political process had functioned effectively in that case,
and that it was unnecessary to decide what affirmative limits on the scope of the Commerce Power might be imposed by the constitutional structure of federalism. These general statements are a far cry from an express recognition of even a possibility that there may be a rule against federal action that compels states to implement a federal policy.

Justice O'Connor also cites a number of older opinions to suggest that "[t]hese statements in \textit{FERC} and \textit{Hodel} were not innovations," but the references are strained and inconclusive. Most involve quotations that emphasize in general terms the importance of states in the constitutional system. Such general statements clearly do not establish a rule against commandeering. Two citations, however, warrant special mention.

First, Justice O'Connor cites \textit{Coyle v. Oklahoma} for the proposition that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." Neither the referenced page nor the general holding of \textit{Coyle} support such a proposition. \textit{Coyle} decided only that the principle of equality of states prevented Congress from attaching conditions (in this case regarding the location of the state capital) on its decision to grant statehood, because such conditions would relegate that state to second-class status. This holding, which dealt only with unequal treatment, does not have any obvious bearing on the distinct question of federal power to compel states—on an equal basis—to implement otherwise valid Commerce Clause legislation. Whatever indirect support \textit{Coyle} might provide for a no-commandeering rule, it does not establish the proposition for which it is cited.

Second, Justice O'Connor quotes the following passage from \textit{Lane County v. Oregon}, which held, as a matter of statutory interpretation, that legislation making United States currency legal tender for all debts did not apply to state taxes:

"Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, \textit{directly upon the citizens}, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States."

\begin{itemize}
\item \textit{Id.} at 556-57.
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Justice O'Connor interprets this passage as indicating that the Constitution not only granted the federal government power to act directly on individuals, but also denied the federal government power to act upon states. This negative inference from the grant of federal power to regulate individuals directly is the crux of Justice O'Connor's rationale for the no-commandeering rule. Note, however, that while the quoted language uses the modifier "only" to describe the Confederate government's power to act on States, this modifier is omitted in describing the federal government's power to act on individuals. Thus, the passage arguably supports precisely the opposite inference—that federal power is not limited to direct action on individuals. In any event, the passage only supports a negative inference if the reader is predisposed to find one, a problem that also pervades Justice O'Connor's treatment of framers' intent, which will be discussed more fully below.

In sum, through a series of misleading case citations, the New York opinion creates the impression that the no-commandeering rule is firmly established in the Court's federalism jurisprudence. On closer examination, however, it becomes clear that the precedential support for the rule is very weak. Although the Court has on occasion acknowledged the possibility of constitutional difficulties if the federal government compels states to implement federal policies, until New York it had never embraced a broad no-commandeering rule. Indeed, much of the authority relied on by Justice O'Connor weighs against such a rule, rather than in favor of it.

b. What Is the Impact of Garcia?

Even assuming that cases like Hodel and FERC had firmly established a no-commandeering rule, the question remains what impact the intervening Garcia decision, which rejected the Usery prohibition against federal regulation of states as states, would have on the rule. As mentioned above, the Court's 1988 South Carolina v. Baker opinion made this precise point, noting that "[t]he extent to which the Tenth Amendment claim left open in FERC survives Garcia or poses constitutional limitations independent of those discussed in Garcia is far from clear." But Justice O'Connor's treatment of this issue in her New York opinion was superficial at best.

80. Id. at 513.
Perhaps in recognition of the problems presented by Garcia, Justice O'Connor does claim that Garcia's rejection of external limits on federal power was not controlling in New York.\(^{81}\) She characterizes Garcia—and the cases leading up to it—as cases concerning "the authority of Congress to subject state governments to generally applicable laws," and concludes that "[t]his case presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties."\(^{82}\) In Justice O'Connor's view, the constitutionality of such generally applicable legislation was a different question from Congress' authority to "direct or otherwise motivate the States to regulate in a particular field or a particular way."\(^{83}\)

While this discussion does identify a factual difference between the cases, it offers no explanation as to why this factual difference should matter in terms of the Tenth Amendment issue. Garcia's rejection of the Tenth Amendment as an external limit was not qualified by any express or implicit recognition of such a distinction. Nor does Justice O'Connor at this point in her opinion attempt to bring the case within either of the exceptions arguably recognized in Garcia—legislation that is destructive of state sovereignty or cases in which the political process has failed. Some of the later analysis is perhaps consistent with these exceptions; commandeering states to implement federal policy might be viewed as destructive of state sovereignty and Justice O'Connor argues elsewhere in the opinion that federal commandeering dilutes the accountability of federal and state legislators, which is suggestive of a political process failure. But Justice O'Connor's effort to distinguish Garcia neither draws on the reasoning of Garcia itself nor purports to bring the case into either of the Garcia exceptions.

The closest Justice O'Connor comes to explaining why the distinction offered is relevant in terms of the Garcia rationale is an unexplained "cf." citation to FERC.\(^{84}\) FERC does suggest that the Usery question of "the extent to which state sovereignty shields the States from generally applicable federal regulations" is different from that presented when "the Federal Government attempts to use state regulatory machinery to advance federal goals."\(^{85}\) But FERC was decided before Garcia and premised on the then valid

\(^{81}\) See New York, 112 S. Ct. at 2420.

\(^{82}\) Id.

\(^{83}\) Id.

\(^{84}\) Id.

\(^{85}\) 456 U.S. 742, 758-59 (1982).
Usery view that the Tenth Amendment erected judicially enforceable, federalism-based restrictions on federal power. Neither FERC itself nor Justice O'Connor in New York offers any rationale for the distinction that would suggest why a no-commandeering rule should survive Garcia's broad rejection of judicially enforceable Tenth Amendment limitations on federal power.

Moreover, Justice O'Connor's reliance on this distinction in FERC is somewhat disingenuous, insofar as her dissent in FERC applied the Usery test to argue that the statute at issue was a violation of state sovereignty. Thus, when Usery was good law, she considered federal legislation commandeering state governments to be sufficiently similar to other regulation of states as states that she applied the same test to argue that commandeering was unconstitutional. But after Usery was overturned in Garcia, she distinguished the Usery line and without explanation declared Garcia irrelevant to the question of whether state sovereignty might prohibit federal commandeering of state governments.

Ultimately, Justice O'Connor's conclusory effort to distinguish Garcia simply does not come to grips with the serious and difficult issue raised by the Court in South Carolina v. Baker. In the absence of such analysis, reliance on Hodel and FERC is a dubious proposition at best. It was incumbent upon Justice O'Connor to acknowledge that Baker had raised the issue and to offer some explanation as to why it should be resolved in favor of the continued viability of any limit on federal power arguably created by FERC or Hodel, especially since she relied on Baker to support the no-commandeering rule. Instead, aside from a conclusory passage advancing the distinction between generally applicable regulation and legislation using state machinery to implement federal policy, the opinion completely ignores the possible implications of Garcia for the no-commandeering rule.

Given the doubt cast on the rule in FERC and the fact that Justice O'Connor dissented in that case, the upshot of New York is indeed ironic: A principle that Justice O'Connor could not persuade a majority of the Court to apply in the pre-Garcia era of Tenth Amendment law survived Garcia's rejection of Tenth Amendment limits and became a new restriction on federal power.

c. Can Other Examples of State Implementation of Federal Policy Be Distinguished?

As the discussion of Hodel and FERC should make clear, the Court has approved some programs in which states implement

86. See id. at 778-81 (O'Connor, J., dissenting).
87. New York, 112 S. Ct. at 2420.
federal policy. Justice O'Connor acknowledged such decisions, but argued that the take title provisions at issue in *New York v. United States* were different because they were coercive.\(^88\) Other programs, she reasoned, afford states the option of refusing to implement federal programs.\(^89\) In some, the state may decline to implement federal policy by refusing federal grant money, while in others the state may withdraw its regulatory apparatus altogether, allowing direct federal regulation to occupy the field.\(^90\) The first two incentives under the Low-Level Radioactive Waste Policy Amendments Act were constitutionally permissible under these precedents; one set of incentives involved federal grants analogous to other conditional spending programs, and the other involved legislation permitting discriminatory pricing and access policies by disposal sites, which was analogous to conditional preemption.\(^91\)

In contrast, under the third set of incentives, a state that refused to implement the federal policy at issue in *New York* was required to take title to and bear liability for low-level radioactive waste, an option that Justice O'Connor concluded was itself unconstitutional.\(^92\) In Justice O'Connor's view, the requirement that the state choose between two unconstitutional alternatives was what distinguished *New York* from previous cases upholding state implementation of federal power.\(^93\) This distinction is deeply flawed for several reasons.

First, it rests on the bare assertion that "an Act of Congress directing the States to assume the liabilities of certain state residents . . . would 'commandeer' state governments into the service of federal regulatory purposes."\(^94\) Justice O'Connor provides no support for this assertion, either in the form of precedent or reasoning. It is true that the imposition of liability on states has been considered problematic in terms of federalism, and limitations on state liability have figured prominently in the Court's Eleventh Amendment jurisprudence (to which Justice O'Connor does not refer), but even in that field the Court has held that Congress may create causes of action against states under the Commerce Power.\(^95\) It is hard to see the difference between the coercive effect of

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88. See *id.* at 2420-23.
89. *Id.* at 2423-24.
90. *Id.*
91. See *id.* at 2415-16.
92. See *id.* at 2416-17.
93. See *id.* at 2427-29.
94. *Id.* at 2428.
creating a cause of action against states and that of requiring
states to assume the liability of certain residents, since that is, in
effect, what a successful cause of action does. All this is not to
say that the assertion on which Justice O'Connor premised her
distinction is wrong; it is just unsupported. A distinction so
essential to a constitutional decision ought to rest on a firmer
foundation than Justice O'Connor provides.

Second, from a practical perspective, the take title provisions
are not significantly more coercive than the types of choices the
Court has approved. The Court in FERC recognized that the
"option" of withdrawing from a field of regulation is itself highly
coercive (indeed, Justice O'Connor's FERC dissent makes this
precise point96), but this did not prevent the Court from upholding
the challenged legislation.97 Likewise, the denial of federal funds
has a highly coercive effect, yet the Court has approved the use
of denial of funds as a means to encourage state regulation
consistent with federal policy. In South Dakota v. Dole,98 for
example, the Court approved legislation that threatened to cut off
federal highway funds unless states raised their minimum drinking
age to twenty-one.99 If federal commandeering of state governments
is fundamentally inconsistent with the principles of federalism,
then these other instances of state implementation should be in-
validated as well.

Finally, the distinction is inconsistent with Justice O'Connor's
own rejection, elsewhere in the New York opinion, of the argument
that New York had waived its right to object to the legislation in
question by actively participating in the process of formulating it
and advocating its adoption.100 Justice O'Connor reasoned that
"[w]here Congress exceeds its authority relative to the States, . . .
the departure from the constitutional plan cannot be ratified by
the 'consent' of state officials."101 But if states cannot consent to
their use as implementers of federal policy, how can the presence
of constitutional options, such as declining federal monies or
withdrawing from a field, validate those areas where states cur-
cently implement federal policy? The presence of such options can
validate voluntary state implementation of federal law only if states
may choose to do so, yet Justice O'Connor's rejection of the

97. See id. at 766.
99. Id. at 211-12.
101. Id. at 2431 (emphasis added).
waiver argument seems to rest on the contrary proposition.

2. Framers’ Intent

The foregoing discussion demonstrates that none of the cases relied on by Justice O’Connor provide convincing support for the rule established in *New York v. United States*. The key question then becomes whether it is required by the other main source of support relied on by Justice O’Connor, the history of the Constitution and the intent of the framers. As with her treatment of precedent, Justice O’Connor marshals a seemingly incontrovertible mass of evidence to suggest that the framers intended to deny the federal government power to implement federal law via the intermediary of states. But the evidence is in reality far from conclusive. Much of Justice O’Connor’s discussion reflects a predisposition to read ambiguous statements and events concerning the grant of direct regulatory authority as implicitly reflecting a denial of authority to act via the states. Although there is some evidence that provides more direct support for Justice O’Connor’s views, her analysis neither develops an underlying rationale for her reading of history nor adequately addresses the impact of the intervening two hundred years of constitutional evolution.

a. The Negative Inference

Just as Justice O’Connor’s reliance on *Lane County v. Oregon*, discussed above, was marred by a predisposition to find a negative inference in ambiguous language, so too her treatment of framers’ intent reads an ambiguous record as conclusively establishing an intent to preclude federal power to act via the intermediary of states. This problem is evident from the outset of the discussion of framers’ intent, which begins with the statement that “the question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers.”102 Of course, since regulatory agencies did not exist at that time, this statement can hardly be taken literally. But it is wrong in a more fundamental sense—while there is considerable evidence showing that the framers meant to grant the federal government direct regulatory authority over individuals, there is much less evidence that they also meant to preclude the federal government from acting via the intermediary of states. The failure to distinguish between the two types of statements pervades the discussion of the historical record.

102. *Id.* at 2421.
While it is possible to interpret statements granting one type of power as implicitly denying other types, the question is whether that interpretation is correct. In thinking about how these statements should be interpreted, it is important to consider the context in which they are made. In my view, this context cuts against Justice O'Connor's interpretation.

There can be no doubt that the framers intended to replace the Articles of Confederation, under which the "United States in Congress Assembled" (there were no other arms of the federal government) could act only upon states, with a system in which the federal government could act directly upon individuals. But it is equally clear that their reasons for doing so related to the weakness of the United States government under the Articles. The framers were concerned, in other words, that the limitations of federal government under the Articles—including its inability to legislate directly—made it ineffective. As Professor Leonard Levy (no relation to the author) put it:

That Congress lacked commerce and tax powers was a serious deficiency, but not nearly so crippling as its lack of sanctions and the failure of the states to abide by the Articles. Congress simply could not make anyone, except soldiers, do anything. It acted on the states, not on people. Only a national government that could execute its laws independently of the states could have survived.103

Thus, the principal reason for granting federal authority to act directly on individuals rather than states was to increase federal power vis-a-vis the states. Given the broad purpose of strengthening the federal government, the grant of direct regulatory authority does not necessarily imply the denial of authority to regulate via the states.

This background also reveals the framers' assumption that direct regulatory authority was the greater power, and hence the greater threat to state sovereignty. Of course, the notion that the greater power necessarily includes the lesser has long been exploded, but given the framers' desire to increase federal power, it is by no means obvious that they intended by granting the greater power to deny the lesser. More fundamentally, the framers did not view federal regulation via the states as fundamentally inconsistent with state sovereignty. Indeed, by singling out indirect regulation as a particular threat to state sovereignty, Justice O'Connor turns the framers' assumption on its head.

Viewed against this background and stripped from a predisposition to find a negative inference concerning federal power to act via states, the specific historical evidence cited by Justice O’Connor to support a no-commandeering rule is far from conclusive. Many passages speak only of granting the federal government power to regulate individuals directly, and should not be taken as strong evidence of the framers’ intent to deny power to act via states.

Justice O’Connor relies heavily, for example, on Alexander Hamilton’s discussion in The Federalist No. 15:

Alexander Hamilton observed: “The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contra-distinguished from the INDIVIDUALS of whom they consist.” . . . As Hamilton saw it, “we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens—the only proper objects of government.” . . . The new National Government “must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations . . . . The Government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals.”

The italicized portions of this excerpt suggest that the primary focus of Hamilton’s comments were, as I have suggested above, the need for additional federal power to regulate individuals directly. Although some of Hamilton’s language (as will be discussed more fully below) arguably supports Justice O’Connor’s reading, the passage is far from conclusive as to whether the decision to grant direct authority encompasses the concurrent decision to restrict federal power to regulate via states.

Most of the other statements quoted by Justice O’Connor also defend the grant of direct regulatory authority to Congress by arguing that federal power would be inadequate if Congress were limited to reliance on state implementation. Thus, for example, Madison’s statement that “[t]he practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands,” refers to the ineffectiveness of federal law under the Articles of Confederation rather than any perceived threat to state sovereignty. Likewise, Charles Pinckney was arguing

104. See New York, 112 S. Ct. at 2420-23.
105. Id. at 2421-22 (emphasis added) (citations omitted) (capitalization in original).
106. Id. at 2422 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 9 (M. Farrand ed. 1911) [hereinafter RECORDS]).
in favor of the expansion of federal power when he stated before the South Carolina House of Representatives that "the necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present." The same is true for Rufus King, a Massachusetts delegate who supported ratification "by recalling the . . . unhappy experience under the Articles of Confederation and arguing: 'Laws, to be effective, . . . must not be laid on states, but upon individuals.'" In each of these instances, the speaker compares direct regulation favorably to legislation that operates only upon states, but since each remark is intended to demonstrate the need for direct legislative authority, it is by no means clear that the speakers understood the Constitution to prohibit indirect legislation.

Justice O'Connor also relies heavily on the framers' rejection of the so-called New Jersey Plan, but this reliance is similarly misplaced. As Justice O'Connor seems to recognize herself, the primary objection to this plan was that it was too much like the Articles of Confederation. Thus, it is unsurprising, but also inconclusive, that the framers expressed concern that the federal government might be required "to coerce the States into implementing legislation," or that they preferred a government that acted directly on individuals. And the fact that one version of the New Jersey Plan incorporating a preference for state implementation "never even progressed so far as to be debated" is not necessarily attributable to a rejection of that specific provision, as the version's lack of popularity may be due to any of a variety of provisions or to political and strategic factors unrelated to its substantive content.

In short, most of the evidence cited by Justice O'Connor makes clear the framers' belief that indirect legislative authority, standing alone, was inadequate; it is far from clear that they found it necessary to deny the federal government such power. This is not to say that Justice O'Connor's view of the framers' choice is entirely unsupported in the historical record. Some statements tend to support the negative inference she would draw from the grant of direct regulatory authority. But even these statements do not make a particularly strong case for the no-commandeering rule.

107. Id. at 2422-23 (quoting 4 RECORDS, supra note 106, at 256).
108. Id. (quoting 2 RECORDS, supra note 106, at 56).
109. See id. at 2422-23.
110. Id. at 2422.
111. Id.
b. The Framers’ Conception of Federal Power

Although most of the passages and events referred to by Justice O’Connor are ambiguous, some statements in the historical record do explicitly reject federal power to act via the intermediary of states. The question remains, however, whether these statements are sufficient to support the adoption of an absolute no-commandeering rule in New York. In my view, given the relative scarcity of these statements, the failure of Justice O’Connor to develop a coherent rationale for such a rule, and the evolution of constitutional law since 1789, the answer is no.

The foregoing discussion makes clear that the framers could not have rejected federal power to act via the states because it was incompatible with state sovereignty; on the contrary, they defended the greater power to legislate directly against the charge that it would undermine state power. Thus, while some of the statements relied on by Justice O’Connor do reject federal power to act via the states, this rejection must rest on reasons other than the fear that such measures undermine state sovereignty.

First, there is some evidence that the framers drew a sharp theoretical dichotomy between governments based on direct regulation and those acting via the intermediary of states. Hamilton’s statement, discussed above, draws a distinction between a league and a government, and indicates that citizens are the only proper objects of government. Likewise, Edmond Randolph declared that “‘[t]here are but two modes, by which the end of a Gen[eral] Gov[ernment] can be attained: the 1st is by coercion . . . [t]he 2nd] by real legislation.’”112 To the extent that the framers operated on the assumption that there were two mutually exclusive forms of government from which they must choose, the choice of one form of government constituted the rejection of the other. Although Justice O’Connor does not fully develop this idea in New York, it figures strongly in her FERC dissent,113 and might provide the basis for a no-commandeering rule.

But this evidence supporting the no-commandeering rule is counterbalanced by direct evidence that influential framers contemplated state implementation of federal law. Hamilton, for example, explicitly stated in The Federalist, No. 27, that “‘the Legislatures, Courts and Magistrates of the respective members will be incor-

112. Id. (quoting 1 Records, supra note 106, at 255-56).
porated into the operations of the national government, as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws." 114 Similarly, Madison suggested in The Federalist, No. 45 that state officials might be called upon to collect federal taxes. Such statements make clear that the framers did not universally adhere to such a strictly dichotomous view of governmental forms. Interestingly, while Justice O'Connor acknowledges and attempts to respond to some of this evidence in her FERC dissent, 115 she makes no mention of it in the New York opinion.

Even if the framers envisioned such a dichotomy, subsequent developments show that such a strict separation is no longer the controlling view of the constitutional relationship between the states and the federal government. The civil war and reconstruction amendments fundamentally altered the federal-state relationship, giving the federal government greater authority vis-a-vis the states. Indeed, Congress' authority to enforce Section Five of the Fourteenth Amendment is clearly intended to authorize legislation applicable to states in their governmental capacity—the difficult question under that provision is whether Congress may also regulate private conduct. 116

As a practical matter, the strict division between state and federal governments envisioned by Justice O'Connor no longer exists—if it ever did. Case law establishes at least three ways in which the federal government may effectively employ states as agents to implement federal policy across a broad spectrum of regulatory subjects. First, Garcia (even as limited by New York) envisions virtually unrestricted federal authority to subject states to legislation on the same terms as private actors, and such measures may effectively require states to implement federal policy (e.g., minimum wages and maximum hours in employment). Second, as discussed above, Testa v. Katt and FERC approve federal statutes requiring states to engage in adjudicatory and quasi-adjudicatory implementation in matters of individual rights and public utility regulation. Third, the federal government uses the threat of pre-emption and conditional grants to procure state implementation

114. This and other historical evidence that the framers contemplated state implementation is collected in H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 Va. L. Rev. 633, 659-64, which appeared while this Essay was in press.
115. See 456 U.S. at 796 n.35 (O'Connor, J., dissenting).
of significant federal regulatory programs such as public land use (approved in *Hodel*) and Social Security, even to the point of requiring states to legislate as a condition of receiving funds. Despite Justice O'Connor's efforts to distinguish such cases, the reality of federal-state relations in the late twentieth century is quite different from the strict dichotomy suggested by her interpretation of the framers' intent.

In addition, the framers' general tendency to view powers as categorical and mutually exclusive has eroded in other contexts. For example, the initial justification for invalidating state laws under the Commerce Clause was the notion that the commerce power is indivisible and exclusive, such that the grant of power to the federal government implicitly denied such power to the states. But current doctrine rejects the exclusivity rationale in favor of restricting state power on the basis of inferences from congressional silence or judicial enforcement of the purposes underlying the Clause. Given the general evolution of constitutional jurisprudence away from categorical rules in favor of more functional analyses, it is doubtful that the framers' assumptions about the categorical nature of governmental forms, even if demonstrated by the historical record, should be controlling in light of constitutional and jurisprudential developments in the intervening two hundred years.

A second argument for the no-commandeering rule that is supported by some evidence in the historical record relates to the undesirable practical and policy consequences that ensue when the federal government acts via the states. Based on the experience under the Articles of Confederation, some framers clearly believed that states would resist implementing federal legislation, and would have to be forced to do so. Thus, indirect legislation might produce discord and often was unfair to individuals, who could be caught in a struggle for power between the federal and state governments. Edmund Randolph, for example, continued his support for direct federal regulation by noting that """"[c]oercion [is] impracticable, expensive, cruel to individuals."""" Likewise, Hamilton defended

117. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824) (attributing "great force" to the argument that "as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing").

118. See, e.g., City of Phila. v. New Jersey, 437 U.S. 617, 623 (1978) (noting that restrictions on state power "appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose").

119. See *supra* note 112 and accompanying text.

direct federal taxation on the ground that no state would ""suffer itself to be used as an instrument of coercion"" and that as a result ""either a federal standing army [would be needed] to enforce the requisitions, or the federal treasury [would be] left without supplies, and the government without support.""\textsuperscript{121}

Again, however, such statements are far from conclusive support for a blanket prohibition on federal action via the states. Taken in historical context, it is unclear whether these speakers actually opposed any and all federal power to act via states, or merely argued on behalf of federal power to legislate directly and against a system limiting federal power to indirect action. Hamilton's argument, moreover, was directed to the taxing power, and might not extend to other powers that did not engage the same unique concerns in the mind of the framers. Even if they do support an absolute ban on state implementation of federal law, these arguments are countered by the contrary evidence noted previously.

Ultimately, whatever the framers' concerns about state resistance to implementing federal law and its possible consequences for individuals, much has changed in the intervening two hundred years. The problem of state resistance, while typically a dominant constraint at the birth of a new federal system, is not equally important in a mature federal system that has seen the Civil War, the expansion of federal regulatory authority since the New Deal, and the emergence of federal civil rights law replete with judicial desegregation orders (enforced by the National Guard, no less). Indeed, as discussed above, state implementation of federal policy is now a common feature of our system of government. Such implementation, even if distinguishable because it involves adjudicatory bodies, generally applicable regulations, or constitutionally permissible alternatives for states, illustrates that the danger of discord and unfairness from state resistance is no longer a matter of great concern.

It bears repeating that there is nothing in the text of the Constitution itself that expresses a dichotomous view of state and federal government or explicitly denies Congress the power to act via states. While Article I vests legislative authority in Congress, it does not limit the subjects of that legislation to individuals. In the absence of textual support and in the face of an ambiguous historical record, it is entirely appropriate for the Court to reject the strictly dichotomous view of governmental forms and concerns about state resistance as outdated.

\textsuperscript{121} Id. at 2423 (quoting 2 Records, supra note 106, at 233).
III. STATE IMPLEMENTATION OF FEDERAL DIRECTIVES AND THE VALUES OF FEDERALISM

Although Justice O'Connor's precedential and historical arguments, standing alone, cannot sustain the no-commandeering rule of *New York v. United States*, the question remains whether there are good reasons to conclude that federal legislation compelling states to implement federal policy is inconsistent with the principles of federalism and state sovereignty. In this section of the Essay, therefore, I shall explore possible federalism-based arguments in favor of the rule. Specifically, building on the two implicit exceptions from *Garcia*, I will ask whether federal legislation compelling state implementation either is destructive of state sovereignty or reflects a failure of the political process. These sorts of arguments are fairly compelling, but they are not fully developed in the *New York* opinion. Ultimately, however, even if one accepts concerns for the destruction of state sovereignty and the efficacy of the political process as sufficient to justify limits on federal laws compelling state implementation, they do not require *New York*'s sweeping no-commandeering rule.

A. Preserving State Sovereignty

As noted above, the explosion of federal power since the New Deal has provoked concern over the preservation of federalism, and some judicially enforceable restrictions on federal power imposed in the name of state sovereignty are arguably justified. Perhaps the *Garcia* Court acknowledged the need for such restrictions when it noted that the federal legislation before it was not destructive of state sovereignty.122 Many observers have interpreted this comment as creating an exception to the *Garcia* Court's broad pronouncement that the political process was the exclusive constitutional mechanism for the preservation of state sovereignty. Building on this exception, one might argue that federal legislation commandeering states as implementing machinery is destructive of state sovereignty because it breaks down the barriers between states and the federal government and places states in a subservient position to the federal government. Such an argument is suggested at the conclusion of Justice O'Connor's opinion in *New York*, where she observes that "states are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government."123

122. 469 U.S. 528, 554 (1985).
123. 112 S. Ct. at 2434.
This argument operates at both a practical and definitional level. At the practical level, it suggests that states compelled to implement federal policy are deprived of the freedom to make essential governmental choices that they deem to be in the interests of their citizens. At the definitional level, it posits that the hierarchical subservience of states is fundamentally incompatible with the retained state sovereignty inherent in the concept of federalism. While these notions have some force, neither the practical nor definitional approach to state sovereignty requires an absolute prohibition of federal legislation requiring state implementation.

First, from the practical perspective, state implementation of federal policy, as opposed to direct federal legislation, actually may serve the interests of states and state power. Experience with administrative agencies (which occupy the same positions as would states if they implement federal policy) suggests that statutory provisions leave considerable discretion to those charged with their implementation. Agencies may choose implementation strategies that are more or less aggressive, favor some aspects of federal policy over others, and otherwise tailor implementation of statutory mandates to their own view of sound policy. Thus, although state implementation of federal law makes states subservient in one sense, it also empowers states in another. In particular, it may allow states to accommodate their implementation of federal policy to local needs. This was true for the radioactive waste disposal program at issue in New York, which left considerable discretion regarding siting, interstate cooperation, and other matters to the states. The Court seemed to recognize the advantages of such cooperative arrangements in Hodel and FERC, and it is difficult to see why differences in the mechanisms used to effectively compel state participation should completely eliminate these advantages. Put simply, we must ask whether it is truly preferable, in terms of state sovereignty, for the federal government to simply dictate these matters via direct regulation, as opposed to leaving the states with discretion to implement the federal policy in ways that are best suited to local needs. In many cases, the advantages of flexibility would outweigh, from the states’ point of view, any impingement on state sovereignty from being required to implement federal policy.

Second, the definitional notion that federal legislation requiring state implementation is inherently incompatible with state sovereignty ignores a countervailing tradition that views state implementation of federal directives as perfectly consistent with state sovereignty. Indeed, our own constitutional history, the international system, and other federal arrangements reflect precisely the
opposite premise—that direct federal legislation is the greater threat to state sovereignty.

Consider first our own constitutional history, discussed above. Under the Articles of Confederation, Congress was required to act via states. It was widely understood that this arrangement made the states too powerful, and the federal government too weak. Thus, the framers clearly did not perceive an arrangement in which federal legislation acted on states and required states to implement federal policies as definitionally incompatible with state sovereignty. They operated on the contrary assumption that this arrangement was destructive of federal authority, and that more federal power was needed to ensure the success of the union. While there were some expressions of concern that federal action via states would produce conflict if states resisted and force was necessary to gain compliance, this concern is fully consistent with the premise that state implementation left states too powerful.

The view that state implementation is consistent with state sovereignty is reinforced by the international legal system, which creates the background principles of sovereignty at issue in *New York*. In effect, the international legal system is the loosest possible form of relationship between states, one in which each member of the international community retains the full measure of its sovereignty. Under this regime, it is generally understood that international law operates primarily upon states in their governmental capacities, and that states are required to fulfill their international legal obligations through legislative action, if necessary. Thus, international law requires sovereign states to implement the policies reflected in international legal rules, but no one regards this arrangement as converting nations into mere political subdivisions of the international system.

The structure of the European Community reflects a similar perspective. Under the various community agreements, the Council of the European Community establishes policies that bind the member states. The Council can act, inter alia, in the form of "regulations" or "directives." Regulations operate directly upon individuals like ordinary federal legislation in the United States, while directives act upon the member states and require the member states to conform their laws to Community standards. The

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126. *Id.* at 188-97.
underlying premise of these different forms of binding action is that "[r]egulations are reserved for situations in which a uniform solution appears necessary for all Member States. In other situations, the Community merely issues 'directives.'" Thus, the European Community is structured on the premise that centralized rules requiring legislative implementation by states are to be preferred over direct legislation because they leave member states greater flexibility to adapt policies to their particular situations and concerns.

A final example illustrating that state implementation of federal policy is consistent with federal arrangements is the Federal Republic of Germany. Federalism scholars broadly agree that the German Basic Law (Germany's Constitution) creates a federal system. The Basic Law contemplates state implementation of federal law as the rule and direct federal administration as the exception. Article 83, for example, provides that "[t]he Laender [states] shall execute federal laws as a matter of their own concern in so far as this Basic Law does not otherwise provide or permit." Article 85 then sets forth the conditions under which state implementation of federal law shall occur. Moreover, the Basic Law in Article 75 embraces in some fields the concept of "skeleton" federal legislation, which would set the parameters for further state legislation in compliance with its mandates. Thus, a widely accepted example of federalism operates on precisely the model condemned by Justice O'Connor.

Of course, the assumptions of the framers, the international legal system, the European Community, or the Federal Republic of Germany are not controlling for purposes of constitutional interpretation. If the no-commandeering rule were derived from clear constitutional language, strong authority in the Court's jurisprudence, or strong evidence of a specific intent of the framers, then these comparisons would not present a compelling argument against the rule. But in the absence of such direct evidence, they do argue strongly against the conclusion that laws requiring states to implement federal policy are inherently destructive of state sovereignty.

Nonetheless, federally compelled state implementation may, in some cases, present a threat to the separate existence of the states. But these concerns are not presented equally by each and every

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127. 3 COMMON MKT. REP. (CCH) ¶ 4902.11, at 4114 (1976) (emphasis added).
128. An excellent English translation of the Basic Law, complete with a general introduction, is available from the Press and Information Office of the German government. All references herein are to that translation.
form of compelled state implementation. States may be left a greater or lesser degree of flexibility in implementing federal mandates, and the overall impact on the states' ability to maintain their sovereignty will vary depending on the nature of the federal policy to be implemented as well as the specific demands placed upon the states. Thus, a more case specific and sensitive evaluation of statutes that commandeer states might be in order, but concerns for the preservation of state sovereignty do not require the blanket and absolute rule adopted by Justice O’Connor.

B. Political Process Failure

A political process failure exception to Garcia’s rejection of Tenth Amendment limits on federal power arguably is a necessary corollary to the reasoning of that decision. The Garcia Court rejected such limits because it viewed the political process as the principal constitutional mechanism intended by the framers to safeguard state sovereignty.129 But the political process is an adequate safeguard only if it functions properly, and in other contexts the Court has frequently relied on a failure of the political process to justify judicial intervention. The Garcia Court apparently acknowledged this logic when it stated that, in the case before it, the political process had worked as intended.130 Thus, the Court in South Carolina v. Baker recognized that “Garcia left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment.”131 Although neither Garcia nor South Carolina conclusively establish such an exception, we may assume for purposes of argument that judicial intervention to preserve state sovereignty is appropriate when the political process has failed.

There is some language in both Justice O’Connor’s New York opinion and her FERC dissent to the effect that federal commandeering creates a defect in the political process, but the argument is not fully developed. If one builds on these statements, a strong argument can be made that, in some instances at least, federal legislation compelling state implementation may reflect a political process failure. In addition, political process theory may help to explain why generally applicable legislation ought to be treated differently than legislation applicable to states alone. But even if

129. 469 U.S. 528, 556 (1985).
130. Id.
this argument is accepted, it only supports a no-commandeering rule that is both narrower in scope and less absolute than that announced in *New York v. United States*.

Justice O'Connor advanced a political process argument when she reasoned in *New York v. United States* that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."\(^{132}\) When the federal government legislates directly, the argument continues, it "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."\(^{133}\) In contrast, if policy is made at the federal level but implemented by states, "it may be state officials who will bear the brunt of public disapproval, while the federal officials . . . may remain insulated from the electoral ramifications of their decision."\(^{134}\)

In effect, Justice O'Connor is arguing that legislation compelling states to implement federal policy exports the burdens of that policy onto state political actors. This sort of "burden export" argument is commonly used to challenge the constitutionality of state legislation alleged to discriminate against interstate commerce in violation of the negative implications of the Commerce Clause. In such cases the Court has recognized that "to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."\(^{135}\) The analogy is not exact, but the underlying premise of Justice O'Connor's political accountability argument is the same: unless the federal political actors who make a policy decision bear the electoral burden of their decision, the political restraints normally exerted on government action are ineffective.

Although Justice O'Connor does not make the point explicitly, this argument provides a rationale for distinguishing between generally applicable legislation that applies to private and state actors and legislation that applies directly to states only. In the Commerce Clause context, the corollary of the burden export argument is that when state legislation burdens in-state and out-of-state actors equally, the political process functions properly. This is because in-state actors, who have access to the state's political process, will serve as proxies for out-of-state interests. Analogously, where


\(^{133}\) *Id.*

\(^{134}\) *Id.*

private actors as well as states bear the burdens of federal legislation (e.g., the minimum wage and maximum hour laws at issue in *Usery* and *Garcia*), the private actors who have direct access to the federal political process will hold Congress politically accountable. Because the private actors serve as proxies for the interests of states (who are similarly burdened in their capacity as employers), the political process functions appropriately.

In my view, there is considerable force to this argument. Of course there are some problems with it as well. First, the Court does not use the political process analysis consistently in evaluating alleged deviations from the constitutionally mandated structure of government. For example, the same kinds of accountability problems are inherent whenever Congress delegates discretion to administrative agencies. Like the commandeering of states, delegations to agencies may diminish the accountability of federal legislators, who may seek to avoid taking the political heat for controversial policy decisions. But, despite some separation of powers restrictions, the Court has broadly tolerated the modern administrative state and the loss of political accountability it entails. Justice O'Connor does not explain why the loss of accountability in the federalism context requires an absolute ban on state implementation of federal policy, but the loss of accountability in the administrative context can be assessed under a functional approach that upholds most legislative delegations.

Second, Justice O'Connor's effort to distinguish, on political process grounds, laws "encouraging" state implementation through conditioning of grants or through the threat of federal preemption is less than persuasive. Such methods are less damaging to political accountability, Justice O'Connor declares, because:

[1]If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not preempted. 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."

This argument is flawed in several respects. First, it turns on the accountability of state officials, yet the primary thrust of the political process exception to *Garcia* is that defects in the federal political process render it incapable of protecting the interests of

states. Perhaps lack of accountability of state officials means that they will abdicate their responsibility to protect state interests, as suggested by Justice O'Connor's response to the waiver argument, but this argument is both tenuous and speculative.

Moreover, even accepting diminished accountability of state officials as an appropriate basis for distinction, it is difficult to see any real difference between the take title provisions at issue in New York and conditioning receipt of federal grant monies or the threat of federal preemption, both of which remain permissible under New York. States could decline the federal policy at issue in New York by accepting title to private waste. As a practical matter, it is unclear whether the resulting financial burden on states is any greater than that imposed by the cut off of federal funds on which the state has become dependent. And Justice O'Connor's rosy depiction in New York of the states' "choice" to withdraw from a field and allow the federal government to bear the costs is hard to square with her FERC dissent, in which she argued that the same sort of choice "compels state agencies either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to state authority." 137

Despite these difficulties, one cannot completely discount the political process problems associated with state implementation of federal legislation. But even accepting the argument, it does not follow that a broad and absolute ban on federal commandeering is required. In my view, the Court should examine on a case-specific basis the process by which federal legislation is adopted to determine whether there has been a process failure and acknowledge the possibility that legislation might be upheld despite a process failure.

First, not all state implementation of federal law exports the burdens of legislation to state officials. For example, one might explain the permissibility of conditioning federal grants on state implementation of federal policy in political process terms. Because the federal government finances the state policy, its imposition of taxes on private persons means that it will be held politically accountable. But if this is the explanation for the New York result, federal laws compelling implementation by states should be permissible if the federal government bears the costs of implementation by providing federal funds. Like a conditional grant, in such a case federal officials would be held accountable for their decision to devote resources to this problem.

Moreover, one cannot assume that the public is in each and every instance unable to see beyond state implementation to the federal policy mandate. Justice O'Connor herself seems to acknowledge as much when she argues that the states may not waive the prohibition against commandeering because the state actors may wish to shift responsibility for unpleasant radioactive waste disposal decisions to federal actors. Justice O'Connor seems to assume that both the state and federal government will evade responsibility by blaming each other, but it is just as plausible that unhappy voters would hold both accountable. In any event, the degree to which a particular federal program to be implemented by states actually diminishes accountability so as to constitute a political process failure ought to be determined not on the basis of a hard and fast rule, but rather on the basis of the specific content and context of the regulatory program.

The *New York v. United States* rule is overbroad for a second reason: it is a per se rule. Justice O'Connor explicitly rejects the government's argument in *New York* that federal interests may be sufficiently strong to overcome the state sovereignty interests at stake when states are compelled to implement federal policies.\(^{138}\) Although cases in the *Usery-Garcia* line supported the government's view, Justice O'Connor again distinguished these cases and concluded that "the Constitution simply does not give Congress the authority to require the States to regulate."\(^{139}\) This conclusion flows from Justice O'Connor's reading of precedent and history, which I have challenged above.

If a restriction on federal commandeering is to be justified in political process terms, however, a different result should obtain. In other contexts when the Court employs political process analysis, the existence of a political process failure does not create a per se rule invalidating state action. Instead, a process failure means that the Court will scrutinize with greater care both the purposes behind the legislation and the connection between those purposes and the means chosen to accomplish them.\(^{140}\) This sort of heightened scrutiny usually results in the invalidation of legislation, at least under the so-called strict scrutiny test frequently employed in the event of a process failure. Nonetheless, even the strictest form of scrutiny contemplates that some purposes will be sufficiently compelling that a narrowly-tailored measure designed to achieve those purposes would pass muster.

\(^{138}\) 112 S. Ct. at 2429-30.
\(^{139}\) *Id.* at 2429.
The use of heightened scrutiny instead of a per se ban is implicit in the rationale for political process analysis. The underlying objection to judicial intervention is that it is counter-majoritarian—politically unaccountable judges should be reluctant to invalidate the policies of politically accountable government institutions. Political process failure justifies judicial intervention because the breakdown of the political process undermines political accountability as a check against the arbitrary or repressive exercise of power. Thus, the Court engages in heightened scrutiny to ensure that government action is not the product of antagonism or disregard for the unrepresented parties who bear the burdens of that action.

Not every result of the unchecked political process constitutes abuse or ignores the interests of unrepresented parties, and if in a particular case the justification for government action is sufficiently strong, it is not unconstitutional. In Maine v. Taylor, for example, the Court upheld a state statute prohibiting the importation of live baitfish against a Commerce Clause challenge even though the statute discriminated against interstate transactions. Although the Court applied the strictest form of Commerce Clause scrutiny, it concluded that the statute’s purposes were legitimate and that there were no less discriminatory alternative means of accomplishing its goals.

Similarly, if legislation requiring states to regulate is characterized by a political process failure in a particular case, the appropriate judicial response is to intensify scrutiny of the purposes of the legislation and the fit between those purposes and the means chosen to effectuate them. The legislation at issue in New York would arguably meet a fairly high level of scrutiny. Certainly, the problem of low-level radioactive waste disposal was a serious one requiring some congressional response, and action by individual states had proven to be ineffective because of the “NIMBY” (not in my backyard) phenomenon. States seem to recognize the need for disposal facilities, but any effort to site them results in strong opposition from local residents. The phased-in incentive program, eventually adopted in the Act, seems well designed to counteract this phenomenon by “upping the political ante” if a state fails to develop a site. At the same time, states retain considerable flexibility in the ultimate siting decisions. On the other hand, the take

143. Id. at 151-52.
144. Id. at 138, 151.
title provisions impose potentially significant costs on states, and there may be alternative incentives less burdensome to the interests of state sovereignty.

For purposes of this Essay, I am not suggesting either the appropriate level of scrutiny or that the provisions at issue in New York should satisfy that level of scrutiny. The point is much more basic: the per se rule against commandeering cannot be defended on the basis of preserving state sovereignty or preventing a political process failure. Any analysis based on these implicit Garcia exceptions requires a more case-specific analysis of the actual effects of the legislation, its implications for political accountability, and whether the legislation is closely tied to a sufficiently important federal purpose. Because Justice O'Connor relies on a distorted reading of precedent and history to advance a strictly dichotomous view of state and federal government, the resulting per se rule against commandeering is too crude to adequately reflect the complex federalism issues presented in cases such as New York v. United States.

IV. Concluding Thoughts

Perhaps the result in New York v. United States is correct. But if so, it ought to be sustainable without misleading case citations and a slanted reading of an ambiguous historical record. And although principles of federalism provide plausible arguments in favor of the result, the opinion in New York neither developed them nor tailored the resulting rule appropriately to these principles. One can only hope that future cases will further refine the analysis, limiting the scope and impact of the no-commandeering principle in accordance with the reasoning that best supports it.

The significance of New York, however, goes beyond the validity of the take title provisions at issue or the propriety of a no-commandeering rule. Federalism is a fundamental constitutional value, and so long as the Constitution embraces a federal structure, the appropriate role of the Court in preserving federalism against encroachments by the political branches will be a central question of constitutional law. Perhaps Justice O'Connor is right that the erosion of enumerated powers limits on the federal government requires that the Court intervene to protect the last vestiges of state sovereignty. But intellectually dishonest opinions advancing overbroad rules will undermine the credibility of such efforts and ultimately hinder, rather than advance, the cause of federalism.

Put simply, preserving federalism is important, and well-reasoned efforts to preserve state sovereignty in the face of expanding federal
power are to be welcomed. 145 *New York v. United States* is not such an effort.

145. For example, Powell, *supra* note 114, attempts to develop a principle requiring the federal government to respect the integrity of state government processes.